

LIST OF ABBREVIATIONS

ACE - Societe Civile des Auteurs, Compositeurs et Editeurs pour le Controle des Droits de Reproduction Mecanique

AEMRO - Arab Emirates Music Rights Organisation

AFM – American Federation of Musicians

AGM – Annual General Meeting

ARIPO – African Regional Intellectual Property Organization

ASCAP – American Society of Composers, Authors and Publishers

BCIA - Berne Convention Implementation Act of 1988

BIEM - Bureau International des Sociétés gérant Les Droits d'enregistrement et de Reproduction Mécanique

BMI – Broadcast Music Incorporated

CAPASSO – Composers, Authors and Publishers Association

CD – Compact Disc

CD-R – Compact Disc Recordable

CIPC – Companies and Intellectual Property Commission

CIPRO – Companies and Intellectual Property Registration Office

CJEU – Court of Justice of the European Union

CMO – Collective Management Organisation

CRB – Copyright Royalty Board

CRC – Copyright Review Commission

DAC – Department of Arts and Culture

DALRO – Dramatic, Artistic and Literary Rights Organization

DMCA – Digital Millennium Copyright Act

DP – Dominio Publico (Public Domain)

DTI – Department of Trade and Industry

ECJ – European Court of Justice

ECL – Extended Copyright Licence

ECTA – Electronic Communications and Transactions Act

EDIFO - Societe Generale de L’Edition Phonographique

EGM – Extraordinary General Meeting

EU – European Union

GDP – Gross Domestic Product

GEMA - Gesellschaft für Musikalische Aufführungs und Mechanische Vervielfältigungsrechte

ICT – Information and Communications Technology

IDC – Industrial Development Corporation

IMPRA – Independent Music Performing Rights Association

IPAP – Industrial Policy Action Plan

ISP – Internet Service Provider

LAWSA – Law of South Africa

MCPS – Mechanical-Copyright Protection Society

MECOLICO - Mechanical Copyright Licences Company

MIDEM – Marché International du Disque et de l’Edition Musicale

MOI – Memorandum of Incorporation

NAB – National Association of Broadcasters

NCOP – National Council of Provinces

NDP – National Development Plan

NMPA - National Music Publishers' Association

NORM – National Organisation for Reproduction Rights in Music

P2P – Peer-to-Peer

PPL – Phonographic Performance Limited

PRS – Performing Right Society

RAV – RiSA Audio Visual

RiSA – Recording Industry of South Africa

RIAA – Recording Industry Association of America

SABC – South African Broadcasting Corporation

SACD – Société des Auteurs et Compositeurs Dramatiques

SACEM – Société des Auteurs, Compositeurs et Editeurs de Musique (Society of Authors, Composers and Publishers of Music)

SAMPRA – South African Music Performance Rights Association

SAMRO – Southern African Music Rights Organisation

SARRAL – South African Recording Rights Association Limited

SDRM - Societe pour L'Administration du Droit de Reproduction Mecanique des Auteurs, Compositeurs et Editeurs

SESAC – (originally Society of European Stage Authors)

SGDL - Société des Gens de Lettres

SOCAN – Society of Composers, Authors and Music Publishers of Canada

TRIPS – Trade-Related Aspects of Intellectual Property Rights

UCLA – University of California Law School

UK – United Kingdom

US – United States

USA – United States of America

USACE - Union Syndicale de Defense Professionnelle des Auteurs, Compositeurs et Editeurs

VCR – Videocassette Recorder

VHS – Video Home System

VTR – Video Tape Recorder

WIPO – World Intellectual Property Organization

WPPT – WIPO Performances and Phonograms Treaty

WTO – World Trade Organization

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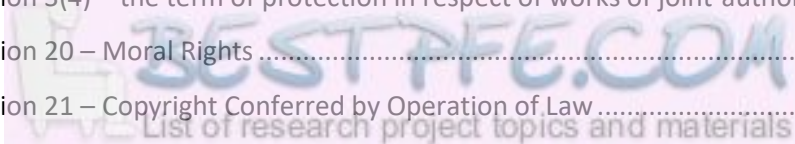
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PART 1 – THE HISTORICAL DEVELOPMENT OF COPYRIGHT IN MUSICAL WORKS

Chapter 1: Introduction

"The sole and end aim of figured-bass should be nothing else than God's glory and the recreation of the mind. Where this object is not kept in view, there can be no true music but only infernal scraping and bawling." – Johann Sebastian Bach (1685 – 1750)

"But the mere truth won't do. You must have a lawyer." – Dr Allan Woodcourt to the wrongly-accused George Rouncewell, in Charles Dickens' *Bleak House*.

1 Research Problem

1.1 Background

Music is a form and means of entertainment. Its value derives from its aesthetic or pleasing properties and its appreciation from its ability to enrich (and to render worthwhile) moments of relaxation, leisure, fun and idleness.¹ Apart from its relaxation function, music is also seen as having therapeutic value; as William Congreve is reputed to have observed, “Music has charms to soothe a savage breast, to soften rocks, or bend a knotted oak ...”² The association of music with light or relaxing moments should not, however, give the impression that music itself is a light subject not worthy of scholarly research; and neither should it engender a view of music as an economically-insignificant commodity. Both in its art form and its legal analysis, music is a complicated subject that requires dedicated study. Whether it is with regard to Baroque art (or “serious”) music or the complexity of modern Jazz, on the one hand; or the complicated “world” of music copyright law,³ on the other; music proves to be not just mere fodder for light moments of entertainment but a complex and engaging subject meriting serious study and research. The fact that global music consumption is itself, a multi-billion-dollar industry with a sizable contribution to GDP means that the industry is naturally beset with entitlement disputes⁴ and makes the study of music copyright a worthwhile pursuit.

Such a study is even more urgent and pertinent for South Africa – a country which is, in many ways, truly in transition. In line with this, the South African entertainment sector is also in a state of significant transition. South Africa’s entertainment sector – comprising the music, film, literary, theatrical, television and live entertainment industries – is worlds apart from the sombre years of apartheid’s rule, when cultural boycotts were the order of the day stymying development of the sector.⁵ Today’s entertainment sector in South Africa is vibrant, ambitious and economically relevant - and one which many artists aspire to be part of. Beyond any doubt, there are more persons and

¹ This should not, however, be seen as suggesting that music has no role in “active” or commercial life. Music’s soothing qualities makes it an indispensable component of commercial life, where it is used daily to create the right ambiance for customers and employees. It is in fact this use of music that contributes a large part of the income earned by owners of music copyright, in the form of performing rights royalties.

² See for example Tunajek [https://www.aana.com/docs/default-source/wellness-aana.com-web-documents-\(all\)/music-soothes-the-mind-and-body.pdf?sfvrsn=132c4bb1_2](https://www.aana.com/docs/default-source/wellness-aana.com-web-documents-(all)/music-soothes-the-mind-and-body.pdf?sfvrsn=132c4bb1_2) (date of use: 27 May 2018). The phrase was adapted by Berman AJ in *Southern African Music Rights Organisation v Svenmill Fabrics (Pty) Ltd* 1983 (1) SA 608 (C), at para 17, where he quipped: “Music, to misquote William Congreve, hath charms to soothe a factory staff.”

³ In respect of the complexity of music copyright law Loren “Understanding the Complexity of Music Copyrights in the United States”, in Yu *Intellectual Property* 161, notes: “... [T]he world of music copyrights is one of the most complicated areas within copyright law. ... The complexity stems from the historical development of the music industry and the corresponding process of regulatory accretion that responded to the changes in the industry.”

⁴ For the use of the term “entitlement” in relation to copyright infringement cases see Pitt *Direct Licensing* (at 83 and 84), who refers to “an infringement lawsuit seeking industry *entitlement* fees” (at 84). Emphasis added.

⁵ For a discussion of the cultural boycott of South Africa see Beaubien 1982 *AT* (29:4) 5, writing on “The Cultural Boycott of South Africa”; see also *Johannesburg Operatic and Dramatic Society v Music Theatre International & Others* Patent Journal March 1969 223, where the Copyright Tribunal was approached for the obtaining of a compulsory licence as a result of this boycott.

entities actively participating in the modern South African entertainment industries than at any other time in South Africa's history.⁶

The South African entertainment sector has furthermore gained international exposure and interest through such achievements as the winning of the Oscar award by the film *Tsotsi*, the nomination of films like *District 9*, *Yesterday* and various submissions in a number of categories.⁷ Unlike its inauspicious cousin, the music industry - the film industry has since 2004 been recognised in, and received support from government's industrialisation plan for the creative industries created to provide "an additional financial incentive for the production of both foreign and domestic large budget film and television projects in South Africa."⁸ Nevertheless, recent achievements in the music industry are a testimony to the great potential that this industry wields.

Such achievements include the attainment of five Grammy awards by the *isicathamiya*⁹ group, *Ladysmith Black Mambazo*, including one as recent as 2018;¹⁰ the attainment of three Grammy awards by a fairly new Soweto group, the *Soweto Gospel Choir*,¹¹ and a recent Grammy Award to the South African flautist, *Wouter Kellerman*. Other artists such as *Lira*, *Thandiswa Mazwai*, the entrepreneurial *Cassper Nyovest*, the self-made Cape Town-based band, *Die Antwoord* and the current "sensation", *Sho Madjozi*, have contributed in placing modern South African music on the map. In 2010 South Africa was the country of honour at the Marché International du Disque et de l'Édition Musicale (MIDEM), the world's premier music industry conference. Perhaps partly as a result of some of these developments¹² government took a decision to include the music industry within its Industrial Policy Action Plan (IPAP) as part of its new industrialisation plan, the so-called "New Growth Path".¹³

As a study focus the music industry is particularly appealing for other important reasons: For one thing, it is one of only a few industries where participation in the industry is not dependent upon

⁶ See in this regard a Department of Arts and Culture document, 'Mzansi's Golden Economy. Contribution of the Arts, Culture and Heritage Sector to the New Growth Path', at 9, where it is noted that '[t]he South African music industry is a hive of innovation and creative talent, populated by hundreds of small and medium-sized entrepreneurs ...'. Available at <http://www.info.gov.za/view/DownloadFileAction?id=146493> (date of use: 12 June 2012) / <http://nfvf.co.za/home/22/files/Policies/Mzansi%20golden%20economy.pdf> (date of use: 20 February 2019).

⁷ <http://www.filmcontact.com/news/south-africa/oscar-history-south-africans-can-be-proud> (date of use: 22 February 2019). See also "Tsotsi puts SA film in spotlight", available at <http://www.southafrica.info/about/arts/tsotsi070603.htm>. (Date of use: 05 June 2012).

⁸ See in this regard Grealy P et al, 'Financing of Films', in 'Entertainment', *Law of South Africa* (LAWSA), at 440. See also generally http://www.thedti.gov.za/financial_assistance/financial_incentive.jsp?id=7&subthemeid=26 and "South Africa's film industry", available at <http://www.southafrica.info/business/economy/sectors/film.htm> (date of use: 12 June 2012).

⁹ Isicathamiya is defined as 'a type of secular cappella choral singing developed in South Africa by migrant Zulu communities. The music became widely popular outside of Africa in the late 20th century when it was picked up and promoted by the world-music industry.' <http://www.britannica.com/EBchecked/topic/1565404/isicathamiya> (date of use: 13 June 2012).

¹⁰ https://en.wikipedia.org/wiki/Ladysmith_Black_Mambazo (date of use: 20 February 2019).

¹¹ https://en.wikipedia.org/wiki/Soweto_Gospel_Choir (date of use: 20 February 2019).

¹² One other obvious reason is the pressure exerted by the creative industry and their demand to have their concerns addressed by government. In this regard a meeting between the creative industry and certain high-profile government officials, including the State President, was held on 17 November 2009, where an undertaking was made by the State President to attend to various concerns of artists. See in this regard <http://www.thepresidency.gov.za/pebble.asp?relid=779> and <http://www.polity.org.za/article/sa-zuma-address-by-the-president-of-south-africa-to-the-report-back-meeting-with-performing-artists-cultural-industry-sector-johannesburg-17112009-2009-11-17>. (Date of use: 17 June 2012).

¹³ Also as part of government's New Development Plan (NDP). See in this regard http://www.thedti.gov.za/news2013/ipap_2013-2016.pdf (date of use 28 March 2015).

large capital investments or high levels of education. This is unlike the film industry, where large capital investments and high professional skills often precede the success of any project. In the music industry raw talent, whether in the form of natural talent or acquired skills, is often all it takes to make a successful career, as many of the greatest singers of all time have proved.¹⁴ In view of this the music industry has been recognised as being a labour-intensive industry having a potential to contribute significantly to economic growth and employment. The role of intellectual property rights in generating revenues for the music industry has been recognised and in this regard it has been said that “there are a few South African industries better placed to take advantage of the global shifts towards knowledge-based, export-oriented growth and that draws on local competencies as a source of competitive advantage, than the music industry.”¹⁵

Music’s role as a means for economic development in its own right as well as through supporting economic activity in other sectors has also been recognised. In this regard it has been reported that the Department of Trade and Industry (DTI) was to formulate a Music Industry Strategy and Action Plan, in conjunction with the Department of Arts and Culture (DAC) and the Industrial Development Corporation (IDC).¹⁶ Further to this, a recent study of the World Intellectual Property Organisation (WIPO) has shown that music, theatrical productions and operas contribute up to 5.71% to GDP when compared to other core copyright industries, with copyright collecting societies contributing 1.05% of this.¹⁷ To understand how significant this is, the role that music plays in other core copyright industries such as *motion pictures and video, radio and television and advertising agencies and services* needs to be recognised. It should furthermore be noted that the majority of collecting societies are those operating in the field of music, and thus the contribution of collecting societies to GDP should not be seen as completely detached from the contribution of the music industry in general. Thus, as observed above, music plays a vital economic role not only in respect of the music industry itself but also in respect of supporting economic growth in other sectors. Within the South African context itself collections in respect of authors’ rights for the same period grew by 5.4% in 2009, totalling some ZAR277.7 million, with local authors’ rights accounting for 95% of the collections, representing a 6.5% increase.¹⁸ In 2018 collections for performing rights alone¹⁹ totalled R488,9 million before deductions,²⁰ showing the significance of the market.²¹

¹⁴ This is not to suggest that artists do not need to have education. Often a level of education and / or training, especially that relating to business and financial management, is crucial to ensuring that artists are able to manage their affairs and finances well, thus hopefully escaping the “poor artist” syndrome. Having indicated this it needs to be emphasised however that, as a requirement for participation and recognition in the industry, education and large financial investment are not the requisites. The remarkable story of Cassper Nyovest, who, with sheer entrepreneurial zest, has performed feats that some could have only thought of, including filling stadiums with single-handed effort, looms large. See in this regard <https://www.okayafrica.com/cassper-nyovest-biggest-south-african-hip-hop-artist/> (date of use: 21 February 2019). Another remarkable story is that of “Sho Madjozi”, who, without a record label, shot to fame in recent times, largely through the use of social media, and became the first South African female musician to win the BET Award. See in this regard <https://www.iol.co.za/the-star/news/look-sho-madjozi-gets-a-big-welcome-home-after-bet-win-28361612> (date of use: 01 July 2019).

¹⁵ <http://nfvf.co.za/home/22/files/Policies/Mzansi%20golden%20economy.pdf> (date of use: 20 February 2019)

¹⁶ https://www.gov.za/sites/default/files/gcis_document/201409/dtiipap2012-151.pdf (date of use: 20 February 2019).

¹⁷ “WIPO Studies on the Economic Contribution of the Copyright Industries”, at 13, available at http://www.wipo.int/ip-development/en/creative_industry/pdf/economic_contribution_analysis_2012.pdf. (Date of use 13 June 2012).

¹⁸ Informa 2010 *Music & Copyright* at 22.

South Africa's recording industry, noted for its "competitive capability in musical production", ranked 17th in the world in 2007.²² It has also been noted that, unlike the developed markets of Europe and North America, South Africa's recorded-music sales grew steadily year-on-year until 2008,²³ this decline arguably as the result of the recession. Another interesting trend relates to the fact that, although international repertoire has traditionally accounted for the majority of music sales in South Africa, this dominance declined from 74% in 2000 to 57% in 2008, with an even more significant decline of 54.1% in 2009.²⁴ A further study revealed that the copyright industries generally contributed 4.8% of GDP and 4.08% of employment in South Africa in 2013.²⁵ This is a significant contribution and is higher than that of agriculture, with an average contribution of 2% of the GDP.²⁶ The copyright industries can therefore, no longer be ignored and demand more focus and development. Regarding the music industry in particular, attention needs to be given to dealing with the constraints identified in relation to the development of this industry, in particular constraints relating to "problems of intellectual property protection" and skills development.²⁷ These skills, it is suggested, include the crucial skills of lawyers, prosecutors and judges equipped with the necessary knowledge and expertise regarding the operations, nuances and idiosyncrasies of this flamboyant yet GDP-contributing industry.

1.2 *Statement of the Problem*

The foregoing has highlighted the positive trends of growth that can be associated with the entertainment (or creative) industries at large and the music industry in particular. The post-apartheid era has seen a notable growth of the music industry, both in terms of an increase in the numbers of persons and entities involved in the industry, the contribution of the industry to the economy, and the development of new styles of music.²⁸

As would be expected, the proliferation of activity in the industry has inevitably resulted in a complex and increasingly litigious environment, as more people and entities assert their rights and others feel aggrieved and deprived of their rights. This situation is further borne out by the fact that there has,

¹⁹ I.e. the rights under s 6(c) – (e) rights of the Copyright Act 98 of 1978 (the Copyright Act or the Act) administered by the Southern African Music Rights Organisation (SAMRO).

²⁰ With R336,8 million available for distribution to members after deductions.

²¹ See the SAMRO Annual Integrated Report for 2018, available at <https://www.samro.org.za/sites/default/files/SAMRO%202018%20Integrated%20Report.pdf> (date of use: 20 February 2019).

²² "WIPO Studies on the Economic Contribution of the Copyright Industries", at 13, available at http://www.wipo.int/ip-development/en/creative_industry/pdf/economic_contribution_analysis_2012.pdf. (Date of use 13 June 2012). Unfortunately South Africa lost this global ranking in 2012, when it lost its value by 5.8 % and fell beyond the Top 20 Global Market ranking, with the explanation for this being that "the government has not focused on protecting IP Rights." <https://www.ifpi.org/south-africa.php> (date of use: 02 July 2019).

²³ Informa *Music & Copyright* 17 – 18.

²⁴ *Id* at 18.

²⁵ "WIPO Studies on the Economic Contribution of the Copyright Industries 2014" https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf (date of use: 20 February 2019).

²⁶ With a GDP contribution of 2.14% in 2016. See <https://www.southafricanmi.com/south-africas-gdp.html> (date of use: 20 February 2019).

²⁷ As highlighted in the Industrial Policy Action Plan. http://www.thedti.gov.za/news2013/ipap_2013-2016.pdf (date of use 28 March 2015)

²⁸ With Kwaito music being the most ubiquitously South African sound of the post-apartheid era. See in this regard <https://www.southafrica.com/blog/kwaito-music-in-south-africa/> (date of use: 12 January 2019).

post 1994, been a steady increase in cases dealing directly with disputes relating to the music business appearing before our courts, adding to the handful of cases appearing in our law reports prior to 1994.²⁹ This is a welcome development which is leading to a growing, albeit still limited, *body* of case law – a crucial step towards the development of a veritable jurisprudence in this important area of the law.

Some of the cases that have come before our courts in recent times are: *South African Broadcasting Corporation v Pollecutt*,³⁰ an enlightening case which highlights the nature of copyright as a *bundle of rights*, and the interplay between different areas of law (namely copyright, performers' rights and the law of property) applicable to intellectual property works and expressions;³¹ *Morris v Benson and Hedges*,³² which dealt with the important question of a reasonable royalty paid in lieu of damages for copyright infringement; *Disney Enterprises Inc v Griesel NO & Others*,³³ *Pulkowski v South African Broadcasting Corporation Ltd & Another*,³⁴ which dealt with the effect of a "cession" of copyright on the cedent's ability to institute infringement proceedings; *Feldman NO v EMI Music SA (Pty) Ltd / EMI Music Publishing SA (Pty) Ltd*,³⁵ which dealt with the question of joinder of co-authors in a claim for damages arising from copyright infringement; *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others*,³⁶ which dealt with the jurisdiction of South African courts in respect of foreign copyright, where the defendant was an *incola*; *Shapiro and Galeta v South African Recording Rights*,³⁷ which dealt with the liquidation of a collecting society, and which is important from the point of view of providing insight into the workings of collecting societies in South Africa.³⁸

More recently, a number of cases dealing generally with the question of the reasonableness of licence fees payable for the exploitation of so-called "needle-time" rights³⁹ have appeared before the

²⁹ Apart from the English decisions that applied in South Africa prior to its independence from British rule on 31 May 1961, some of the cases dealing with music-related disputes prior to 1994 are *Performing Rights Society Ltd v Berman & Another* 1966 (2) SA 355 R; *Performing Right Society Ltd v Butcher & Others* 1973 (1) SA 562 R; *Gramophone Co Ltd v Music Machine (Pty) Ltd & Others* 1973 (3) SA 188 (W); *South African Music Rights Organisation Ltd v Trust Butchers (Pty) Ltd* 1978 (1) SA 1052 (E); *Southern African Music Rights Organisation Ltd v Svenmill Fabrics (Pty) Ltd* 1983 (1) SA 608 (C); *RPM Record Company (Pty) Ltd v Disc Jockey Music Company (Pty) Ltd*, Case No: 21081/84, TPD; *Priority Records (Pty) Ltd v Ban-Nab and TV1*; *Gramophone Record Co (Pty) Ltd v Ban-Nab Radio and TV* 1988 (2) All SA 69 (D); *CCP Record Company (Pty) Ltd v Avalon Record Centre* 1989 (1) SA 445 (C); *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) and *S v Nxumalo* 1993 (3) SA 456 (O).

³⁰ 1996(1) SA 546 (A).

³¹ See further in this regard Visser 1997 *Juta's Bus. L* 81.

³² 2000 (3) SA 1092 (W).

³³ 895 JOC (T). While this was a case dealing with the attachment of property *ad fundandam jurisdictionem* (in this case intellectual property in the form of certain trademarks), it has significance for copyright in musical works because in confirming the attachment order the court in effect agreed to the *continuing application* of the doctrine of the *reversionary interest* inuring in copyright provided for in British colonial copyright legislation, to modern South African copyright law; for which see Dean 2006 *DR* 16.

³⁴ 2008 ZAGPHC 440.

³⁵ 2010 (1) SA 1 (SCA).

³⁶ 2010 (6) SA 329 (SCA).

³⁷ Unreported case no: 14698/04, South Gauteng High Court. The writer wishes to note that the citation of this case is not accurate, as the name of the respondent is not given in full. The full name of the respondent was South African Recording Rights Association Limited (with the acronym SARRAL). This is the same case in which an intervening application was made earlier, as reported in *Shapiro v South African Recording Rights Association Ltd (Galeta Intervening)* 2008 (4) SA 145 (W) [Emphasis added].

³⁸ See the discussion in Chapter 6 *infra*.

³⁹ The expression "needle-time" is defined as "the time in any period in which any recording may be included in a broadcast or cable programme service." See Davies and Cheng *Intellectual Property Law* 101. Needle-time rights are essentially the "remuneration rights" in respect of the exploitation of the broadcast and communication to the public of sound recordings provided for in international neighbouring rights treaties such as the International Convention for the

courts and the Copyright Tribunal (in this respect representing a “resuscitation” of the Copyright Tribunal).⁴⁰ These cases include *National Association of Broadcasters v South African Music Performance Rights Association and Others*,⁴¹ a case dealing with the question of the jurisdiction of the Copyright Tribunal to hear matters relating to licensing disputes; *South African Music Performance Rights Association v National Association of Broadcasters and Others* (Copyright Tribunal),⁴² a case concerned with a dispute relating to the process to be undertaken by the Copyright Tribunal when adjudicating needle-time rights licensing disputes, which was essentially the first appearance before the Copyright Tribunal in respect of needle-time rights; *South African Music Performance Rights Association v National Association of Broadcasters and South African Music Rights Organisation*,⁴³ the first ruling of the Copyright Tribunal on the merits in respect of a needle-time rights licensing dispute,⁴⁴ and *Foschini Retail Group (Pty) Ltd and 9 (Nine) Others v South African Music Performance Rights Association*,⁴⁵ a needle-time rights licensing dispute brought by a group of retailers.

Another set of needle-time cases was concerned with disputes between owners of copyright in sound recordings (and the intervention of the Registrar of Copyright) with regard to the administration of the performer’s share in needle-time royalties. These include *South African Music Performance Rights Association and Another v Mr Kadi Petje N.O. and Others*,⁴⁶ an application for the review of the decision of the Registrar of Copyright to reject distribution rules required in terms of the Needle-time Regulations, and *Southern African Music Rights Organisation v South African Music Performance Rights Association and Others*,⁴⁷ a matter seeking an interim interdict preventing SAMPRO from distributing any royalties in terms of its newly-approved distribution plan, *pendente lite*.⁴⁸

Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) of 1961 (in art. 13 thereof) and the WIPO Performances and Phonograms Treaty (WPPT) of 1996 (art. 15 thereof). In South Africa needle-time rights were introduced through an amendment of both the Copyright Act 98 of 1978 (the Copyright Act) and the Performers’ Protection Act 11 of 1967 (the Performers’ Protection Act) in 2002, and the promulgation of the Regulations on the Establishment of Collecting Societies in the Music Industry, Notice No. 517, GG No. 28894 of 1 June 2006 (the Needle-time Regulations). Although the needle-time rights cases dealt primarily with matters relating to sound recordings and performers’ rights, the cases are worth mentioning here as the principles applicable to the administration of sound recordings also have relevance on musical works. Furthermore, these cases provide important guidelines as to how the courts and the Copyright Tribunal will approach disputes relating to copyright licences.

⁴⁰ Apart from the *Johannesburg Operatic and Dramatic Society* referred to supra at n 8, no cases had appeared before the Copyright Tribunal in South Africa.

⁴¹ Unreported case no: 2020/2009, North Gauteng High Court.

⁴² Reference No. 00002 [2009]. An attempt to appeal this decision to both the High Court and the Supreme Court of Appeal was dismissed with costs. See *National Association of Broadcasters v SA Music Performance Rights Association and Another*, unreported case no: 138/10, Supreme Court of Appeal (where reference to the High Court appeal is made).

⁴³ Copyright Tribunal hearing, reference no: 00002(R).

⁴⁴ This ruling was successfully appealed in *National Broadcasting Association v South African Music Performance Rights Association and Another* [2014] 2 All SA 263 (SCA). An attempt by the South African Performance Rights Association (SAMPRO) to appeal the SCA’s decision to the Constitutional court was dismissed in *South African Music Performance Rights Association v National Association of Broadcasters and Others* Case No: CCT 59 / 14 on the ground of bearing “no prospects of success.”

⁴⁵ [2013] ZAGPPHC 304.

⁴⁶ Unreported case no: 9085/2010.

⁴⁷ Unreported case no: 42008/13.

⁴⁸ This matter was later withdrawn following an agreement between SAMRO and SAMPRO to end the dispute. See in this regard <http://www.samro.org.za/news/articles/sampra-samro-reach-agreement-needle-time-rights-impasse-support-and-blessing-principle> (date of use: 15 October 2018).

It is true that, when compared to other jurisdictions such as the United States of America, (where it could be humorously said that there is an *oversupply* of cases of this nature), the body of case law dealing with music-related disputes in South Africa is still miniscule. The growth trend is however, encouraging, and with the continuing growth of the industry, both in terms of its contribution to the GDP and the numbers of persons and entities involved, this trend is poised to continue. Which is where the problem lies: the growth of the entertainment and in particular the music industry would require an adequate supply of lawyers – attorneys, advocates, law academics and judges – who are skilled in this area of law and who can confidently advise, render opinions and give pronouncements on the intricate and complex legal issues arising from music industry relationships. The present reality is that not many legal professionals in South Africa possess this speciality or even display an interest in this area of law. This is borne out by the fact that unlike in other jurisdictions, there is an almost deafening silence in our law journals relating to articles dealing with music rights issues.

However, perhaps the major indicator of this situation is the fact that no South African law faculty offers a programme in Music Law or Music Rights Law as of the time of writing this work - in spite of the fact that many specialised areas of law have developed in recent years and are taught at university level (including aviation law, cyber or information technology law, water law, space law, sports law etc.).⁴⁹ When issues relating to the legal aspects of music copyright are dealt with, they are generally dealt with in passing or in a cursory manner, as part of the general treatment of copyright law. This is in contradistinction to a number of major universities internationally, which offer formal programmes in Entertainment (including Music) Law, both at undergraduate and postgraduate levels.⁵⁰ Furthermore, apart from a brief introductory section in the *Law of South Africa*,⁵¹ not a single academic text book exists in South Africa which deals with this area of law.⁵²

It is the writer's conjecture that the combination of factors such as the fact that the South African music industry was for many years a small market that could, perhaps, not sustain many

⁴⁹ The writer is aware of the fact that both the Universities of Cape Town and Johannesburg have in the past offered short programmes in Entertainment Law. These programmes however focussed on Film and Television law, rather than Music Law. The University of Johannesburg programme was eventually changed into a seminar on *Introduction to Entertainment and Media Law*. See in this regard <http://www.uj.ac.za/EN/Faculties/law/coursesandprogrammes/Documents/Intro%20to%20Entertainment%20Media%20Law%20Oct%202011%20WEB.pdf>. (Date of use: 18 June 2012). It does not however appear that these programmes are continuing as of the time of submission of this thesis.

⁵⁰ Some of the international universities offering formal programmes in Entertainment Law include, in the United States of America, the University of California (UCLA) Law School, Southwestern Law School, Stanford Law School, Loyola Law School, Cardozo School of Law and the University of Miami School of Law. In the United Kingdom the most well-known programme is that offered by the University Of Westminster School of Law. Further to this, the School of Oriental and African Studies at the University of London offers, amongst others, an elective in *Legal Regulation of the Music Industry* as part of its LLM programme, while the University of Derby offers an elective in *The Law of the Music Industry*, also as part of its LLM programmes. In Australia Monash University, the University of Melbourne and the University of Technology Sydney all offer programmes in or relating to Entertainment Law.

⁵¹ Grealy P *et al*, 'Entertainment', in Joubert WA (ed) *Law of South Africa (LAWSA) Volume 8(2) 2ed*, at 403. The section deals briefly with the following areas forming part of Entertainment Law: *Film and Television Production and Exploitation Law; Restrictions on the Content of Films and Television Programmes; Financing of Films; Statutory Protection of Performers; Music Law* [although in fact Music Law would also encompass the protection of performers]; *Sports Law; Entertainment and Advertising and Protection of the Arts*.

⁵² The writer is aware of two textbooks that have been written on the subject of the music business. The first one, *South African Music Law, Contracts and Business*, written by Advocate Nick Matzukis, while a very useful and informative guide to the music industry, was not, in the opinion of the writer, written with critical academic rigour. The second work, *The South African Music Business*, by Jonathan Shaw, while it is more academically oriented, has little legal analysis as it focusses mainly on marketing matters.

practitioners, and the fact that no formal course of study and very few scholarly articles have been available in this area of law, *inter alia*, has led to a situation where not many can claim expertise in this area of law in South Africa. With no comprehensive academic exposition of the applicable law and thus no elucidation of the pertinent legal principles, many an aspirant practitioner in this area of law and business would have few places to get assistance. This is further exacerbated by the fact that the law relating to the protection of music rights is based mainly on copyright law, an area of law recognised as “technical” and “arcane” in its own right by no less an eminent person than a judge of the Supreme Court of Appeal.⁵³ This situation is aptly captured by Thall in his seminal work, “What They’ll Never Tell You About the Music Business”, where he observes:

... Unlike participants in other industries, the major players in industries in the area of intellectual property (music, theatre, film and television) often enter the business with neither a clear understanding of its workings or history nor means to obtain the information which would convey such knowledge to them.⁵⁴

This, Thall argues, gives rise to the need for persons aspiring to participate in the music industry to “know the difference between surface and substance; between truth and lie; between reality and myth ...”⁵⁵

Dealing with a similar concern, Du Plessis, in a two-part series appearing in TSAR,⁵⁶ highlights the importance of counsel, when representing clients in music rights matters, being *au fait* not only with the facts of the case but also both [the dynamics] of the music industry and the settled norms in the industry.⁵⁷ In this regard Du Plessis argues that “... the perceived prejudice that may potentially befall the songwriters, may not lie in the ability of the courts to make a proper ruling, but in the inability of counsel to argue their cases.”⁵⁸ Analysing the case of *Sunshine Records v Frohling*,⁵⁹ “the leading case relating to the music industry”, Du Plessis argues that counsel could have argued the case differently⁶⁰ by analysing the contract in question and correctly identifying it as embodying not only a recording contract with a performer, but also a publishing contract with a songwriter and a performance (management) contract.⁶¹ Du Plessis further opines that counsel should therefore not

⁵³ Harms ADP in *King v South African Weather Services* 2009 (3) SA 13 (SCA), at paragraphs 5 and 16 respectively. The arcane nature of copyright is recognised even in the United States of America, a more developed and complex jurisdiction, where it is said of judges that “[g]iven the breadth of their efforts, they lack the luxury of time to delve deeply into what for many judges is an arcane subject.” Patterson and Linderberg *The Nature of Copyright* at 6.

⁵⁴ Thall *What They’ll Never Tell You About the Music Business* at ix.

⁵⁵ Thall *ibid* at xii. The confusion that can often arise as a result of the lack of understanding of the nuances that characterise the music industry and the different layers of rights involved can be illustrated by the error evident in a recent text titled *A Guide to Intellectual Property Law*, by Peter Ramsden (Juta 2011 Claremont). At 35 – 36, when discussing copyright in sound recordings and particularly the new section 9A of the Copyright Act dealing with needle-time royalties, the author concludes by suggesting that the regulations relating to the royalties provided for in section 9A are dealt with in section 14 of the Act. This is however not correct because the royalties provided for in section 14 and the regulations promulgated pursuant thereto relate to “records of musical works”, and not the public play of sound recordings. Rather it is the Needle-time Regulations referred to earlier (see *supra* n 42) that apply in respect of the public play of sound recordings.

⁵⁶ Du Plessis 2007 TSAR 1 112 and Du Plessis 2007 TSAR 2 321.

⁵⁷ Du Plessis 2007 TSAR 2, at 330.

⁵⁸ *Ibid*.

⁵⁹ 1990 (4) SA 782 (A).

⁶⁰ Du Plessis 2007 TSAR 1, at 124.

⁶¹ *Id* at 124 - 125.

have argued the case on the ground of restraint of trade as set out in the *Magna Alloys*⁶² case, but on elements of slavery and unconscionability in the contract, lack of consensus regarding the songwriter's / publishing contract and misrepresentation.⁶³

The crisp point, according to Du Plessis, seems to be the ability to scrutinise a contract in order to determine if there may be various contractual issues, in particular pertaining to “the transfer of different form [sic] of copyright”, which may be contained in one document.⁶⁴ In what could not have been a more succinct capturing of the crisp issue, Du Plessis concludes:

The position of the songwriter in South Africa is often confused with that of a recording artist / performer. The seriousness of the implications of copyright issues in songwriters' publishing contracts is therefore often overlooked. From the discussion of the music industry, and specifically the recording industry, coupled with the confusion that sometimes exists between the positions of that of the songwriter and the artist / performer, and the risks that are borne by the recording companies, a well-drafted standard contract by an established and reputable record company, where the songwriter and artist / performer and their respective roles are defined, may very well be more suitable than a personally drafted contract, overlooking detail that may have dire consequences for the songwriter.⁶⁵

Du Plessis' articles raise very crucial issues that highlight the importance of having experienced counsel when dealing with music rights matters. As the case of *Pollecut*⁶⁶ has illustrated, it is often not easy to deal with the many “different and distinct intellectual property rights that have to be taken into account”⁶⁷ in complex copyright matters. Inexperienced counsel would find it difficult to plough through the complexity and to decipher the different nuances, as appears to have been the case in the situation discussed by Du Plessis. The music industry is a global, billion-dollar-a-year industry and often much is at stake. Expertise is therefore essential to successfully litigate disputes arising from this industry. If the lawyers for the Solomon Linda deceased estate did not have this expertise, they would not have been able to tackle the global giant conglomerate, Walt Disney Enterprises, rendering it necessary to settle the matter.⁶⁸

There can be many shades and twists in disputes relating to music, requiring the sharp and incisive mind of counsel having the experience and expertise to deal with these matters. Thus whereas in the *Pollecut*⁶⁹ case the issue was about the use of one contract document in relation to a number of

⁶² *Magna Alloys & Research v Ellis* 1984 (4) SA 874 (A).

⁶³ Du Plessis 2007 TSAR 20p cit note 50 at 125 – 126.

⁶⁴ Du Plessis 2007 TSAR 1 47.

⁶⁵ *Ibid* at 330 – 331. By quoting from Du Plessis the writer does not express full agreement with Du Plessis' argument here. In particular the writer is under no illusion about the graciousness of record companies (one of which was said to be 'too grasping' in the case under discussion – *Sunshine Records v Frohling*, supra n 62, at 55), which would ensure fair terms in contracts. It is the writer's experience that generally record companies (as do many other service companies in the music business) seek to maximise their interest to the detriment of those of the artist. Nothing would therefore, in the writer's opinion, take the place of an experienced and knowledgeable attorney / legal practitioner when seeking to defend the interests of the artist. In any case it is not, or should not be, for record companies to make determinations that relate to songwriters as they are not involved with musical works but sound recordings (although there has been a trend in recent times for record companies to take interest in music publishing through the use of the so-called 360 degree record deals).

⁶⁶ *South African Broadcasting Corporation v Pollecut* 1996(1) SA 546 (A).

⁶⁷ *Id* at para 3.

⁶⁸ See in this regard Dean 2006 DR 16.

⁶⁹ *South African Broadcasting Corporation v Pollecut* 1996(1) SA 546 (A).

different and complex intellectual property relations, the American case of *Cortner and Silberman v Israel and Others*⁷⁰ highlighted “the confusion that can occur when lawyers indiscriminately use multiple contracts (some on standard forms) in the transfer of copyright interests without giving careful consideration to the consequences of their action.”⁷¹ On the other hand, Showalter highlights the difficulty that often arises in respect of proving damages in music rights cases, requiring the legal representative to have skills “in forensically investigating and quantifying claims”.⁷² In the same vein, there is a need to have a balanced number of judges that can expertly rule on disputes of this nature, as well as academics that can contribute to the building of a body of literature on this subject-matter. This therefore highlights the need to go to the basics: has the complex universe and full ambit of the legal construction of the concepts of “music” and “musical work” been properly unravelled?

In summation therefore, this thesis seeks to address the research and knowledge gap arising from the lack of a comprehensive, analytical and systematic exposition of the rules and legal principles applicable to the copyright protection of musical works. This also entails explaining concepts and usages arising from practice that cannot be mastered by the bare reading of copyright legislation, including the proper delineation of the applicable rights and sub-rights. Thus for example, while copyright legislation simply refers to the reproduction right in musical works, it is not immediately obvious that this right is a complex, multi-pronged right with various segments or fragments (what the writer terms “sub-rights”), with their own idiosyncrasies applicable to particular sectors of the music reproduction market (e.g. print reproduction, mechanical reproduction, synchronisation etc.). This study seeks to highlight such nuanced connotations, in addition to providing a systematic exposition of the different components applicable to the copyright protection of musical works through a historical and contextual analysis.

As pointed out above, the existence of a research and knowledge gap often leads to the lack of astuteness on the part of lawyers representing clients, and even on the part of judges, to respond adequately when confronted with the intricacies of music rights disputes. Du Plessis’ articles dealt with above highlight the situation with regard to legal counsel who may not be completely *au fait* with the nuances of music rights disputes; however, the effect of this can also be seen in some of the court rulings dealing with this subject-matter. The case of *South African Music Performance Rights*

⁷⁰ 732 F.2d 267 (2d Cir. 1984).

⁷¹ *Ibid* at para 1.

⁷² Showalter 2011 74 *Tex. B.J.* 210. Others have highlighted the important and unique role of lawyers in the music business. Passman *All you need to know About the Music Business*, at 57, says of the role of lawyers that “[t]hey are very involved in structuring deals and shaping artists’ business lives.” Biederman *et al Law of the Entertainment Industries* seem to affirm this when they observe (at xi), “The role of law in the entertainment industries is often one of anticipation. ... In fact, the analysis of law as applied to the entertainment industries is often one of assessing how incomplete and inadequate the anticipation has been. From that vantage point, the entertainment lawyer must assay the damage and construct a method of dealing with the inadequacies to obtain the best result in an imperfect system.” This important role of lawyers experienced in matters relating to the music business was also highlighted in the English decisions of *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 All ER 237 (CA); *O’Sullivan v Management Agency and Music Ltd* [1985] 1 QB 428 (CA) and *Silverstone Records v Mountfield, Zomba Music v Mountfield* [1993] EMLR 152 and [1993] EMLR 171 (unreported judgment), where it was shown that the absence of independent legal advice resulted in *inequality of bargaining power* and rendered the agreements unenforceable.

Association (SAMPRA) v National Association of Broadcasters (NAB) and Another,⁷³ which was the first Copyright Tribunal referral to deal with the merits of a needle-time rights licensing dispute, is an example in this regard. In this case the Tribunal was called upon to make a determination as to the royalty that SAMPRA, the referrer, was eligible to charge NAB members for their broadcast of sound recordings belonging to record companies affiliated to the Recording Industry South Africa (RiSA), the sole member of SAMPRA at the time.

In the case the Commissioner of Copyright, constituting the Tribunal (Sapire AJ), took the view that “there are three copyright owners” in relation to recorded music, namely (i) “the composers of the music and the lyrics, who ... SAMRO represented”, (ii) the manufacturers of the recordings and (iii) the performers.⁷⁴ Based on this conclusion the Commissioner, noting that the rate that SAMRO charged broadcasters for their use of musical works (3.5%) was “the only operating guideline”, observed that while there was a need for some correlation, “the rate to be applied for the royalty payable to performers and record manufacturers need not be the same”.⁷⁵ In this regard the Commissioner rejected the NAB’s contention that composers should get a greater royalty than record labels and performers. The Commissioner reasoned that the contention that composers contributed more to the popularity of a recording was “difficult to accept as a rule ... [as the] popularity of a sound recording could in many cases, be attributable to the talents of the performer”.⁷⁶

Clearly based on this the Commissioner accepted, without questioning, SAMPRA’s contention that the rate payable for needle-time rights had to be “more than twice the amount paid to the composer”, as needle-time royalties had to reward both the record manufacturer and the performer”.⁷⁷ Accordingly the Commissioner awarded SAMPRA a royalty rate of 7%, “representing in approximate terms, twice the rate applicable using the SAMRO formula”.⁷⁸ The Commissioner’s *ratio* in this regard was clearly faulty.⁷⁹ It is submitted that it is this (perceived) inability of certain

⁷³ Copyright Tribunal hearing, reference no: 00002(R); referred to above, n 46. The second respondent was the Southern African Music Rights Organisation (SAMRO).

⁷⁴ *Id* at 2 – 3.

⁷⁵ *Id* at 13.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

⁷⁸ *Id* at 15.

⁷⁹ The ruling was successfully appealed in *National Broadcasting Association v South African Music Performance Rights Association and Another* [2014] 2 All SA 263 (SCA), where the Appeal Court approved a maximum rate of 3% (see para 75), which Dean and Karjiker *Handbook of Copyright Law* 1-58 have, in turn, castigated as being “arrived at in a fairly arbitrary manner.” There are several reasons in the writer’s opinion that Sapire AJ’s decision in the Tribunal matter was faulty, which highlighted poor astuteness in dealing efficiently with music copyright matters as a result of the research and knowledge gap mentioned in this work: (a) Sapire AJ’s characterisation of the rights involved was faulty. As indicated Sapire AJ took the view that there are three “copyright owners” in respect of *recorded music*, namely “the composers of the music and lyrics”, “the manufacturers of the recordings” and “the performers”. This however is a poor characterisation of the matter. While it is true that different copyright works are embodied in recorded music, as elaborated upon further below (see paragraph 6 on Scope and Delimitation), it needs to be understood that *recorded music* is in essence, a “record”, as defined in the Copyright Act 98 of 1978, as amended (the Copyright Act or the Act), and refers to the material embodiment of a *sound recording*. The copyright embodied in *recorded music* is thus primarily copyright in the sound recording, which is generally owned by the record label either in terms of paragraph (c) of the definition of “author” in s 1(1) of the Copyright Act; or in terms of s 21(1)(c) of the Act. This observation is instructional also from the point of view that what the Tribunal was concerned with was the payment of royalties in relation to needle-time rights, i.e. in this case, the broadcast of *sound recordings*.

members of the judiciary to competently adjudicate matters relating to intellectual property rights that has led to the trend where many intellectual property contracts make provision for the referral of disputes to arbitration rather than to the courts. While this is a positive development in certain respects, on the flip side it has the potential of depriving the legal system of the development of a rich and reliable jurisprudence – something direly needed in the area of music copyright.

2 Research Questions

(b) A better characterisation or delineation is to say that while recorded music entails the physical embodiment of a sound recording in a “record”, the sound recording itself embodies other copyright works, namely a musical work and often, a literary work (in the form of lyrics). Thus in the end, *three distinct copyright works* capable of being owned by three or more different persons, exist in recorded music. It is not that there are three copyright owners in recorded music, but that there are three copyright works or *copyrights* capable of being owned by three or more different persons. All three copyright works could be owned by one person, as in the case of the singer-composer-producer, who writes the lyrics of his songs, composes the music, and independently records the music, without the aid of a recording company. Or they could be owned by more than three persons, as in the case of works that are co-authored or otherwise co-owned by more than one person.

(c) In light of this, to say that the composer of the music and the lyrics is a copyright owner in respect of recorded music is a misleading statement and a poor delineation of the rights involved. The composer of the musical works has no interest in the copyright in a sound recording, unless he or she also meets the requirements of author of the sound recording in terms of s 1(1) of the Act, or owns the copyright in terms of s 21(1)(c) of the Act. Furthermore, as indicated, the copyright in a musical work (“music”) is separate from the copyright in the lyrics, so the owner thereof is not necessarily one person.

(d) It was clearly incorrect to say that performers are copyright owners in respect of recorded music. Again, unless the performers also met the requirements of author of a sound recording in terms of s 1(1) or owner of a sound recording in terms of s 21(1)(c) of the Copyright Act, it is common cause that performers have no copyright interest in recorded music, and only receive protection as performers under the Performers Protection Act 11 of 1967, as amended (the Performers’ Protection Act), which is a neighbouring or related rights legislation.

(e) The reference to “record manufacturers” as being one of the three owners of copyright in recorded music is itself problematic. Record manufacturers are not necessarily copyright owners in sound recordings. For example, s 14 of the Copyright Act refers to a manufacturer of records, but it is clear that this is not a reference to the owner of copyright in sound recordings. It is rather a reference to a person who manufactures records of a musical work or an adaptation thereof, where records of the work had previously been made for commercial retail. Moreover, in practice owners of copyright in sound recordings do not necessarily manufacture the records of such sound recordings themselves. Traditionally manufacturing plants such as Compact Disc Technologies (CDT) would manufacture records on behalf of record labels. The record labels would then distribute the records to the market (e.g. to music retail stores), or engage record distribution companies to do so. It is to be noted that CDT has since been taken over by CTP Digital Services, for which see <http://ctpds.co.za/about/> (date of use: 04 July 2019).

(f) Further to the above, the judge clearly displayed a poor understanding of the functioning of collecting societies (or as they are also popularly known, collective management organisations or CMOs). An astute awareness of the collective management system, which has been a part of the copyright system for over two hundred years, and in particular an understanding of the functioning of performing rights societies, the most well-known and established collecting societies, would have assisted the judge not to easily accept the submission by SAMPRO that SAMPRO should be given double the rate used by SAMRO, because while SAMPRO had to pay royalties to both record companies and performers, SAMRO only had to pay royalties to composers. With such knowledge the judge would have known that performing rights societies generally administer copyright on behalf of *both composers and publishers* of musical works. However, even without such intricate knowledge of the functioning of performing rights societies the judge should have, based purely on the provisions of the Copyright Act (and also in light of the contention that record labels had to share their royalty with performers), probed whether the composers would not be sharing their royalties with other entities – especially since the Act makes provision for the assignment of copyright or granting of licences.

(g) Lastly, it is submitted that the honourable judge should have been prompted to interrogate SAMPRO’s submissions purely on the basis that SAMPRO was, at the time, only accredited to represent the rights of owners of copyright in sound recordings (i.e. record labels), in terms of reg 3(1)(a) of the Needle-time Regulations (see supra n 42). It was only later that SAMPRO was reconstituted to represent both owners of copyright in sound recordings and performers, in terms of reg 3(1)(c) of the Needle-time Regulations. Seeing that the court papers clearly identified SAMPRO as being accredited in terms of reg 3(1)(a) the judge should have probed the basis of SAMPRO’s contention that the royalty it was to receive would be shared with performers, especially since reg 3(1)(b) makes provision for a collecting society that represents performers. At least the judge should have probed if the latter collecting society was in existence, and it would have become apparent that SAMRO, the second respondent, was at the time accredited to represent performers in terms of reg 3(1)(b), which it did through the a trust termed Performers Organisation of South Africa (POSA) Trust. Importantly, it is noted that s 5(4)(a) of the Performers Protection Act, which SAMPRO seems to have relied upon, provides that a performer who has authorised the fixation of his performance is, “in the absence of any agreement to the contrary”, deemed to have given the record label that made the fixation the exclusive right to receive needle-time royalties on his behalf (provided that the record label shares such royalties with the performer). However, the Tribunal should not have easily accepted SAMPRO’s contention that the royalty it sought would be shared with performers, without first determining if and to what extent there were any “agreement[s] to the contrary”.

Based on the foregoing, the crisp research question to be answered in this work is: What are the essential elements that constitute the protection accorded to musical works under South African copyright law? What are the historical roots to this protection, and what is the context within which such protection is given today? What are the trends in this regard and does current copyright reform provide assurance regarding the ongoing protection of musical works and the sustainability of the music industry at large?

3 Aims of the Study

3.1 The main objective of this research is to provide a systematic, analytical and contextual exposition of the law relating to the protection of musical works in South Africa, highlighting all pertinent and conceivable issues that those seeking to understand this area of law are likely to be confronted with, whether such issues arise from the law or from practice. In this regard legal research is concerned with an enquiry into particular legal rules and principles *in order to add new knowledge* or to bring about advancement in the science of law. However it needs to be noted that “systematic fact-finding”, or finding and ascertaining the law on a particular subject-matter, where this is obscure, is an integral part of legal research.⁸⁰ This research undertakes to realise both objectives.

3.2 In relation to the foregoing the study aims to develop a thorough, critical analysis of the applicable rules and principles in order to fill the gap that exists in the research literature and the case-law jurisprudence. It is the writer’s conviction that this gap arises from the fact that not enough attention has been given to elaborate on the application of the provisions and principles of copyright law to the protection of musical works. This is as a result of an apparent lack of interest in the subject-matter, which itself would be as a result of the fact that not much is known about the field; but secondly it is because the courts have not been presented with many opportunities yet to adjudicate on matters relating to the subject-matter, although there is a growing positive trend in this regard. The writer is of the view that a historical and contextual analysis will assist greatly in filling this gap. It needs to be acknowledged in this regard that the South African Copyright Act is (as are many copyright legislations generally), a general piece of legislation granting copyright protection to a number of works (e.g. musical works, literary works, cinematograph films, computer programs), whose exploitation has given rise to large-scale industries. In their application in those various

⁸⁰ Jain expresses this point more pointedly when he writes: “... In a strict sense legal research is understood as limited to those works which contribute to the advancement of legal science (that is excluding such materials as text-books and case books, etc.). This is a too narrow a view of research and we need not adopt such a restricted definition of legal research. ... [T]he fact-finding is not so easy as it may seem. First, a researcher has to go into the different statutory provisions and the rules made thereunder. Secondly, he may have to examine the mass of case-law which may have accumulated on the point in issue, *and it is not an easy matter to derive a clear-cut legal proposition from the tangled mass of case-law.*” Jain 1972 *J.I.L.I.* 490. Emphasis added. Vibhute and Aynalem 30 – 31 add to this in the following manner: “... [A] systematic effort is required to ascertain or find law on a given subject / topic. ... It is a matter of common experience that ... legislative instruments are scattered and not easily traceable. ... A plethora of judicial pronouncements of different higher judicial institutions including of the apex court adds to the difficulty in the ascertainment of law. ... *Finding law on a particular topic or subject thus, is not a simple task, as it seems to be.* It involves intensive analysis of legal instruments and judicial pronouncements. ...” Emphasis added. Vibhute and Aynalem 2009 <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> (date of use: 05 July 2019).

industries, the rights afforded by copyright are often subject to fragmentation, which itself has led to the segmentation of the relevant markets (see Chapter 8 below).

The music industry is an example of an industry which is driven by the exploitation of copyright works (i.e. musical works, literary works, in the form of lyrics, and sound recordings, with our interest being in the first two). Perhaps the phenomenon of copyright fragmentation and segmentation is more prevalent in the music industry. This has given rise to primary and secondary markets of exploitation, especially in respect of the reproduction right and the performing right, as highlighted in Chapters 2, 3 and 6. Copyright legislation is concerned with setting out the general principles of the the idiosyncrasies of the different segments and fragmented markets of the different copyright industries. It is thus left to the courts to fill the missing gaps and to interpret the law with specific regard to these industries. As indicated above, the South African jurisprudence in this regard is still developing and gaps still remain with regard to the clear understanding of the subject-matter. Part 2 of this Study seeks to provide a contextual analysis of the subject-matter, to assist in this regard.

3.3 The study also aims to contribute to the reform process in relation to copyright law, by providing various recommendations in this regard. During the process of writing the thesis a very important development with regard to the reform of South Africa's copyright legislation took place, in the form of the publication of proposed amendments to the Copyright Act.⁸¹ The first version of the Bill was published in the government gazette on 27 July 2015, with an invitation for comments from the public.⁸² Several other versions of the Bill have since been published, culminating in the version passed by the National Assembly on 05 December 2018 and approved without changes by the National Council of Provinces on 28 March 2019.⁸³ This approval by the two houses of Parliament was despite intense lobbying against the Bill's approval. The Bill currently awaits signature by the President in order to come into force.

The Bill has proven to be extremely controversial and has polarised views between those who have passionately hailed it as a welcome development and those who, with equal passion, perceive it as constituting a threat to the interests of rights-holders.⁸⁴ The writer has seen the need to comment on the Bill also, and to analyse the impact that it is likely to have on the development of music copyright in South Africa if it comes into law in its current form. Such analysis is evident in different parts of the thesis but more particularly in Chapters 7, 8 and 9. In Chapter 9 the writer provides some in-depth critical analysis of various provisions of the Bill that have a bearing on the protection of musical works and proposes recommendations for improvement.

3.4 Lastly, the writer hopes that the afore-mentioned undertaking will result in a useful reference work where the critical aspects of the law relating to the protection of musical works - addressing all

⁸¹ Parallel developments with regard to the amendment of the Performers' Protection Act have also taken place, but this work is not concerned with these.

⁸² See http://www.thedti.gov.za/gazettes/Copyright_Amendment_Bill.pdf (date of use: 05 July 2019).

⁸³ Version B13B-2017, available at <https://pmg.org.za/bill/705/> (date of use: 04 July 2019).

⁸⁴ See https://libguides.wits.ac.za/Copyright_and_Related_Issues/SA_Copyright_Amendment_Bill_2015 for some of the views expressed in relation to the Bill. (Date of use: 05 July 2019).

conceivable issues attendant thereto – can be found in one place for easy access by lawyers, judges, law students, artist representatives and other music industry practitioners whenever the need arise. The writer also hopes that the work shall provide resource material from which academics and other researchers can further develop this and related areas of law.

4 Points of Departure, Hypotheses and Assumptions

4.1 Points of Departure

4.1.1 There is a need for an important developing nation such as South Africa, to have a developed exposition of the law relating to music rights, in view of the rapid growth of the South African music industry, the proliferation of participants in this industry and the growing contribution of this industry to the GDP.

4.1.2 There is a need for South Africa to “get the ball rolling” with regard to developing a jurisprudence on entertainment law in general and music rights law in particular, which other related African jurisdictions can draw from. At a time when there is an emphasis on the harmonisation of laws in Africa,⁸⁵ it is incumbent upon South Africa as one of the leading economies in Africa and as the country with the most-developed form of the music industry, to provide a lead by developing a veritable jurisprudence that others can draw from, particularly in relation to those African jurisdictions whose intellectual property laws are, like South Africa, traditionally derived from British law.

4.1.3 While it is possible to find scattered references to the law relating to music rights and some focussed references in selected cases,⁸⁶ there is currently no comprehensive, systematic exposition of the subject-matter dealing with the nature, history and contextual application of the law in South Africa.

4.2 Hypotheses

4.2.1 It is possible to make a thorough, systematic exposition of the law relating to the protection of musical works in South Africa.

4.2.2 In this regard although there is limited literature in this area of law, there is however, an adequate (albeit not exhaustive) body of case law and statutory enactments to build from, bolstered by a comparison of laws applicable in specific foreign jurisdictions. Such regard to foreign law would

⁸⁵ For a discussion of the various initiatives made at harmonising African laws see Ferreira-Synman and Ferreira 2010 73 *JCRDL* 698. The Pretoria University Law Press (PULP), though not necessarily established to promote the harmonisation of African laws, is poised to make a contribution in this regard through its objectives of publishing texts on African law, as well as publishing collections of legal documents related to public law in Africa and textbooks from African countries other than South Africa. See in this regard <http://www.pulp.up.ac.za/>. (Date of use: 25 June 2012).

⁸⁶ The most conspicuous in this regard is a short commentary by Grealy in *LAWSA*, dealt with under the heading of “Entertainment”. See Grealy P *et al*, ‘Entertainment’, in Joubert WA (ed) *Law of South Africa (LAWSA) Volume 8(2) 2ed*, at 403.

be consistent with the Constitution, which provides that foreign law may be used when interpreting the Bill of Rights.⁸⁷

4.3 Assumptions

4.3.1 Although considered to be an arcane subject, the law of copyright (and related rights) is increasingly becoming an established area of study in South Africa alongside the broader field of intellectual property law, eliciting growing academic interest, with a growing body of scholarship in relation thereto.⁸⁸

4.3.2 What is still lacking is the development of specialised branches of law deriving from the main area of copyright and related rights, e.g. a focus on the law relating to literary publishing, the law relating to the protection of music rights, the law relating to the protection of films and television programmes and the law relating to the protection of theatrical and other performances – in short, the law relating to copyright and related rights in the entertainment industries or what could be broadly termed “Entertainment Law”.⁸⁹

4.3.3 Such an exposition of law, in particular with regard to the protection of music rights, is possible.

5 Significance of the Study

This study is extremely significant in that:

5.1 There is at present, to the writer’s knowledge, no formal, single, comprehensive study on or exposition of the subject-matter, which those having an interest in the subject-matter, or simply wishing to review it can refer to;

5.2 There is a need for such a reference work, in view of the fact that the music industry is experiencing rapid growth and disputes relating to music rights are likely to escalate;

⁸⁷ Section 39(1)(c) of the Constitution of South Africa, 1996. Of course the fact that this provision relates to the interpretation of the Bill of Rights, raises questions as to whether intellectual property rights are to be considered as constitutional rights – questions which the writer does not wish to delve into in the present analysis. Suffice it to say that the Constitutional case of *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC), which dealt with a trademark matter, has been generally hailed as providing support to the position that intellectual property rights are to be considered as constitutional rights. See for example in this regard Tong L ‘The interface between intellectual-property rights and human rights’ in Klopper *et al Law of Intellectual Property* at 438 footnote 27, where it is noted with reference to the *Laugh it Off* case that “South African courts appear to accept that intellectual property rights are property rights”. This issue is further ventilated in other parts of this thesis.

⁸⁸ Apart from an increasing number of journal articles in this area of law, a number of publications have also emerged in recent years in this area of law, including Klopper *et al Law of Intellectual Property* (2011); Ramsden *A Guide to Intellectual Property* (2011); Du Plessis *et al Adams & Adams Practical Guide* (2012), and more recently, Dean & Dyer *Introduction to Intellectual Property* (2014). Further to this, a new journal, the *South African Intellectual Property Law Journal (IPLJ)*, which is set to increase scholarship in intellectual property law, was launched by Juta Publishers in 2013.

⁸⁹ The expression “broadly termed” is used here because in its true sense, the term “Entertainment Law” (as also the term “Music Law”), entails more than just a consideration of copyright and related rights. In the narrow sense it would also include a consideration of the principles of contract law, and in the broader sense it would include a consideration of other areas of law such as trademark law (in relation to branding and merchandising); publicity and privacy law, the law of agency, labour and independent contractor law, cyber law etc, as elaborated upon in the Scope and Delimitation below.

5.3 Pursuant to Du Plessis' arguments dealt with above,⁹⁰ it is important to have a comprehensive study of the subject-matter to ensure that there is clarity regarding the various obscure layers and areas intrinsic to this subject-matter, to ensure that counsel representing clients in this area of law can do so with an adequate sense of confidence. In the same breath, judges who had no prior exposure to this area of law can have a good reference work from which to analyse the facts before them; and

5.4 A study of this nature is academically justified. Such a study is likely to spark interest in the subject-matter and encourage further studies in this and related areas of law. This will lead to a growing body of literature in this area of law as well as provide law students with more options regarding their choices of a law career.

6 Scope and Delimitation

6.1 The aim of this study is to provide a comprehensive analysis of the principles relating to the protection of *musical works*. In this regard it needs to be noted that the work does not attempt to deal broadly with the subject of *Music Rights*; nor is it an attempt at discussing the broader subject of *Music Law* or for that matter, *Entertainment Law*. It is submitted that albeit at times subtle, a distinction can be drawn between these various concepts.

6.2 The expression "Music Rights" (or Music Rights Law) needs to be understood from the point of view of the concept of "bundle of rights" which is used in relation to copyright. This concept links the various rights associated with the exclusive acts relating to the exploitation of copyright in a work, back to the work in which the copyright subsists. Although the various rights can be exploited separately or even owned by different persons, they are however, linked to one work in which copyright subsists and are in fact, fragments of the copyright subsisting in such a work. A similar position would apply when dealing with the bundle of rights in respect of related rights (i.e. rights which, though they are not copyright "rights", are analogous to copyright, e.g. rights in respect of the *performance* of a musical work). In dealing with this concept Dean and Karjiker⁹¹ have observed:

Copyright in respect of any particular work comprises in effect a monopolistic right to a number of different acts. The sum total of all these rights constitutes a whole copyright. ... The copyright in each category of works in fact consists of a 'bundle' of rights.

6.3 Thus strictly speaking, when reference to "Music Rights" or "Music Rights Law" is made, it is in fact a reference to the bundle of rights that are associated with the *copyright and related rights applicable in respect of music*. This expression, "copyright and related rights applicable in respect of music" needs to be well understood. First, it makes it explicit that when referring to the term "music" (as understood popularly to refer to *recorded music*) *we are in fact dealing with both copyright and related rights*. Secondly, it then needs to be understood that more than one category of copyright

⁹⁰ See paragraph 1.2 supra.

⁹¹ Dean and Karjiker *Handbook of Copyright Law* at 1-81.

works are involved in recorded music, namely, copyright in the *musical work*, copyright in the *sound recording* of the musical work and often, copyright in the *lyrics* forming part of the musical work.⁹² Thirdly, the term “music” as dealt with here is not only concerned with copyright works but also with related rights in the form of a recorded *performance* of the musical work. In this sense therefore the term “music” as understood popularly refers to “the sound recording of the performance of a musical work.” In this regard the expression Music Rights or Music Rights Law falls squarely within the domain of copyright (and related rights) law, albeit what could be termed *applied* copyright and related rights law. The principles that are applicable and that therefore need to be considered are those applicable to copyright and related rights.

6.4 While it is accepted that the exploitation of copyright and related rights often involves the use of contractual arrangements,⁹³ it must however be noted that the subject of “Music Rights” or “Music Rights Law” is in fact, limited to a discussion of the principles applicable to copyright and related rights law. It is left to the broader field of “Music Law” and the even broader rubric of “Entertainment Law” to deal with other areas of law. When employing the terms “Music Law” or “Entertainment Law” the implication is that one is dealing with something more than just an exposition of principles of copyright and related rights. Under such circumstances regard has to be had to other principles of law applicable to the music and entertainment businesses, thus including copyright, related rights, principles of contract law, etc. Thus in defining “Entertainment Law” Grealy *et al* have observed succinctly that “at its most general level [entertainment law] concerns those legal principles which govern activities within the entertainment industry”.⁹⁴

6.5 Entertainment Law is the broader rubric and Music Law is a component of Entertainment Law. As with Entertainment Law, it can be said that Music Law is that branch of the law *that is concerned with those legal principles which govern activities within the music industry*. These legal principles relate to many varied areas of law, and as Grealy *et al* have noted, because the industry is in a constant state of development “the legal principles which apply in existing areas of our law will, in the absence of legislation, need to be visited with a view to their application within the emerging entertainment context.”⁹⁵

6.6 Having highlighted the foregoing, it then needs to be noted that the present work is only limited to a consideration of *musical works* (and by implication, *literary works* in the form of lyrics). This therefore is the scope and delimitation of the work. The work thus deals with the subject of *Music Rights Law* only in a limited sense (i.e. limited to a consideration of copyright in a musical work and copyright in a literary work). It does not at all deal with the broader subjects of Music Law or Entertainment Law, as a comprehensive consideration of these subjects would extend the scope of the work far beyond any manageable bounds. Having indicated this, it needs to be noted that in

⁹² The lyrics are protected as a literary work under the Copyright Act.

⁹³ See in this regard Dean and Karjiker *Handbook of Copyright Law* at 1-82, para 12.5. See also Biederman *et al Law of the Entertainment Industries* at 1.

⁹⁴ Grealy *et al Entertainment* at para 403.

⁹⁵ *Ibid.*

certain instances, where the context requires, limited references to or discussion of the position applicable in respect of sound recordings and / or performers' rights will be made.

7 Research Methodology

7.1 Introduction

To understand the research methodology used in this thesis a brief outline of the approach used in legal research methodology would be useful. Although some have charged that debates regarding the theory or philosophy of law (i.e. jurisprudence) could be seen as “theorists talking past one another”,⁹⁶ the general, succinct description of research methodology as “a way to systematically solve the research problem”⁹⁷ is equally true for legal research. A research methodology entails the use of certain methods and / or types and elements of research in conducting particular research, as well as providing the justification for doing so.⁹⁸ The study of legal doctrine (or rather doctrinal research or methodology, also termed “black-letter law” and “research in law”), has been the mainstay of traditional legal scholarship – its “fodder”, as some have called it.⁹⁹ The prominence of the study of legal doctrine as a focus area in legal research methodology is evident from the fact that legal research methodologies are described simply as either doctrinal or non-doctrinal.¹⁰⁰ Thus the way to systematically solve or resolve legal research problems is either through the use of doctrinal or non-doctrinal methods (or, as the writer will submit, a combination of these methods).

Doctrinal legal research is concerned with the research of legal doctrines through the analysis of statutory provisions and case law by the application of the power of legal reasoning; in this regard the focus is largely upon the law itself “as an internal self-sustaining set of principles which can be accessed ... with little or no reference to the world outside of the law.”¹⁰¹ It has been said that legal doctrine is a mainly hermeneutic (i.e. interpretational) discipline also entailing empirical, argumentative, logical and normative elements.¹⁰² Jain has argued that it is the normative character of law and the need for stability and certainty in this regard that makes doctrinal research of primary concern to a legal researcher.¹⁰³

⁹⁶ See in this regard Bix 1995 *LEG* 465; also Nobles and Schiff *Legal Theory Today* 7.

⁹⁷ See Kothari *Research Methodology* 8.

⁹⁸ See in this regard Kothari *ibid*.

⁹⁹ See McConville and Chui (eds) *Research Methods for Law* 1; also Arthurs *Law and Learning* 63 – 71.

¹⁰⁰ See McConville and Chui *ibid*; Vibhute and Aynalem 2009 <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> 70 (date of use: 05 July 2019).

¹⁰¹ *Ibid*. As Westerman PC, “Open or Autonomou? The Debate on Legal Methodology as a Reflection of the Debate on Law”, in Van Hoecke (ed) *Methodologies of Legal Research* 94 has observed, legal doctrine refers to “the type of research ... which draws on the legal system as the main supplier of concepts, categories and criteria.”

¹⁰² Van Hoecke M, “Legal Doctrine: Which Method(s) for What Kind of Discipline?”, in Van Hoecke (ed) *Methodologies of Legal Research* 94

¹⁰³ Jain 1982 *J.I.L.I* 341. See also Chynoweth P, “Legal Research”, in Knight and Ruddock (eds) *Advanced Research Methods* 30, who makes the same point. Smits seems to support this perspective, with his emphasis on normative legal science as constituting “the core of the legal discipline”, as “legal science is primarily formed by the question of how the law ought to read.” Smits *Method of the Legal Academic* generally, at at 35 – 99 in particular. Smits generally recognises four forms of legal scholarship, namely descriptive scholarship, empirical legal scholarship, theoretical legal scholarship and normative legal science / scholarship.

Non-doctrinal legal research on the other hand falls within the broader domain of “law-in-context” (or what Westerman categorises within the rubric of “legal science” generally); a legal tradition which is said to have emerged in the late 1960s, where the starting point is not law but problems in society.¹⁰⁴ This tradition uses concepts, categories and criteria “that are not primarily borrowed from the legal system”, so that while the law may provide a solution or part of the solution, “other non-law solutions, including political and social-rearrangement, are not precluded and may indeed be preferred.”¹⁰⁵ It entails the idea of “contextualism” and a move away from being overly concerned with doctrinal classification; instead understanding phenomena from the context of the case in question.¹⁰⁶ This causes facts and rules “to fuse into one” towards the balancing of interests – “rather than applying law on the basis of legal positions”. The disciplines used in non-doctrinal legal research may include historical studies, sociological research, philosophy, political theory and economy.¹⁰⁷

In a report on the state of legal education and research in Canada Arthurs proposes a taxonomy of legal research methodologies that not only delineates between doctrinal methodology (“research in law”) and interdisciplinary methodology (“research about law”), but further delineates between aspects of those methodologies that relate to what he terms *pure research* and those relating to *applied research*.¹⁰⁸ In this regard Arthurs identifies *legal theory research* (i.e. jurisprudence, legal philosophy etc.) as constituting the pure doctrinal methodology, while what he terms “expository research” (i.e. research on conventional treaties and “black letter law”) amounts to applied doctrinal methodology.¹⁰⁹ On the other hand, the pure interdisciplinary methodology is characterised by what Arthurs terms “fundamental research”, which comprises such fields as sociology of law, critical legal studies, law and economics etc.¹¹⁰ This is to be contrasted with the applied interdisciplinary methodology, which relates to *law reform research*, i.e. socio-legal research or “law in context”.¹¹¹

Some of the research methods used to determine the research methodology of a particular research include the following contrasted elements: (a) Whether the research is *descriptive* or *analytical*; (b) whether the research is *applied* or *fundamental*; (c) whether the research is *quantitative* or

¹⁰⁴ McConville and Chui (eds) *Research Methods for Law* 1; Westerman PC, “Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law”, in Van Hoecke (ed) *Methodologies of Legal Research* 94. Smits however traces the origin of the sociological description of law, a genre of the law-in-context debate, to Eugen Ehrlich in 1913 and Max Weber in 1922. Smits *id* at 22. Arthurs, in an earlier report on legal education and research in Canada has on the other hand, placed such disciplines as “law in context / socio-legal research”; “sociology of law”, “critical legal studies”; “law and economics” etc. within the rubric of “Interdisciplinary Methodology”, as distinguished from doctrinal methodology. See Arthurs *Law and Learning* 63 – 71.

¹⁰⁵ *Ibid.* McConville and Chui opine that within the law-in-context approach the law itself may be part of the problem in that it may be a contributor to or cause of the social problem. This could be said of the current Copyright Amendment Bill, for which see the general commentary on the Bill in Chapter 9 *infra*.

¹⁰⁶ De Vries U.R.M.Th. and Francot L.M.A., “The Legal Method Reconsidered”, in Karanika-Murray and Wiesemes (eds) *Avenues to Interdisciplinary Research* 173 – 174.

¹⁰⁷ Westerman PC, “Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law”, in Van Hoecke (ed) *Methodologies of Legal Research* 94.

¹⁰⁸ Arthurs *Law and Learning* 63 – 71.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

quantitative; or (d) whether the research is *conceptual* or *empirical*.¹¹² These methods are then used as appropriate within certain research paradigms or models, e.g. the evolutive and evaluative models; the identificatory and impact models; the projective and predictive models; the collative model; the historical model; and the comparative model.¹¹³

7.2 The Research Methodology used in this Thesis

Having provided the afore-mentioned background it becomes important to map out the methodology used in this research. At the outset the writer wishes to note that a doctrinal methodology is an integral part of this thesis. This is more evident in parts of Chapter 3, in Chapter 4 and in Chapter 7. However, it is clear in reading the thesis that the doctrinal methodology is not the only methodology used in the work. There is a clear leaning towards the realm of the interdisciplinary methodology in the “applied” sense, as postulated by Arthurs, i.e. through the use of the socio-legal or “law in context” approach.¹¹⁴ This is evident throughout the thesis, but more particularly in this introductory Chapter, in parts of Chapter 4, in Chapter 5, in Chapter 6 and in Chapter 8. This was to be expected since this study proposes a contextual approach.

However this research does not delve into the fundamental aspects of the interdisciplinary methodology, within the mould of the “sociology of law” discipline,¹¹⁵ nor does it, in its use of aspects of interdisciplinary methodology, veer away completely from the doctrinal methodology. It does not, in particular, “embrace the epistemologies and methodologies of the social sciences.”¹¹⁶ Thus no surveys, questionnaires, interviews or other forms of obtaining quantitative data were used in this research. It is more a situation where “a doctrinal researcher” gets his social policy, social facts and social values from “his own experience, observation, reflection and study of what others have done before him in a similar or same kind of situation”, as Jain has postulated.¹¹⁷ It is an acknowledgement that “[i]n practice, even doctrinal analysis usually makes at least some reference to other, external, factors”, such as when “an uncertain or ambiguous legal ruling can often be more easily interpreted when viewed in its proper historical or social context, or when the interpreter has an adequate understanding of the industry ... to which it relates.”¹¹⁸

This is exactly the position with regard to the current research. It is research steeped in the doctrinal tradition, where the writer is nevertheless persuaded that the subject-matter can best be understood through the occasional reliance on socio-legal analysis and the use of a historical and contextual approach. Indeed it can be confirmed that the writer has an adequate understanding of the music industry, having in the past worked within the music industry where he occupied a senior

¹¹² See in this regard Kothari *Research Methodology* 2 – 4; Vibhute and Aynalem 2009 <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> at 16 – 17 (date of use: 05 July 2019).

¹¹³ For an elaboration on these models please see Vibhute and Aynalem *id* at 102 – 108.

¹¹⁴ Arthurs *Law and Learning* 63 – 71.

¹¹⁵ See Arthurs *ibid*.

¹¹⁶ Chynoweth P, “Legal Research”, in Knight and Ruddock (eds) *Advanced Research Methods* 31.

¹¹⁷ Jain 1982 *J.I.L.I* 350 – 351.

¹¹⁸ See Chynoweth P, “Legal Research”, in Knight and Ruddock (eds) *Advanced Research Methods* 30.

management position; and having been consulted to advise on matters relating to music copyright and copyright law reform.¹¹⁹ The writer draws on this experience while also bringing in the perspective of practices in other jurisdictions and also highlighting the impact of historical developments, while ensuring a continued adherence to the doctrinal methodology.

In light of the above the research methods used in this thesis are clearly *descriptive*, in the sense of highlighting “what has happened or what is happening”,¹²⁰ a method “exemplified in a wide range of disciplines, such as empirical and socio-legal research, legal history and much writing in textbooks and case commentaries.”¹²¹ It is however, also avowedly *analytical*, as it is concerned with a probe into the causes of the phenomena in question, using and analysing existing information to critically evaluate the subject-matter.¹²² While maintaining its doctrinal foundation, the study also constitutes *applied*, contextual research in the sense used by Arthurs but particularly because it is concerned with finding solutions for problems facing society and thus depicts a practical context.¹²³ The study is thus in this regard, not concerned with *fundamental* theoretical questions of law. As a doctrinal study it is concerned with *expository*, black law research rather than being a jurisprudential treatise.¹²⁴

As indicated above, the research is concerned with *qualitative* rather than quantitative analysis, i.e. it is concerned with probing the reasons or motivations for particular phenomena, e.g. the probe as to why the performing right was not fully exploited in Britain prior to the enactment of the Statute of Anne (see Chapter 2 *infra*).¹²⁵ Moreover, the fact that the study is not concerned with fundamental theoretical research does not mean that it is not concerned with a *conceptual* enquiry. It has been observed that legal issues are considered within a particular *conceptual framework* of legal doctrinal research, which itself gives rise to the very categories, concepts and forms of the legal subject-matter or area of law being researched.¹²⁶ Keeping within the conceptual framework wards against

¹¹⁹ From 2005 until 2011 the writer worked for SAMRO in various capacities, including as Head of Legal and Company Secretary. After leaving SAMRO the writer acted as a Copyright and Entertainment Law consultant and advised industry organisations in relation to the Copyright Amendment Bill when it was published in 2015 and thereafter. In particular, the writer was engaged in 2017 to assist an organisation termed the Copyright Alliance, which was comprised of the main organisations involved in the administration of music and literary rights in South Africa (including SAMRO, SAMPRA, DALRO, and RiSA), with preparing and presenting a submission on behalf of members of the organisation to the Portfolio Committee on Trade and Industry, in response to the Bill. More significantly, the writer was one of three technical experts appointed by the Portfolio Committee on Trade and Industry to advise, amongst others, on the constitutionality of the Bill and its adherence to international treaties. The writer also co-authored a text on the collective management of musical works and audiovisual works, and a related one on the collective management of neighbouring rights, commissioned by WIPO. See in this regard <https://www.wipo.int/publications/en/series/index.jsp?id=133> (date of use: 07 July 2019). The writer also co-authored a chapter on Collective Management in Africa in Gervais (ed) *Collective Management of Copyright* (2016) 369 – 424.

¹²⁰ Kothari *Research Methodology* 3.

¹²¹ Bell J, “Legal Research and the Distinctiveness of Comparative Law”, in Van Hoecke (ed) *Methodologies of Legal Research* 156. Smits *Method of the Legal Academic* 24 – 25 highlights a similar theme when he refers to an approach in the historical description of law, used by the majority of legal historians, which “departs from present-day law, which it extends backwards in order to solve modern problems.” This approach is used in this thesis in Chapter 2 and Chapter 3, where the analysis of the *performing right* as provided for in pre-1912 English copyright law is made from the perspective of how this right is protected in modern copyright law.

¹²² Kothari *Research Methodology* 3.

¹²³ See Arthurs *Law and Learning* 63 – 71; Kothari *ibid*.

¹²⁴ See Arthurs *ibid*.

¹²⁵ See in this regard Vibhute and Aynalem 2009 <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> at 17 (date of use: 05 July 2019).

¹²⁶ Westerman PC, “Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law”, in Van Hoecke (ed) *Methodologies of Legal Research* 87; Bell J, “Legal Research and the Distinctiveness of Comparative Law”, in Van Hoecke (ed) *Methodologies of Legal Research* 162;

delving too deep into the empirical realm of the sociology of law, where the analysis is no longer an inward-looking “research *in* law” but rather an outward-looking “research *about* law”.¹²⁷

Another method that runs like a thread throughout the thesis and in fact marks the thesis’s foray into the law-in-context methodology, is the *explanatory* method. This is because there is a view that because legal doctrine is normative, its systematisation cannot be explanatory but is rather justificatory.¹²⁸ Where therefore the explanatory method is used this would be seen as something beyond or outside doctrinal methodology. The explanatory discipline used here is one which uses legal doctrine to provide a historical, sociological, psychological, economical and similar explanation, or even “internal logic” to “explain[] why a rule is a valid legal rule in a given society”.¹²⁹ At some level the explanatory method is seen as being “the aim of legal sociology than of legal doctrine.”¹³⁰

Reference was made above to the different models used in legal research methodology. Of these models it is the evolutive method, the predictive method and more importantly the historical method that are relevant for this work. Vibhute and Aynalem describe the *evolutive* method as one used “when a researcher endeavors to find out how a legal fact, rule, concept, an institution or the legal system itself [including the development of a given law] come [sic] to be what it is today.”¹³¹ In this regard it is submitted that this model could clearly be subsumed within the historical paradigm. This model has been used in this thesis for example when the analysis of the evolution of the performing right is dealt with in Chapter 2 below, as well as the discussion with regard to historical development of the institution of “collecting society” in Chapters 2 and 7 below. Regarding the *predictive* model, Vibhute and Aynalem observe that this is used when the researcher anticipates or highlights the possible misuse of a proposed law or legal measure as a way of influencing legislative changes.¹³² This has been done in this research when highlighting the possible negative effects of the Copyright Amendment Bill 2017, currently awaiting the President’s signature, if it is passed into law in its current state (see in this regard in particular Chapter 6, Chapter 8 and Chapter 9).¹³³

¹²⁷ Chynoweth P, “Legal Research”, in Knight and Ruddock (eds) *Advanced Research Methods* 30.

¹²⁸ See in this regard Mackor AR, “Explanatory Non-Normative Legal Doctrine”, in Van Hoecke (ed) *Methodologies of Legal Research* 45, who in fact rejects this view of legal doctrine. Van Hoecke however, is emphatic in his argument that “legal doctrine is not mainly an explanatory discipline.” Van Hoecke M, “Legal Doctrine: Which Method(s) for What kind of Discipline?”, in Van Hoecke (ed) *Methodologies of Legal Research* 8.

¹²⁹ Ibid.

¹³⁰ Ibid. See also Vibhute and Aynalem in this regard, who assert: “The language of law is essentially directive and normative, whereas the language of sociology is descriptive, revealing or explanatory.” Vibhute and Aynalem 2009 <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> at 112 (date of use: 05 July 2019).

¹³¹ Vibhute and Aynalem *id* at 102.

¹³² Vibhute and Aynalem *id* at 105.

¹³³ See in this regard <https://legal.sabinet.co.za/articles/copyright-amendment-bill-passed/> (date of use: 05 July 2019). There were essentially three versions of the Bill, namely (i) the 2015 draft Bill (version BX-2015) published for public comments, with a slightly revised version that served at NEDLAC through the instigations of representatives of the copyright industry in late 2016. See for this version <https://pmg.org.za/bill/581/> (date of use: 05 July 2019); (ii) the version introduced to Parliament (version B13-2017), available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170516B13-2017_Copyright.pdf (date of use: 05 July 2019). This version underwent several drafts at the behest of the Portfolio Committee on Trade and Industry. See in this regard https://libguides.wits.ac.za/Copyright_and_Related_Issues/Version3_2018 (date of use: 05 July 2019); and (iii) the version approved by both houses of Parliament and currently awaiting the President’s signature (version B13B-2017), available at <https://pmg.org.za/bill/705/> (date of use: 05 July 2019).

The main thrust of this work is that it is a historical and contextual analysis of the protection of copyright in musical works. In this regard it needs to be noted that although many doctoral studies employ a comparative model, such a model does not form the main thrust of this work. As indicated, comparative analysis is a component of the *descriptive* method.¹³⁴ Seeing that this work uses the descriptive method also, it goes without saying that comparative analysis would also be used. In this regard the observations of Zweigert and Kötz are apt:

... [A]ll legal history involves a comparative element: the legal historian ... is bound to make comparisons, consciously if he is alert, unconsciously if he is not. ... Legal history and comparative law are much of a muchness; views may differ on which of these twin sisters is the more comely, but there is no doubt that the legal historian must often use the comparative method and that if the comparatist is to make sense of the rules and the problems they are intended to solve he must often investigate their history. ...¹³⁵

In light of this, comparative analysis is evident throughout the work in all chapters, with some chapters displaying a more focussed attention to such an approach (e.g. Chapters 7 and 8). The main thrust of this work however is a historical and contextual analysis making use of the above-mentioned methods and also employing the evolutive and predictive methods where appropriate. The aim is to place the protection of musical works within a historical and contextual context and to paint a coherent picture in this regard. Part 1 of the study is mainly concerned with a historical analysis, while Part 2 is mainly concerned with a contextual analysis, although contextual analysis and the explanatory method can be detected throughout the thesis. This however, remains steeped and finds its rootedness in the doctrinal methodology.

It would seem that a historical and contextual approach, rather than a simply comparative approach, is one that the courts themselves have preference for.¹³⁶ In this regard Chaskalson P observed in the Constitutional Court ruling of *S v Makwanyane*.¹³⁷

In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

In the same vein, when considering the question as to what constituted fair dealing in the case of *Moneyweb v Media24*¹³⁸ Berger J observed:

¹³⁴ Vibhute and Aynalem 2009 <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> at 16 (date of use: 05 July 2019)

¹³⁵ Zweigert and Kötz *Comparative Law* 8. The authors also show a link between the comparative method and sociology of law, where for example it is observed that "[i]n its *applied* version, comparative law suggests how a specific problem can most appropriately be solved under the given social and economic circumstances." *Id* at 11.

¹³⁶ I.e. it would seem that, regardless of a comparative methodology, a historical and contextual approach is imperative.

¹³⁷ 1995 (3) SA 391 (CC), at para 39. See also paras 34 and 35 in this regard. Emphasis added.

... Both sides referred me to decisions and writings from several foreign jurisdictions on the meaning of the phrase *“fair dealing”*. I understand that foreign authorities are referred to for guidance only. *I also accept that I must be cautious in considering foreign law because its jurisdiction has its own particular history* and, in many cases, is bound or influenced by domestic statutory precepts. *I therefore I intend, for historical reasons, to focus on English authority.*¹³⁹

As a final observation under this section the writer wishes to highlight the following technical information with regard to the thesis:

1. When referring to himself throughout the thesis the writer uses the word “writer”, but uses the word “author” or “authors” when referring to the author or authors of a material being considered;
2. Where a word, phrase or other construction is italicised within quoted text, the writer has chosen not to use the phrase “italics in original text” but to leave the situation as is. However, where the writer has himself italicised a word, phrase or other construction from any quoted text, the writer indicates this through the use of the words, “Emphasis mine”; and
3. Where quoted text contains a footnote, the writer has chosen to remove the footnote from the quoted text, to prevent confusion.

8 Framework of the Study

PART 1 – THE HISTORICAL DEVELOPMENT OF COPYRIGHT IN MUSICAL WORKS

Chapter 1 – Introduction

This section provides the rationale for the study, including the statement of the problem.

Chapter 2 – The Historical Development of Music Copyright Up to the Early 1900’s

This section seeks to trace the historical development of music rights protection and the progressive recognition of the different sets and bundles of rights that are today acknowledged as constituting music rights. The Chapter is of particular relevance to South Africa as it traces the historical development of the copyright system in the United Kingdom. This system of copyright was applicable to South Africa during the colonial rule, and forms the basis of modern South African copyright law.

Chapter 3 – The Further Development of Music Copyright: The Role of Technological Developments and the Imperial Copyright Act

This section seeks to analyse the further development of music copyright especially in relation to the development of the reproduction right in response to technological developments; and further seeks

¹³⁸ *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81.

¹³⁹ *Id* at para 103. Emphasis added.

to analyse the role of the British Imperial Copyright Act with regard to the modern-day construction of the concept of “musical work” and the reframing of the *performing right* from its understanding in English law prior to this. Modern South African copyright law has its foundation in these developments.

Chapter 4 – The Historical Development of Music Copyright in South Africa

This section traces the historical development of music copyright law in South Africa from the colonial period to the enactment of the Act of 1916. It highlights the colonial laws applicable to South Africa prior to the 1916 Act, and also considers the laws of the different republics prior to the establishment of the Union of South Africa.

PART 2 – THE MODERN PROTECTION OF COPYRIGHT IN MUSICAL WORKS

Chapter 5 – General Principles of Copyright Protection with a Focus on Music Copyright Protection

This section seeks to analyse certain general principles relating to copyright protection, applying them to the protection of copyright in musical works.

Chapter 6 – The Nature and Functioning of Collecting Societies: A Contextual Analysis

Collective Management of Copyright plays a pivotal role in the protection of copyright in musical works and this section seeks to highlight this, with a focus on contemporary application.

Chapter 7 – The Protection of Musical Works under the Copyright Act 98 of 1978

This section probably represents the main thrust of this work, as it seeks to provide an exposition of current copyright law with regard to the protection of musical works, while also considering the possible effect of the Copyright Amendment Bill currently before Parliament.

Chapter 8 – Digital Technology and Music Copyright’s Continuing Struggle for Survival

This section seeks to highlight the continuing tussle between copyright protection and technological developments in the modern, digital era, and how copyright law has responded and is responding to these challenges.

Chapter 9 – Conclusion

Chapter 12 is a recap of the matters raised in the thesis with the proposal of recommendations, especially in light of developments arising from the Copyright Amendment Bill.

Chapter 2: The Historical Development of Music Copyright up to the Early 1900's

*"We are concerned with the law of to-day, not with the law of the Middle Ages. The only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law to-day by seeing how it took place."*¹

¹ Windeyer J in *Attorney-General (Vict) v Commonwealth* (1962) 107 CLR 529, at 595.

2.1 Introduction

Music, it would seem, is as old as mankind itself. From the pre-diluvian era, where we are told of one Jubal, who was “the father of all such as handle the harp and organ”,² and throughout the centuries, music has always invoked deep feelings and emotions amongst all. In this regard music has clearly been the most non-discriminatory force of all. It has provided the necessary ambience for occasions of celebration, mourning and ceremony alike. Furthermore, its appeal has been experienced equally by all: whether those living in opulent royal courts, those in the remotest primitive villages, the privileged and the impoverished alike - with no distinction between male or female.

The legal protection of music is however not as old.³ This notwithstanding, it is noteworthy that the earliest form of copyright protection is associated with music or a form thereof - as also is the bloodiest copyright battle ever fought - *literally*. The story is told⁴ of how, in the 560s AD, St. Columba, having borrowed Abbot Fennian’s prized Psalter,⁵ sat up all night to furtively copy the Psalter. Upon discovery of this, an infuriated Fennian demanded that St. Columba deliver to him the pirated copy, a plea which St. Columba was not disposed to accede to. Abbot Fennian then appealed to King Dermot (or Diarmed), who ruled in favour of the Abbot, declaring, “*La gache boin a boinin*”.⁶ Not willing to accept the outcome, and armed with the Psalter copy as a talisman, St. Columba summoned men to fight against the king in the pitched Battle of Cúl Dreimhne, where thousands of the king’s men were killed.⁷ This deadly battle makes the later infamous courtroom copyright battles, including the well-referenced Battle of the Booksellers⁸ - “[a] warfare ... costly, prodigious, and protracted”⁹ – fade in comparison.

² Genesis 4: 21, *King James Bible*.

³ It has been noted that Roman law recognised three types of rights, namely real rights, personal rights and personality rights, but did not recognise intellectual property rights. Writings and letters were treated like plants and things sown. Writing acceded to the owner of the paper on which it was written, and painting acceded to the material on which it was laid with no protection for copying, although at times some recognition was given “of the value of the labour that went into the writing or the painting”. Ramsden *Guide to Intellectual Property Law* at 1 and 3. To this Dean *Application of the Copyright Act 209* adds: ‘Although even in the days of the Roman Empire reproduction of books took place ... no economic interest in such reproduction existed. Copies were made to order and “publishers” were not required to make any financial outlay or investment in advance which needed to be protected. ... It was not until the discovery of the printing press that there was any impetus to provide any form of protection to publishers. ...’

⁴ See Birrell *Law and History of Copyright* 41 – 42; McFarlane *Performing Right* 15 -16.

⁵ A Psalter is defined as “a collection of Psalms for liturgical or devotional purposes” <http://www.merriam-webster.com/dictionary/psalter> (date of use: 24 September 2013). In the Biblical text, many of the psalms are set to music.

⁶ Meaning “To every cow her calf”, and accordingly, “to every book its copy”. See Birrell *Law and History of Copyright* 42. See also Patry *Copyright Law and Practice* 4.

⁷ See Breithiún http://www.sanart.org.tr/PDFler/70a.pdf_2 (date of use: 23 September 2013); <http://www.donegaldiaspora.ie/people/colmcille> (date of use: 25 September 2013).

⁸ The expression “Battle of the Booksellers” refers to a series of court battles that raged for some thirty years from around 1743 in *Midwinter v Hamilton* (1748) Mor 8295 and finally settled in 1774 in *Donaldson v Beckett* (1774) 17 Cobbett’s Parl Hist Eng 953 (1813), available at www.copyrighthistory.com/donaldson.html (date of use: 15 November 2017), when the House of Lords declared that copyright is a creature of statute and accordingly confirmed its limited term of protection and the release of works into the public domain. The court cases arose when the Scottish booksellers started reprinting works that fell under the Statute of Anne, when the term of protection provided for under the statute started expiring in 1731. The London booksellers, the original publishers of the works, turned to the courts after failing to persuade parliament to extend the term of protection, arguing that a common law copyright subsisted in the works in spite of the expiry of the term of protection under the Statute of Anne, since the Statute of Anne merely supplemented and did not substitute this common-law copyright. As Rose has observed, this period “was dominated by the commercial struggle between the patriotic Scots, who were proud of their growing printing and publishing trade, and the booksellers of London, who wanted to maintain their

In the following discussion the writer seeks to present a crucial analysis of the historical development of the bundle of rights relating to musical works that developed over time but are today well-known and recognised in copyright legislations throughout the world. Such a historical analysis does not merely perform a pedantic function, but is necessary in understanding the nature of the rights concerned because, as observed, “when examining copyright law ... a page of history is worth a volume of logic ...”¹⁰ It is the writer’s conviction that often injustice is caused by a lack of understanding of the historical context in which certain legal concepts and / or scenarios developed.¹¹ Thus it is often necessary to move beyond a merely textual or literary analysis to a consideration of the historical development of the concepts to gain more understanding of their meaning.¹² This analysis is relevant for South Africa as South Africa’s copyright law has its rootedness in the laws of other countries, in this case the law of England – with our courts continuing to rely on English decisions today. The analysis will thus serve to provide a historical context to the rights protected by modern copyright law in South Africa, which, in the case of the

centralized control of all publishing in Britain.” Rose *Authors and Owners* 68. The judgment in *Donaldson v Beckett* settled the matter, signalling the end of this wave of litigation. See further in this regard Birrell *Law and History of Copyright* 99 – 138; Feather *A History of British Book Publishing* 76 – 83; MacQueen *Copyright, Competition and Industrial Design* 1 – 6; Gaines *Contested Culture* 61 – 65.

⁹ Birrell *Law and History of Copyright* 99.

¹⁰ *Eldred v Ashcroft*, 537 US 186, 200 [2003]. See also Garnett, Davies and Harbottle *Copinger and Skone James* 34, noting: “It is helpful to an understanding of the modern law of copyright to study its history – to see how it has developed from its origins to the present day.” Dealing with the importance of history in the understanding of music copyright Carrol 2005 *Florida Law Review* 910 – 911 has observed: “... A central question for how the law should respond to music copyright owners’ initiatives is whether to focus on the future of copyright law generally or on the future of music copyright more specifically. History is relevant to how this question should be answered. ... An understanding of ... history supports arguments that disputes concerning music copyright may be better resolved with tailored solutions rather than through broad changes in copyright law as a whole. History also supplies authority for arguments about how copyright has evolved and should evolve. ...”, further calling for a better understanding of “the nuances of music copyright’s evolution”.

¹¹ Thus, as highlighted in Chapter 1, in the case of *South African Music Performance Rights Association (SAMPRO) v National Association of Broadcasters (NAB) and Another* 2013 BIP 411 (CT) the Commissioner of Patents, sitting as the Copyright Tribunal as contemplated in s. 29(1) of the Copyright Act 98 of 1978 (as amended), was easily persuaded to accept a misleading argument suggesting that “because needle time royalty, apart from that payable to the composer, has to reward both the record company and the performer the rate should be than [sic] more than twice the amount being paid to the composer, to be [sic] sufficiently reward both the record manufacturer and the recording artist” (at 13). Accordingly the commissioner, acknowledging that this was based on “the limited information available”, felt justified to approve as reasonable a royalty rate of 7% of net income, “representing in approximate terms, twice the rate applicable using the SAMRO formula”, in favour of SAMPRO (to be shared between record companies and performers), while it was acknowledged that the Southern African Music Rights Organisation (SAMRO) used a current rate of 3.5% (at 15). It is submitted that if the commissioner had used a contextual, or rather historical analysis, he would have realised that the performing right represented by SAMRO is, *by its nature and historical development*, a right due to *both composers and publishers*, and would be deserving of a similar, if not higher rate as the one approved in favour of SAMPRO. On appeal in *National Association of Broadcasters (NAB) v South African Music Performance Rights Association (SAMPRO) and Another* 2014 (3) SA 525 (SCA) the SCA appeared to recognise this, and bemoaned the fact that the rate proposed by the commissioner in favour of SAMPRO appeared to be based on a “purely arbitrary” consideration, stating (at para 71): “It certainly was never suggested, with substantiation, by any of the witnesses that owners of copyright in sound recordings were entitled to rate their talents at twice the rate received by composers.”

¹² In this regard the words of Schreiner JA, emphasising the importance of context in statutory interpretation in a dissenting judgment in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A), at 662 – 663, are instructive: “Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning *is the statement that they must be interpreted in the light of their context*. ... Often of more importance is the matter of the statute, its apparent scope and purpose, *and within limits, its background*.” Emphasis added. Schreiner’s judgment was cited with approval by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15 at para 89. In this case Ngcobo J made it clear that “[t]he technique of paying attention to context in statutory construction *is now required by the Constitution*, in particular, s 39(2)” (at para 91). Emphasis added. This is in line with the purposive approach of statutory interpretation required by the Constitution. This in fact is not a completely new position. Thus in *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 554 the court observed: “... It is true that owing to the elasticity which is inherent in language it is admissible for a Court in construing a statute to have regard not only to the language of the Legislature, but also to its object and policy as gathered from a comparison of its several parts, *as well as from a history of the law and from the circumstances applicable to its subject-matter*.” Emphasis added.

reproduction right, have remained largely unchanged. Even where there have been changes in the nature of the rights, as in the case of the performing right, an understanding of the historical development of the concept of “performing right”¹³ – part of the undertaking in this chapter – would be crucial in understanding the full dynamics of its application today.

2.2 The Historical Development of the Print Right and the Performing Right

As alluded to in Chapter 1, the concept of “Music Rights” is in fact, a reference to the bundle of rights that relate to the different works that are relevant in respect of musical copyright (i.e. literary works, in the form of lyrics, musical works and sound recordings) and the rights of music performers. This bundle was developed in a period of over two hundred years and its development was not without controversy and confrontations. The bundle commenced with the simple right of copying (from which the word “copyright” emanated), and was extended to include other rights in respect of particular works and related expressions, often in response to developing technology.¹⁴ This section seeks to provide a necessary analysis of the historical development of Music Rights, from the earliest legal recognition of such rights to the modern day. The main focus nevertheless is on rights relating to musical works, in line with the objective of this thesis.

2.2.1 The Development of the Reproduction Right: *Print Rights and the Publishing Industry*

2.2.1.1 Background

The stage for the formal, international recognition of copyright would not be set until almost about 1450 with Johannes Gutenberg’s invention of moveable type.¹⁵ The discovery of the printing press made it easy to print multiple copies of books and other writings, ushering in a new era from the earlier one where the writing and copying of manuscripts was a long and arduous manual process, usually carried out by monks like St. Columba.¹⁶ In this regard Dean observes:

The introduction of the use of a printing press brought about a radical change in the distribution of books because now prior investments which needed to be recouped by means of the sale of copies of the books in large numbers took place.¹⁷

¹³ Which, in its full ambit today, in fact entails more than one right. See the detailed discussion under paragraph 2.2.2 below.

¹⁴ See Garnett, Davies and Harbottle *Copinger and Skone James* 35.

¹⁵ See Dean *Application of the Copyright Act* 4, noting: “The development of the printing press by Johannes Gutenberg towards the middle of the 15th century was the event which sparked off the beginnings of the concept of copyright.” See also generally in this regard Deazley, Kretschmer and Bently (eds) *Privilege and Property* xvi. In addition to the invention of movable type, “the emergence of a sense of individualism” and rapid economic expansion driven by international merchants who organised annual trade fairs are considered to be two other factors that “combined to turn copyright into a legal issue.” Frith and Marshall (eds) *Music and Copyright* 22.

¹⁶ See Ramsden *Guide to Intellectual Property Law* 3.

¹⁷ Dean *Application of the Copyright Act* 209.

After the discovery of the printing press many efforts were made, mainly by the printer-publishers, to have legal protection in respect of works of authorship, which prompted the commencement of a system of “proto-copyright” - printing privileges and letters patent which became “a progenitor of modern copyright”.¹⁸ Providing more clarity on this Kostylo has observed:

In contrast to modern copyright and patent, early privileges were conceived as a form of municipal favour (*gratiae*) and an exception to the law (*priva lex*) **rather than the recognition of the author’s inherent rights**. Such privilegia took various forms, from exclusive monopolies permitting the inventors or introducers of a new technology the right to exploit their trade or engage in other productive activity, to printing privileges bestowing the publishers or authors with the exclusive rights to print and sell a work. These two types of privileges would later be identified as patents for inventions and proto-copyrights respectively ...¹⁹

The Crown privilege, issued by the monarch to printers against payment of a fee, granted monopoly rights for a limited period or even in respect of particular books, and in essence became “the defining economic instrument of late feudalism”.²⁰ Venice is dubbed “the home of the first printing privileges”, where a printing privilege was granted to Johannes of Speyer in 1469;²¹ printing privileges were thereafter granted in Milan (1480s), Germany (1501), France (1507) and England (1518), amongst other jurisdictions.²² In this regard it has been reported that Venice also granted the earliest known privilege for exclusive rights to print and sell music, which was granted to Ottaviano dei Petrucci on 25 May 1498 by the Venetian signoria.²³ Similarly, Germany is reported to have issued letters patent in respect of the works of authors and composers circa 1500.²⁴ In Britain it has been noted that two types of printing patents were granted in respect of music printing – namely one for psalm books and another for other music.²⁵ In this regard it has been further noted that competitive publishing of music only applied in respect of psalm books, which had become “part of the English Stock of the Stationers’ Company”, and “not until the late seventeenth century would the unauthorized publication of musical works become worth while”.²⁶

A discussion of this topic would not be complete without elaborating further on the role played by the Stationers’ Company of London, formed as a minor guild of writers, illuminators, bookbinders and booksellers in 1403 and receiving royal charter from Queen Mary in 1557.²⁷ They were to play a major role in the events that led to the enactment of the Statute of Anne in 1710 – the first copyright

¹⁸ Frith and Marshall (eds) *Music and Copyright* 25, and the sources cited therein.

¹⁹ Kostylo J “From Gunpowder to Print: The Common Origins of Copyright and Patent”, in Deazley, Kretschmer and Bentley (eds) *Privilege and Property* 2. Bold emphasis added.

²⁰ Frith and Marshall (eds) *Music and Copyright* 23. Apart from the Crown privilege privileges were also often granted to individual creators through the court system. *Ibid.* Some composers who had access to the Crown also received Crown privileges, e.g. Handel, J.C. Bach and Thomas Arne; although some found it difficult to exploit the privilege because of being “firmly locked into restrictive relationships”, such as those forbidding the author from publishing his works. *Id* at 24 – 25.

²¹ See Kostylo J “From Gunpowder to Print: The Common Origins of Copyright and Patent”, in Deazley, Kretschmer and Bentley (eds) *Privilege and Property* 2 – 5.

²² Frith and Marshall (eds) *Music and Copyright* 23.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Hunter 1986 *Music & Letters* 270.

²⁶ *Ibid.*

²⁷ Frith and Marshall (eds) *Music and Copyright* 23.

statute.²⁸ The right granted to members of the Stationers Company (or simply, “stationers”) was the right to print a new book – namely one that had not been printed before – and it was secured by registering one’s claim before the Stationer’s Company Wardens and having the ownership of the book (if approved), registered in the Stationers’ Register.²⁹ In this regard it is also important to note that, apart from the monopolistic right granted to members of the stationers in relation to the printing of works (in this way “[safeguarding] the right to copy”), the sovereign received from the stationers not only payment: even more noteworthy, the privilege granted became a system of censorship, because the sovereign insisted on having to approve the work before it was printed.³⁰ All works published by the printers had to receive official approval and had to be registered, failing which the printer concerned would be punished by decrees of the Star Chamber.³¹ The Star Chamber had powers of search, confiscation and imprisonment, unobstructed by the interference of parliament.³²

In 1640 the Star Chamber was abolished, in essence making it lawful to publish any kind of material without censure. As a result of “[t]he scandalous nature of some libelous publications”, the English parliament passed a number of ordinances that prohibited the printing of a book unless the book was lawfully licensed and entered into the register of the Stationers’ Company.³³ They also, amongst others, prohibited the printing of any licensed book without the consent of the owner, in essence recognising a perpetual, common-law right of ownership in respect of such books.³⁴ This was to become significant much latter in the Battle of the Booksellers, as the English booksellers would try to use the existence of this common law right to reassert their rights of ownership to works whose Statute of Anne copyright term had expired. Eventually a Licensing Act was passed in 1662 with similar provisions relating to the printing of books, with specific provisions preventing the printing of books that were “contrary to the Christian faith”.³⁵

The Licensing Act was extended by a number of Acts of parliament until it expired in 1679. This is because the system had fallen into disrepute as a result of high prices and a lack of availability of books arising from the power of members of the Stationer’s Company “to claim copyright in perpetuity”; and further as a result of growing sentiments regarding freedom of the press.³⁶ With the expiration of the Licensing Act the Stationer’s Company passed its own byelaws (ordinances) which asserted their common-law right of ownership in respect of their books – albeit such byelaws were

²⁸ Compare Deazley, Kretschmer and Bently (eds) *Privilege and Property* xv – xvi, who mention six “key points” in the “intellectual history of copyright law”, namely the invention of the printing press; the feudal system of printing privileges; the Stationers companies of Basel and London; the first copyright statutes (England in 1710 and the USA in 1790); the recognition of authors’ rights in France (1791/1793), Prussia (1837) and the UK (1842), and the enactment of the Berne Convention (1886).

²⁹ Hunter 1986 *Music & Letters* 270.

³⁰ See Dean *Application of the Copyright Act* 4. It has in fact been noted that the Stationers’ Company’s royal charter “was an attempt by the Catholic Queen Mary to control the spread of heretical material.” Frith and Marshall (eds) *Music and Copyright* 23. See also Dean *Id* at 5. The clear objective of Queen Mary, a convert to Catholicism, was “to prevent the propagation of the reformed religion”. Garnett, Davies and Harbottle *Copinger and Skone James on Copyright Law* 36.

³¹ Dean *Id* at 5.

³² Garnett, Davies and Harbottle *Copinger and Skone James on Copyright Law* 36.

³³ *Id* at 36 – 37.

³⁴ See *ibid*.

³⁵ *Id* at 37.

³⁶ *Ibid*.

only binding on members of the Stationers' Company.³⁷ In 1684 Charles II issued a new charter in favour of the Stationers' Company, and in 1685 a new Licensing Act was passed with a seven-year term, which was extended in 1692 for two additional years, until 1694.³⁸

Influenced by "the spirit of the Age of Enlightenment", in which government censorship, abusive monopolies and a lack of protection for authors were frowned upon – and aided by arguments "purportedly drafted by John Locke" – the British parliament refused to renew the Licensing Act after its expiration in 1694.³⁹ This resulted in the springing up of many independent printers who acted in competition to the Stationers, "[giving] rise to widespread copying and anarchy ... in the printing field."⁴⁰ The Stationers' Company began to repeatedly lobby parliament for a new Licensing Act, this time employing a rhetoric that suggested that they had concern for the plight of authors.⁴¹ In fact however, the Stationers, whose beneficence authors were, for the most part, forced to rely upon, were "a group not contemporaneously associated with generosity".⁴² In this regard it has been noted that the typical author-publisher relationship in this period "involved nothing more than the sale of a manuscript" secured by a single payment.⁴³ Thus it has been succinctly observed that "[t]he Stationers' *Hall Book* ... provided no institutional recognition of authors' rights."⁴⁴ Thus a stationer would sell the right to print a book to other stationers "without reference to the author."⁴⁵

2.2.1.2 The Statute of Anne: The Advent of Copyright and the Reproduction Right

The agitations of the Stationers yielded results, and the first Copyright Act, the Statute of Anne,⁴⁶ was passed in 1709, coming into force on 10 April 1710. The Statute of Anne was hailed as not only the first copyright statute in the world, but also as the first such statute to recognise authors as "the fountainhead of protection".⁴⁷ The preamble to the Statute of Anne described it as "[a]n act for the encouragement of learning, by vesting the *copies* of printed books in the authors or purchasers of

³⁷ *Id* at 38.

³⁸ Patry *Copyright Law and Practice* 10.

³⁹ *Ibid*. It was in fact, that House of Commons that, "without division", rigorously resisted the renewal of the Licensing Act when it was presented to it along with other laws that were "lately expired and expiring which [were] fit to be revived and continued" – in spite of attempts by the House of Lords to persuade them to change their thinking. See Deazly *On the Origin of the Right to Copy* 1 – 31.

⁴⁰ Dean *Application of the Copyright Act* 5. See also Baloyi 2012 *SA Merc LJ* 221.

⁴¹ "The booksellers argued that failure to continue exclusive rights of printing had resulted in disincentives to writers. Without some form of protection to encourage authors, the public interest would be harmed by the decreased flow of works." Garnett, Davies and Harbottle *Copinger and Skone James on Copyright Law* 38.

⁴² Patry *Copyright Law and Practice* 7 – 8. In similar fashion Hunter 1986 *Music & Letters* 274 has observed that "[many] composers were in a much more difficult position and were forced to depend on publishers who generally cared only for their own business interests." In this regard Baloyi 2012 *SA Merc LJ* 221 and 224 suggests that certain modern music publishers – what he terms "'banking operation' publishers" – act in a similar way to the Stationers' Company.

⁴³ Hunter 1986 *Music & Letters* 271; Frith and Marshall (eds) *Music and Copyright* 24. Sometimes however, as noted by Hunter (*ibid*), payment would be in the form of a number of copies of the printed work being given to the author.

⁴⁴ Frith and Marshall *ibid*.

⁴⁵ Hunter 1986 *Music & Letters* 271. The stationers traded in these "copyright shares" with other stationers, and the practice eventually became "a significant portion of the trade of the major stationers". Music publications however largely fell "outside of the purview of the Stationers' Company" as it had become a distinct speciality by 1700. *Ibid*.

⁴⁶ 8 Anne, c. 19 (1710) (Statute of Anne), available at Avalon.law.yale.edu/18th_century/anne_1710.asp (date of use: 15 November 2017).

⁴⁷ Garnett, Davies and Harbottle *Copinger and Skone James on Copyright Law* 39. Others have, however, countered this proposition. Thus Harms JA has remarked in *Biotech Laboratories v Beecham Group and Another* 786 JOC (A), at Par 11, 'By the wording of the Act an author owned the copyright of his work, but the action of having it published gave the bookseller fourteen years exclusive rights in the work ...'.

such *copies*, during the times therein mentioned.”⁴⁸ In respect of works already in print, the Statute of Anne conferred upon the author, bookseller, printer or any other person who acquired or purchased the copies of a book or books “the sole right and liberty of *printing* such book or books” for a period of twenty-one years from the coming into force of the statute.⁴⁹ Furthermore, the statute conferred on the author of “any book or books already composed, and *not printed and published*, or that shall hereafter be composed”, and his assignees or assigns, “the sole liberty of *printing and reprinting* such book and books”, for a period of fourteen years from the coming into force of the statute. At the expiry of the term of fourteen years, the rights would return to the authors, if they were then living, for another term of fourteen years.⁵⁰ In this way the Statute of Anne recognised the public domain.

Furthermore, in respect of non-printed works, copyright infringement would occur were any bookseller, printer or other person, to “print, reprint, or import, or cause to be printed, reprinted, or imported”, any such books without the consent of the *proprietor*. In the case of works that were already printed, copyright infringement would occur if such persons were to “*sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale*”,⁵¹ any such books, “knowing the same to be so printed or reprinted”, without the consent of the proprietors.⁵² The remedy for such an infringement was a forfeiture of the copies and one penny for every sheet found in such person’s custody, to be shared equally between the Queen and her heirs and successors, on the one part, and the person who instituted the proceedings.⁵³

It was necessary to highlight the foregoing in order to emphasise the fact that, at this stage, the right introduced by the Statute of Anne was a reproduction right – “the right to copy”.⁵⁴ Furthermore, the right related to books or copies, i.e. printed works. In essence thereof, the reproduction right introduced by the Statute of Anne was a *print right*.⁵⁵ Furthermore, it is important to note that the *print right was linked to and associated with the right to publish the work, or to sell it or expose it for sale*. This makes sense because the right to print, without the right to publish the printed works,⁵⁶ would be incomplete. Over time, the *publishing right* evolved to become a stand-alone right, within

⁴⁸ Emphasis added.

⁴⁹ Article II of the Statute of Anne. Emphasis added.

⁵⁰ *Ibid.* Emphasis added. Thus the system of the *reversionary interest* in respect of assigned copyright was introduced. For a further discussion of this see the discussion under paragraphs 3.2.3 and 4.3.1 below.

⁵¹ Emphasis added.

⁵² Article II of the Statute of Anne. Emphasis added.

⁵³ “the one moiety thereof to the Queen’s most excellent majesty, her heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same.” Article II, Statute of Anne.

⁵⁴ See in this regard Government of Canada https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr02281.html (date of use: 15 November 2017), noting: “In the simplest terms, “copyright” means “the right to copy”; Hutchison <https://ssrn.com/abstract=2735089> 2016, 1 (date of use: 15 November 2017), “At its core, copyright is about protecting the author’s right to copy.” See also generally Deazly *On the Origin of the Right to Copy* and *Biotech Laboratories (Pty) Ltd v Beecham Group PLC* 786 JOC (A); 2002 (4) SA 249 (SCA) at para 13, where Harms JA asserts that “copyright was initially nothing more than the right to copy and that right related to the right to print, something the Crown by divine intervention had or approbated.”

⁵⁵ See *Biotech Laboratories (Pty) Ltd v Beecham Group PLC* *ibid.* This right was secured by registration of ownership of the work at Stationer Hall, the Stationer’s register. In this sense the registration system provided for under the Statute of Anne was a perpetuation of the system that had been in existence up to that point, of which it has been noted: “... [T]he right won (by registration or through letters patent) was *the right to print a particular book or books* - not general protection of a creator’s right to determine reproduction of his work.” Hunter 1986 *Music & Letters* 270.

⁵⁶ I.e. issue copies of the printed works to the public.

the copyright bundle of rights - apart from and outside of the print right (or the general reproduction right). Today the publishing right has become a very important, crucial and lucrative right in the music industry – driving a massive, billion-dollar global industry. Likewise, the *print right* was, with time, to become an important source of income for composers and music publishers. At this stage however it was explicit in the Statute of Anne that the right only applied in respect of “books and other writings”.⁵⁷ Because of this, and the fact that the law was passed in response to the petitions of booksellers, composers and music sellers had uncertainty as to the status of music under the Act.⁵⁸ This uncertainty remained until clarity was given in the case of *Bach v Longman* (discussed further below).

Meanwhile the agitations of the English booksellers re-surfaced after 1731, when the copyright protection accorded to books and other literary property under the Statute of Anne came to an end. Scottish printers and those from the provinces started printing new editions of “old books” – i.e. books whose statutory protection under the Statute of Anne had expired - prompting the Stationers to seek injunctions from the Court of Chancery – an equity court - to prevent the new entrants to the market from printing and selling the books.⁵⁹ It has been noted that the Stationers preferred to seek relief from the Court of Chancery because this court appeared to be too prone to grant injunctions on the assumption of the existence of a common law right of copyright, in spite of the expiry of the term of protection under the Statute of Anne.⁶⁰ While the Stationers succeeded in obtaining injunctions from the English equity courts, the question of law remained unresolved and with time, the Scottish booksellers “grew in importance” and obtained legal advice that assured them that the Stationers’ claims regarding the continuation of a common-law copyright were “mere bluff and brag”.⁶¹

Further to the foregoing, the Scottish courts were not keen to uphold a position that supported the existence of a common-law copyright, and “sent these pursuers [i.e. the Stationers] empty away ... repulsed with expenses”.⁶² Thus when the London booksellers sought relief at the Scottish Court of

⁵⁷ See articles I and II of the Statute of Anne, generally. As Carrol 2005 *Florida Law Review* 910 has observed, “Attention to the genesis of music copyright reminds us that copyright was invented to solve a particular problem for book publishers in Eighteenth-century England and that the subsequent expansion of copyright’s domain *has been neither natural nor inevitable*.” Emphasis added.

⁵⁸ See Carrol 2005 *Florida Law Review* 923 note 74. See also Frith and Marshall (eds) *Music and Copyright* 27, who notes: “Music was not thought to be protected under the Statute of Anne ...” It has further been submitted that copyright was also viewed by some music publishers as “a very real obstacle in establishing an otherwise financially lucrative publishing career”, citing the example of the publisher Walsh, who, it is said, became a dominant player in the publishing market not because of reliance on copyright “but rather upon the fact that he routinely produced quick and cheap reprints of material first printed by other music publishers.” Deazley “Commentary on *Bach v Longman*” 2008 www.copyrighthistory.org para 3 (date of use: 26 September 2013). Frith and Marshall support this position, noting that music publishers did not lobby for statutory protection because they reasoned that most musical works would not remain popular for the full duration of copyright protection under the Statute of Anne, and surmised that “the control of distribution channels and predatory pricing against new entrants was as effective a means of market dominance as statutory protection.” Frith and Marshall *ibid*.

⁵⁹ Birrell *Law and History of Copyright* 100 – 101. The London booksellers claimed that the Statute of Anne was merely “an overlay on common law copyright”, which was perpetual and survived the expiration of the statute’s term of protection. Carrol 2005 *Florida Law Review* 925.

⁶⁰ See Birrell *id* at 103.

⁶¹ *Id* at 106.

⁶² *Id* at 106 note 1.

Session in *Midwinter v Hamilton* in 1743,⁶³ the court refused to accede to the London booksellers' arguments. This officially marked the commencement of the infamous Battle of the Booksellers⁶⁴ which was to rage for some thirty years.⁶⁵ The most-important cases in this battlefield were *Millar v Taylor*⁶⁶ and *Donaldson v Beckett*.⁶⁷ In the *Millar* case the King's Bench considered, for the first time, the nature and purpose of copyright, arriving at the conclusion that there was, indeed, a common law right to literary property which was not affected by the Statute of Anne. Such a right, the court held, was revived after the expiration of the term of protection provided for in the Statute of Anne.

Notwithstanding the foregoing, in *Hinton v Donaldson and Others*⁶⁸ the Scottish Court of Session refused to follow the ruling in *Millar*, asserting that Scottish law made no provision for a common law right to literary property. Similarly, as observed, “[p]erpetual copyright was the law of England for five years only.”⁶⁹ In a surprising move, the English House of Lords followed a ruling similar to the *Hinton* ruling, in *Donaldson v Beckett*,⁷⁰ denying the existence of a perpetual copyright and affirming the existence of a public domain – in this way doing away with the earlier English decisions. This case, “probably the most celebrated of all copyright cases” and “uniquely dramatic [and] enthralling the contemporary literary scene”,⁷¹ brought to an abrupt end the protracted “Battle of the Booksellers”, with the Scottish booksellers winning the day. Consequently, “[p]ublishers continued to publish works ... but did so only with authorisation from the authors of the works and arguably for the mutual benefit of [the parties]”.⁷² In this regard it has been observed that “[i]n no other European country had the author and his assigns fared so well” as did English authors under the Statute of Anne.⁷³

The above developments however did not resolve the question as to whether the Statute of Anne applied in respect of musical works. This question did not, in fact, immediately arise. This is because, as observed, the majority of music composers were professional performers who largely depended on the custom and goodwill of rich patrons for their survival - unlike literary authors whose survival depended on the publication of their works.⁷⁴ In this way musicians therefore felt that they could survive without having to rely upon the copyright system.⁷⁵ It is thus clear that uncertainty about the application of the Statute of Anne in respect of musical works was not the only deterrent

⁶³ Decided in 1748. *Midwinter v Hamilton* 1748 Mor. 8595.

⁶⁴ Aptly called the “Battle of the Booksellers for Perpetual Copyright” by Birrell, *id* at 99.

⁶⁵ For a discussion of the court cases decided in this period, commencing and ending with *Midwinter v Hamilton* and *Donaldson v Beckett* respectively, see Yamada “Pirate” Publishing 31 – 81.

⁶⁶ (1769) 4 Burr. 2303.

⁶⁷ (1774) 4 Burr. 2407.

⁶⁸ 1773 Mor. 8307.

⁶⁹ Birrell *Law and History of Copyright* 141.

⁷⁰ *Supra* n 67.

⁷¹ Frith and Marshall (eds) *Music and Copyright* 28.

⁷² Baloyi 2012 *SA Merc LJ* 222.

⁷³ Birrell *Law and History of Copyright* 141.

⁷⁴ Carrol 2005 *Florida Law Review* 925 – 926.

⁷⁵ In this regard Hunter 1986 *Music & Letters*. 272 observes, “Writing was not the way for an author or composer to make a living before the second half of the eighteenth century, unless the creator were Pope, a playwright or a composer of theatre music”; further quipping: “Indeed, to have made money from writing was *hardly accepted*, at least among gentlemen.” Emphasis added.

preventing musicians from placing reliance on the statute. As alluded to,⁷⁶ the control of the distribution market and the ability to enter the market quicker than others were seen as being more beneficial than relying on copyright protection.⁷⁷ Thus it has been observed that composers “embraced copyright reluctantly.”⁷⁸

It appears that successful composers trusted the system of printing privileges better than the protection provided under the Statute of Anne, choosing to “[seek] legal vindication for proprietary claims in their music through petitions for printing privileges.”⁷⁹ Postulating on the reasons for this Carrol has made the following observation:

... Conceivably, privileges may have been preferable to composers because privileges often provided ex ante protection to all of the composer’s works whereas copyright was effective on a per-work basis and normally did not vest registration and deposit took place. Alternatively, royal privileges may have been a valuable status signal that would not have been easily sacrificed in favor of copyright. Finally, if composers would have had difficulty obtaining deposit copies, privileges may have been more attractive. ...⁸⁰

Where composers were non-committal in relation to asserting their rights under the Statute of Anne it has been observed that music publishers were, in fact, *hostile* to the legislation.⁸¹ It is said that this is because they, unlike their literary rights counterparts, remained eligible for royal printing patents even after the lapse of the Licensing Act in 1794.⁸² The considerations regarding the importance of lead time in getting contemporary works into the market were the same for music publishers as they were for composers;⁸³ besides this however, music publishers benefitted from the lapse of the Licensing Act, as this “reduced the burden of state censorship while leaving the prospect of exclusive economic rights intact.”⁸⁴ Thus after the Statute of Anne was enacted only a few music publishers registered their works; for the rest, they “carried on as if the Act did not apply to music and as if composers had no initial entitlement to control reproduction of their work.”⁸⁵

2.2.1.3 Bach v Longman and the Recognition of Print Rights in Musical Works

Notwithstanding the foregoing, a point in time came “when music’s value as a resource had arisen sufficiently to make the administrative costs of copyright socially worthwhile” – to use an expression used by Carrol.⁸⁶ This moment came when “the general public also ... started to become an important patron of music” with the introduction of public concerts with paid admission and annual

⁷⁶ See n 58 supra.

⁷⁷ One reason for this is that “more money was to be made out of the popularity of new musical works than out of the continued republication of old works.” This was in contrast with literary publication where old works were more valuable, justifying the arguments for a perpetual copyright. Hunter 1986 *Music & Letters* 286.

⁷⁸ Carrol 2005 *Florida Law Review* 929.

⁷⁹ *Id* at 930.

⁸⁰ *Ibid*.

⁸¹ *Id* at 930. See also Hunter 1986 *Music & Letters* 278.

⁸² Carrol 2005 *Florida Law Review* 931.

⁸³ “... [S]uccess in the music publishing business required speed, an acute sense for changing tastes, and little regard for proprietary claims of rivals of composers.” *Id* at 932.

⁸⁴ *Id* at 931.

⁸⁵ *Id* at 934.

⁸⁶ *Id* at 916.

music meetings, together with opera (music theatre) for the upper classes.⁸⁷ As observed, “[t]he growth and spread of the music festival intensified the demand for nationally recognized singers and players”, *fueling a growth for printed music and “[creating] new opportunities for freelance music composition.*”⁸⁸ For many composers publication of their musical compositions was a way of increasing demand for their public performances.⁸⁹ However, in the course of asserting their rights, these composers were soon to find themselves at loggerheads with the London music sellers, who “were not inclined to respect any claims of royal privilege, whether they be made by rival publishers or composers.”⁹⁰ The probable reason for this is that “[u]ntil 1777 unauthorized publication in the sense of the printing of a composer’s work without his approval was not illegal except in a very few limited circumstances.”⁹¹ This clearly arises from the uncertainty as to whether “books” or “writings” extended to music compositions.⁹²

Composers also lacked resources and the will to pursue litigation; consequently they tried to protect themselves by issuing public warnings against unauthorised publication of their works and by “a sporadic series of cases during the course of the century”.⁹³ Reference will only be made to a few of these cases here.⁹⁴ In one case John Gay, composer of a sequel to *The Beggar’s Opera* titled *Polly*, which he had printed as a book comprising of the music and words bound together, sought and obtained a preliminary injunction in the Court of Chancery, against more than twenty printers and booksellers who had printed copies of the book without Gay’s permission. Gay had entered the title of the book in the Stationer’s Register at the time of first printing, and none of the defendants had contested the fact that *Polly* was a protected work under the Statute of Anne. Another case involved the musician Thomas Augustine Arne, who had obtained a royal privilege in 1741, after which he issued a public warning against the unauthorised use of his compositions. When certain of his works, including his popular masque *Comus*, were printed without his permission, Arne instituted proceedings, relying on not only his royal privilege but also on the Statute of Anne and the Engraving Act.⁹⁵ In their defence, the defendants argued, *inter alia*, against the continued legitimacy

⁸⁷ With opera singers becoming “the highest paid musical performers in the land.” *Id* at 926 - 927.

⁸⁸ *Id* at 927. Emphasis added.

⁸⁹ *Ibid*. Musicians could however, at times obtain payment for the publication of their manuscripts, where their employment contracts did not entail music composition and only required them to carry out duties as performers. *Ibid*.

⁹⁰ *Id* at 935.

⁹¹ Hunter 1986 *Music & Letters* 272. The publisher John Walsh is notorious for being “the first to employ unauthorized publication as a standard practice”, using “tendentious and misleading advertisements, legal manoeuvres and price cutting, in addition to unauthorised reprinting, which many were coming to regard as theft.” Hunter *id* at 272 - 273. Walsh for instance had legal feuds with the famous composer, Handel, although in the end “Handel and Walsh came to terms and they had a long-lived business relationship.” For this, and others of Walsh’s “less savory tactics” see Carrol 2005 *Florida Law Review* 929 and 933.

⁹² See in this regard Hunter *id* at 274, noting: “As far as the trade was aware, until 1777 music was not protected by the Act of Anne (1709 – 10).”

⁹³ Carrol 2005 *Florida Law Review* 935.

⁹⁴ For a full discussion of these cases see Carrol *id* at 935 – 942.

⁹⁵ The Engraving Act, or Hogarth’s Act, was passed in 1735 through the lobbying of William Hogarth, a well-known artist-engraver, and others, who believed that because the Statute of Anne was enacted to protect “books” it did not extend to engraved works. While engraving technology was increasingly used to publish individual song sheets (as opposed to publishing a complete book) and eventually became “the dominant technique for music publishing”, it is not clear if others other than Augustine Arne made attempts to rely upon the Engraving Act for the protection of musical works. Arne apparently abandoned the case so the outcome is not known. See Carrol *id* at 932, 934 and 939.

of the royal printing privilege, and argued that “neither the Statute of Anne nor the Engraving Act applied to printed music.”⁹⁶

It has been noted that “[b]y the early 1770’s, the pressure to resolve the question of music copyright had begun to grow.”⁹⁷ One case in which permanent relief was obtained apparently on the basis of, *inter alia*, the Statute of Anne, was *Pyle v Falkener*.⁹⁸ As observed, “the outcome of Pyle’s action would depend on how the word ‘writings’ in the preamble to the Act was to be interpreted, and on whether privileges provided valid copyright protection.”⁹⁹ Because the court in *Pyle* did not express an opinion on the merits, merely granting a permanent injunction, it was left to another court to specifically deal with the question whether the expression “writings” in the preamble to the Statute of Anne applied in respect of musical works. Such a determination was made in the case of *Bach v Longman*, where, for the first time, the rights of authors of musical works (in the sense of printed music) were recognised under the Statute of Anne.¹⁰⁰

Bach v Longman

The case was initiated by two famous composers, JC Bach and CF Abel, in the King’s Bench, and concerned the question whether a music composition fell within the ambit of the Statute of Anne.¹⁰¹

Providing a useful background to the case Hunter makes this observation:

Unlike the example of authors and artist-engravers, it was in the courts that composers first established copyright of music ... C.F. Abel and J.C. Bach, as the leaders of the London music scene ... were probably the only composers with sufficient position to effect the changes necessary to provide composers with copyright protection equal to that enjoyed by authors. ...¹⁰²

Both Bach and Abel had obtained Crown privileges protecting their published music – Bach in 1763 and Abel in 1760. Both publishers were in conflict with the publisher, James Longman, who had published their works without authorisation. It has in this regard been noted that “it was the imminent expiration of Abel’s privilege in 1774 that no doubt prompted the two to take their case before the courts.”¹⁰³ Attempts to lobby parliament for the amendment of the Statute of Anne in 1735 and 1737, which in both cases would have extended the application of the statute to “the Author or Authors of

⁹⁶ *Id* at 939.

⁹⁷ *Id* at 940.

⁹⁸ (1774) C33/442.

⁹⁹ Kassler (ed) *Music Trade* 258. The *Pyle* hearing coincided with the hearing in *Donaldson v Beckett*. Consequently, the proceedings in *Pyle* were stayed to await the ruling in *Donaldson* in relation to the question of the applicability of common law copyright. In this regard it has been noted: “After *Donaldson* laid perpetual copyright to rest ... [t]he Statute of Anne was the only remaining basis for the claims concerning the works by Arne, Green and Bickerstaff. ... The most reasonable inference from the court’s ruling is that the privilege was enforceable with respect to the works by Handel, and the Statute of Anne applied to the remaining works.” Carrol 2005 *Florida Law Review* 942.

¹⁰⁰ *Bach v Longman* (1777) 2 Cowp. 623.

¹⁰¹ For a detailed commentary on the case see Deazley “Commentary on *Bach v Longman*” 2008 www.copyrighthistory.org (date of use: 29 November 2017).

¹⁰² Hunter 1986 *Music & Letters* 278 – 279.

¹⁰³ Deazley “Commentary on *Bach v Longman*” 2008 www.copyrighthistory.org (date of use: 29 November 2017). This also informed the choice of the works chosen as the basis for the court proceedings, where two works of Bach were chosen, it being appreciated that “given the leisurely speed of legal proceedings, [Abel’s royal privilege, due to expire in 1774] might not remain in force for the duration of the case” – a concern that was justified as the proceedings were only finalised in 1777. See Hunter 1986 *Music & Letters* 279.

any Book or Books of Musick”, had been unsuccessful.¹⁰⁴ Concomitant to instituting the court proceedings Bach and Abel had, themselves, being unsatisfied with the progress of the case, joined the London booksellers in petitioning the House of Commons statutory protection, particularly in light of the fateful decision in *Donaldson v Beckett*. On their part Bach and Abel sought clarity regarding the status of music under the Statute of Anne.¹⁰⁵ It appears that no positive outcome came from this and so their only hope was in the case underway.

Nevertheless, Destiny did plan a favourable outcome for the composers – and for all composers of all time – forever charting a new course for music copyright. In a judgment that was quickly dispensed the eminent Lord Chief Justice Mansfield,¹⁰⁶ having remarked that the words of the Statute of Anne were ‘very large’, providing, as they did, protection for ‘books and other writings’, opined:

Music is a science; it may be written, and the mode of conveying the ideas, is by signs and marks. A person may use the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and disposing of them to his own use. If the narrow interpretation contended for in the argument were to hold, it would equally apply to algebra, mathematics, arithmetic, hieroglyphics. All these are conveyed by signs and figures. There is no colour for saying that music is not within the Act.¹⁰⁷

Thus the year 1777 marked the first official recognition, in Great Britain, of the first bundle of music rights, namely the reproduction right in musical works, in the form of PRINT RIGHTS. In this way England led the way in the development of this important right in musical works, which, with time and in response to technological developments, developed into a fully-fledged reproduction right covering many forms of music reproduction (e.g. *mechanical reproduction*, *film synchronisation*, *radio transcription* and in current times, *digital reproduction*). The *Bach* decision and the formal recognition of *print rights* in music was so significant, particularly for the Anglo-American market, that for over a hundred years, the manufacture and sale of printed music in the form of “sheet music”¹⁰⁸ became the *modus operandus* – the dominant way in which the music industry operated. The English courts’ affirmation of the fact that a single sheet of music constituted a “book” as contemplated in the Statute of Anne and subsequent legislation no doubt also aided the development of the music publishing industry.¹⁰⁹ In this regard the sale of sheet music was used in

¹⁰⁴ See Deazley “Commentary on *Bach v Longman*” 2008 www.copyrighthistory.org (date of use: 29 November 2017).

¹⁰⁵ Hunter 1986 *Music & Letters* 279.

¹⁰⁶ *Bach v Longman* (1777) 2 Cowp. 623.

¹⁰⁷ *Id* at 624.

¹⁰⁸ Sheet music is the traditional form of printed music and is generally in the form of “one song printed on unbound sheets of paper, containing music and any accompanying lyrics” and generally arranged for piano, voice and guitar. See Kohn and Kohn *Music Licensing* 676.

¹⁰⁹ *Storace v Longman* (1788) 2 Camp. 27, where a one sheet “musical air, tune, and writing” was held to be protected as a “book”; *Hime v Dale* (1803), where it was argued (and upheld) that “there is nothing in the word *book* to require that it shall consist of several sheets bound in leather, or stitched in a marble cover”; all referred to in *Clementi v Golding* (1809) 2 Camp. 25, at 27 – 29, where it was held (at 26) that “[t]he legislature by the word *book* could not be considered as meaning only a number of printed sheets bound up together” and that a book “signifies any writing, without reference to size or form”. Furthermore in *White v Geroch* (1819) 106 Eng. Rep. 376 (K.B.), which concerned a work printed a bound volume of musical compositions, Lord Chief Justice Abbot observed that “any composition whether large or small, is a book within the meaning of this Act of Parliament.”

conjunction with, and to facilitate the live performance of music. Thus Kohn and Kohn have observed:

Before digital downloads and records, before motion pictures and television programs, before AM and FM radio, before even player pianos and music boxes, the music business was composed of live performances and the creation and distribution of printed music to facilitate those performances – better known as, *sheet music*. In the 1890, [sic] when the modern music industry first emerged, ***the music business was essentially the sheet music business, with sheet music ... selling in the millions of copies.*** While during the twentieth century the music industry saw its revenues shift from the sale of printed music to the licensing of public performances and mechanical reproductions, printed music in the twenty-first century is beginning to make a comeback. ...¹¹⁰

The phenomenal growth of the music publishing industry, in particular in the Anglo-American world, can be attributed to this recognition of *print rights*.¹¹¹ This is perhaps best demonstrated by the *Tin Pan Alley* phenomenon,¹¹² which undoubtedly spawned the modern music publishing industry and, arguably, the modern music industry itself. The protection accorded to print rights in musical compositions under the Statute of Anne (as per the ruling in *Bach v Longman*) persisted until the statute was replaced by the Copyright Act 1842, also termed Talfourd's Act.¹¹³ Apart from providing protection to musical (and dramatic) works in respect of “performing rights” (for which see paragraph 2.2.2 below) the 1842 Act protected “sheet of music” under the term “book”. This Act also, for the first time, accorded a statutory definition to copyright, providing that “all copyright shall be deemed

¹¹⁰ *Id* at 669. Bold emphasis added.

¹¹¹ The reproduction right is, itself, so intricately linked to the publishing industry that some have equated “publication” with “reproduction”. See for example McFarlane *Performing Right* 10, who, referring to the right protected under the Statute of Anne, observes: “The right subsisted in printing and it was only through printing (*or as we should now say, publishing*) that it could be infringed.” Emphasis added. Further on (at 36) the author makes reference to “the question of publication”, which, he states, “is the reproduction right”. It is true that in its development, the reproduction right had close connection to the act of publication and can be said to have been precipitated by it. See also in this regard the discussion above under 2.2.1.2 on the scope of the Statute of Anne, where it is stated that “the *print right was linked to and associated with the right to publish the work, or to sell it or expose it for sale.*” Nevertheless, while the reproduction right indeed played this role in the development of the publishing industry and does in fact give efficacy to the act of publication (because the process of reproducing copies *and issuing them to the public* in fact amounts to a publication of the work), it is important to note that, especially in modern copyright law, the right of publishing a work is distinct from the right of reproducing it, and, together with it, forms part of the bundle of rights that subsists in respect of literary and musical works. See further in this regard Poe *Music Publishing* 16, who notes: ‘... [P]ublication doesn’t necessarily take effect even when copies are actually printed or pressed. *There must also be distribution of copies or an “offering to distribute copies” before something is considered to be published.*’ Emphasis added.

¹¹² “Tin Pan Alley” is the expression used to describe the American music publishing sector that developed around West Twenty-eighth Street, between Broadway and Sixth Avenue in the late nineteenth and early twentieth century, and which became the progenitor of the modern American music publishing industry. It is a period “when a song’s popularity was determined not by the number of records it sold but by the number of copies of sheet music it sold”. The name Tin Pan Alley “was the name given to the branch of the music publishing business that hired composers and lyricists on a permanent basis to create popular songs”, which were marketed as sheet music “by means of extensive promotional campaigns” As further observed, “[i]n time, it became the generic term for all publishers of popular American sheet music, regardless of their geographical location.” As to the origin of the phrase “Tin Pan Alley”, it is attributed to the observation of one Monroe Rosenfield, who was conducting research on the fledgling publishing industry on 42 West Twenty-eighth street, and ‘recorded that this street, with dozens of demonstrators working at the same time, sounded like a bunch of tin pans clanging. He characterized the street where all of this activity was taking place as “Tin Pan Alley”’. Jansen *Tin Pan Alley* ix. See also Poe *Music Publishing* 3 – 6.

¹¹³ 5 & 6 Vict. c45, termed Talfourd’s Act because of the role of Serjeant Talfourd, a “celebrated historian and politician”, in its passing – for which see Garnett, Davies and Harbottle *Copinger and Skone James* 41. The Statute of Anne had earlier been amended by the Copyright Act 1814 (54 Geo. 3, c.156), which, in s. 4, introduced a single term of protection of twenty-eight years for copyright works calculated from the date of publication or the natural life of the author, if he was still alive at the end of such period. Also, both in the 1814 Act and the 1842 Act, the right protected was the “sole liberty of printing and reprinting” (1814 Act), with copyright being defined as “the sole and exclusive liberty of printing or otherwise multiplying” (1842 Act).

personal property, and shall be transmissible by bequest, or, in the case of intestacy, shall be subject to the same law of distribution as other personal property” (s 25).

The scope of protection and the infringement provisions under the Act were essentially the same as in existing legislation, and registration of copyright works at Stationers’ Hall was still provided for; failure to register a work did not however, affect the subsistence of copyright, but no infringement proceedings could commence without such registration (ss 11 – 14). A new feature of the Act is that it extended the term of protection to the life of the author and seven years after the author’s death, or forty-two years from first publication of the work (whichever was longer), or where the work was published after the author’s death, forty-two years from publication (s 3). Another innovative aspect of the Act was the introduction of a post-mortem system of compulsory licensing which provided that, if, after the author’s death, the owner of the author’s copyright refused to publish the work, then the Judicial Committee of the Privy Council could grant a licence “in such manner and subject to such conditions as they may think fit”, to ensure that the work was published (s 5).¹¹⁴

It would be noteworthy here to refer to the fact that the system for the protection of the rights of authors in the “copyright system” of the Anglo-American jurisdictions developed divergently from the “authors’ rights” or *droit d’auteur* system of Continental Europe.¹¹⁵ Thus while England can be said to be the originator of the copyright system, France would fit the description in respect of the author’s rights system.¹¹⁶ In this regard it is notable that while England’s lead was with regard to the copyright system and the reproduction right in particular, France led in the area of performing rights and collective management in particular (see the discussion below under 2.2.2). In France authors’ reproduction rights were only recognised after the French Revolution with the passing of the Decree of 19 – 24 July of 1793, which for the first time granted property rights to authors of all kinds of manuscripts, music composers, painters and designers (illustrators), effectively doing away with the system of privileges that had existed since the sixteenth century.¹¹⁷

The law of 1793 granted exclusive rights to authors to sell and distribute their works in France, and all printed copies produced and published without their written authorisation could be confiscated by the police.¹¹⁸ This law was preceded two years back by the Decree of January 13 – 19 1791, which granted authors protection in respect of their “performing rights” (for which see the discussion below under 2.2.2). Of these laws it has been observed:

¹¹⁴ See generally in this regard Deazley “Commentary on *Copyright Amendment Act 1842*” 2008 www.copyrighthistory.org (date of use: 29 November 2017).

¹¹⁵ See for a detailed discussion of the distinction between the two systems Von Lewinski *International Copyright Law* 33 – 63.

¹¹⁶ See Torremans (ed) *Research Handbook* 540, where it is observed: “It is ... intriguing to note that there seems to be only two major systems of copyright law dominating [the] global landscape. The first one, called ‘copyright law’ has its origin in Britain and focuses primarily on the economic rights of the rightholder. The second one is often termed ‘authors’ rights’ or *droit d’auteur*, and is exemplified by France’s Decree of 19 – 24 July of 1793 regarding the property rights of authors, composers, painters and illustrators.” France’s lead was also in respect of the protection of performing rights, where England was a late-comer. See in this regard Scherer *Economics of Music Composition* 178.

¹¹⁷ See De Leeuw and Bergstra (eds) *History of Information Security* 97.

¹¹⁸ De Leeuw and Bergstra *ibid*; also Billboard 22 May 1993 at 61.

These two decrees, which recognized the personal right of the author and designated him as the proprietor of his work, established the basic principle of the 'droit d'auteur'. ... [T]he two decrees "enabled the courts to develop the theory and practice of the 'droit d'auteur' without any further legislation for a century and a half ..."¹¹⁹

It seems however, that it was to be in the area of collective management that French authors would find real protection. This is because the abolishment of the Paris book guild as a result of the law of 1791 brought about a situation where "legal control of printing rights ceased to exist ... [and] Paris was flooded with pirate publications from an increasingly disorganized book trade".¹²⁰ Thus in spite of the existence of these laws, users continued to use the works of authors without compensation, largely because the authors were not able to effectively monitor the various usages of these works.¹²¹ And so enters the enthralling world of the Performing Right in musical works ...

2.2.2 The Development of the Performing Right

2.2.2.1 The Recognition of the Performing Right in France

As indicated, just as copyright and the reproduction right emerged from England, so the performing right and the system of collective management of authors' rights emerged from France. In fact it was in the year 1777 – when the *Bach v Longman* decision was handed down in England, for the first time recognising print rights in respect of musical works – that the performing right was recognised in neighbouring France. It would be useful, before considering this matter further, to provide a brief overview of the meaning of the expression "performing right".

Firstly it needs to be understood that the expression "performing right" is technically only used in respect of musical works – and the expression is itself technical.¹²² Although the expression "performing right" has traditionally been used in relation to the right of "public performance" or "performance in public", it should, because of the historical significance of its development, not be used in reference to the performance of all copyright works generally (whether artistic works, dramatic works, cinematograph films or even a sound recordings). Rather it is properly used in reference to the performance of musical works, and more specifically in respect of so-called *small rights* ("petits droits"). It would be correct to refer to the general right of public performance in

¹¹⁹ Billboard *ibid.*

¹²⁰ Teilmann *British and French Copyright* 23.

¹²¹ See in this regard Chapter 6 below on the rationale for the system of collective management.

¹²² This is in spite of the fact that some indistinctly or interchangeably ascribe the expression "performing rights" to "performance rights" in sound recordings (what is sometimes termed "needle-time" or "public play" rights). In this regard the writer is enlivened by the observation of Schulenberg *Music Industry* 406, 568 who makes a distinction between *performing rights societies* (as referring to societies responsible for the administration of the rights of authors and publishers of musical works) and *performance rights societies* (as referring to societies responsible for the administration of the rights of performers and owners of copyright in sound recording) and in this regard notes that the expressions "performing rights" and "performance rights", while often used interchangeably, "mean quite different things"; further asserting: 'Performing rights refer to the rights in the *material being performed*, e.g., musical compositions. Performance rights refer to the rights in the performance itself *on behalf of the "performer"...*'; further observing (at 289) that "the distinction between the two is technical." The current writer maintains this distinction only in relation to the historical and legal development of the concept of "performing right". As D'Alton *Public Performance Right* 160 has maintained: "Given the similar contemporary usage of the terms it is important to maintain the distinction, *particularly when considering the historical development, as they arise in different historical periods for different reasons.*" Emphasis added.

respect of all works eligible for this right (e.g. dramatic works, musical works, films, computer programs¹²³) as a “performance right”. It would however, be remiss to refer to it as a “performing right” in respect of all these works: *it is a performing right only in respect of musical works*.¹²⁴ This is significant for understanding the historical development of this right.

In this regard the musical works concerned are termed *small rights musical works* – where the expression “small rights” is synonymous to the expression “performing rights”.¹²⁵ Secondly, and more specifically, *small rights* refer to the *non-dramatic* public performance of musical works, as distinguished from the *dramatic* performance of musical works – the so-called *grand rights* (“grands droits”). Some have of course, accorded the expression “performing right” to the right of public performance of dramatic or dramatico-musical works (i.e. the grand rights or “grands droits”), as in the expression “grand performing rights”.¹²⁶ Nevertheless it is clear that the prefix “grand” is in this regard, necessary to make it explicit that the reference is to the public performance of dramatic and dramatico-musical works. A similar qualification is however, not necessary when referring to the public performance right in respect of musical works: it is not necessary (though some do so), to express the right as “*small performing rights*” because the expression “performing rights” is automatically seen as referring to rights in musical works. A further elaboration of this is made below in the discussion of the development of the performing right in England.

The distinction between small rights and grand rights is however, often not easy to make, as at times, certain musical performances with a dramatic element would still fall within the ambit of performing rights, while certain dramatic performances of musical content would fit the description of grand rights.¹²⁷ As Bradford has observed: “The ongoing search for a standard definition of these

¹²³ These are works in which the right of public performance subsists under the Copyright Act 98 of 1978. In respect of films (cinematograph films) the right is expressed as causing the film to be seen or heard in public (s 8(1)(b)).

¹²⁴ The writer is aware of the fact that some refer to the so-called *needle-time rights* (the rights of performance in respect of sound recordings as embodied in s 9(c) – (e) of the Copyright Act) as a *performing right in sound recordings*. See for example McFarlane *Performing Right* 131- 141 (McFarlane however casts aspersions on the justification for the existence of a performance right in sound recordings at all, and predicted its demise – something that has not taken place as the right seems to have gained momentum in recent times). The reference to needle-time rights as “performing rights” is, strictly speaking, incorrect as the expression “performing right” (other than “performance right”) has always – and historically – been used only in respect of *small rights musical works* (for this see the discussion further below). Nevertheless, calling needle-time rights a “performing right in sound recordings” can be useful for purposes of understanding the nature of the rights – i.e. it is helpful from the basis of showing that the rights being dealt with are in the nature of, or similar to performing rights in musical works and that we should look to the system of performing rights to fully understand them. The problem with this however is that these rights are not the same. In particular, while performing rights are exclusive rights, needle-time rights (or their equivalent in international law), are by nature, remuneration rights. This distinction needs to be taken into account when comparing the two sets of rights. There may also be other differences arising from this, such as differences in the manner in which the rights are licensed and collection of royalties is undertaken.

¹²⁵ See Ficsor *Collective Management* 37.

¹²⁶ See Goldstein *Goldstein on Copyright* (2017) 7:264, at n 3.

¹²⁷ See for an outline of this complexity Ficsor *Collective Management* 38 at para 74. An example of these borderline cases is what is termed a dramatico-musical work, which includes an opera, operetta, musical play, revue, pantomime or sketch “in so far as it consists of words and music written expressly therefore”. See definition of “dramatico-musical work” in clause 1(e) of the SAMRO deed of assignment for music creators, available at <http://www.samro.org.za/music-creator-application> (date of use: 08 December 2017). The dramatico-musical work as thus defined is a grand right and thus not licensed by SAMRO. However, in terms of clause 1(i)(iii) of the deed of assignment, an excerpt from a dramatico-musical work which is broadcast on television but does not exceed twenty minutes and does not consist of a complete act; or a similar excerpt broadcast on radio or otherwise performed, but does not exceed twenty-five minutes and does not consist of a complete act can be licensed by the performing right society, unless it “forms a consecutive sequence which preserves all the elements of the original work and does not interrupt the dramatic action”.

terms [i.e grand performance right and small performance right] has perpetually befuddled the legal profession, the music industry and performing entities at large.”¹²⁸ Leaffer provides a simplified distinction below:

Generally, a performance is nondramatic when it is removed from a dramatic context and unrelated to a large plot structure. Alternatively, a dramatic performance occurs when it is used to develop a story line. The entire drama need not be developed to render a performance dramatic, so long as the performance takes place within a dramatic context and carries forth a plot.¹²⁹

Ficsor elucidates further on this, quipping that small rights musical works “are those which, as a rule, are managed fully collectively”, while grand rights musical works “are those which, as a rule, are licensed individually” (although partial collective management involving collecting societies is sometimes used to administer such grand rights).¹³⁰ Ficsor further notes, aptly, that the use of the adjectives “small” and “grand” has no bearing on the economic importance of the rights – observing correctly that in many countries the value of performing rights (i.e. small rights) exceeds that of grand rights. He then concludes that the adjectives are used merely ‘[to] reflect the historical fact that “grand rights” had already been exercised when “small rights” were recognized ... and, initially, the category of “grand rights” was considered more important.’¹³¹

Thirdly, it is important to note that performing rights are generally almost always administered through collective management because the “[n]ondramatic performances number in the millions daily and it would be impossible to police without a performing rights society.”¹³² In contrast, dramatic performances are generally controlled and licensed by the copyright owner himself, as they occur with less frequency. It has in this regard been observed that because they are often advertised, it is easy for the copyright owner to control them.¹³³ One other reason mentioned as to why it is preferable for copyright owners to control the licensing of dramatic or dramatico-musical works is that they “present greater problems of artistic control.”¹³⁴

Lastly, it needs to be appreciated that while the performing right began purely as a right in respect of the public performance of musical works, it has, over the years, evolved into a complex right encompassing not only the public performance of a musical work but also its broadcasting, transmission in a diffusion service (i.e. cable transmission) and more recently, in the digital environment, its communication and making available to the public.¹³⁵ This expansion of the right is however, no different from the manner in which, propelled by technological developments, the reproduction right has also evolved to include a panoply of sub-rights, as discussed in Chapter 3 below.

¹²⁸Bradford 1987 *Loy. L.A. Ent. L. Rev* 46, further observing that it is the nature of the use of the work, and not the type of musical work, that should be characterised as dramatic or non-dramatic.

¹²⁹ Leaffer *Understanding Copyright Law* 374/375 – 375/376.

¹³⁰ Ficsor *Collective Management* 38.

¹³¹ Ficsor *id* at 40.

¹³² Leaffer *Understanding Copyright Law* 375/376.

¹³³ Leaffer *id* at 374/375 – 375/376.

¹³⁴ *Ibid.*

¹³⁵ See in this regard Ficsor *Collective Management* 38 – 40, at paras 75 – 77.

The foregoing served to lay the foundation and to provide the context necessary to understand the current discussion. Within the above context it is necessary to note that it was the dramatic performance right – the *grand droit* – that was achieved in France in 1777 and not the performing right.¹³⁶ A group of some twenty authors, led by the ever-energetic play-wright, Pierre de Beaumarchais – credited with being “the first to express the idea of collective management of copyright”¹³⁷ – led the charge for the recognition of public performance rights for musical works in the dramatic genre. These authors created a bureau of theatre legislation (the *Bureau de législation dramatique*) and on 3 July 1777, formed the first collection agency, *Agence Framery*, raising arguments that “if a work has an economic life, its author must be associated with the revenues that it generates.”¹³⁸ Subsequent to this, and with the influence of Beaumarchais, the French Constituent Assembly passed the decree of January 13 – 19, 1791, which established the public performance right in respect of dramatic works – the *grand droit*. This was followed by the decree of July 19 – 24, 1793, which granted authors an exclusive reproduction right in respect of their works, as referred to above.¹³⁹ Commenting on this, Szendy opines:

... [T]he revolutionary laws of 1791 and 1793 ... [brought] a *shift of music toward the paradigm of theatre*. While, during the time of Matheson and Zacharias, musical law was essentially conceived according to the model of literature, the French Revolution made it swing to the side of the theatre. A major event, it can be read explicitly in the title of the famous decree of January 13 – 19, 1791, relative “to theatres and to the right of representation and performance of *dramatic and musical works*.” ...¹⁴⁰

This seems to suggest that it was at this stage in France that the focus shifted from *print rights* – a category of rights that had not found much success in France as it had in England – to performance rights in the theatre system. Of course the works would still be printed but the primary purpose was not to sell the printed music to the public, but to have it performed in public. This law was the first ever recorded recognition of the performing right in musical works, and as observed, “[t]here is little justification for the performing right ... prior to the eighteenth century...”¹⁴¹ The shift to theatrical performance in respect of authors’ works is, in fact, what would lead to the momentous events that took place some fifty years later, in 1847: This is because, despite the law of 1791 granting exclusive rights to authors in respect of the public performance of their works, the authors remained frustrated because concert promoters and other music users “[continued] to perform musical works

¹³⁶ As shown below, in England also the grand right developed ahead of the performing right.

¹³⁷ Gervais (ed) *Collective Management of Copyright* (2016) 5.

¹³⁸ In 1829 *Agence Framery* morphed into the extant *Société des Auteurs et Compositeurs Dramatiques* (SACD). Gervais (ed) *Collective Management of Copyright* 171.

¹³⁹ See Parker, Harris and Steineck (eds) *Limits and Constraints* 158; Billboard 22 May 1993 at 61. While the 1791 decree abolished the exclusive privilege that had been granted to the *Comédie Française* in relation to the public performance of all dramatic works, granting to authors and their successors the exclusive right to authorise the public performance of their works, the 1793 decree empowered the police to confiscate on behalf of authors and their successors all printed copies of their works published without their written authorisation.

¹⁴⁰ Szendy *Listen* 24.

¹⁴¹ McFarlane *Performing Right* 29. McFarlane *id* at 33 does refer to a system of payment to authors arising from a ruling of the Conseil of 18th June 1757 in France, compelling the *Comédie Française* to pay compensation to authors for the performance of their plays, but observes that this was “a primitive form of a true performing right” as authors could not prevent the performance and the payment was also for a limited duration.

without offering compensation to the composers”.¹⁴² It had to take another court battle – this time in France – before the recognition of authors’ performing rights would be cemented. This happened when, in 1847, the composer Bourget successfully sued the *Les Ambassadeurs*, a concert café, for using his composition without compensation.¹⁴³

With this victory Bourget teamed with playwrights Victor Parizot and Paul Henrion, with the assistance of Colombier, and in 1850 formed a union to collect payments for public performance of musical works.¹⁴⁴ This union morphed into the still-existing *Société des Auteurs, Compositeurs et Editeurs des Musique* (SACEM) on 28 February 1851, giving rise to the first system of “full collective management”.¹⁴⁵ The SACEM model would be replicated in many European and other countries, bringing a revolution in the system of collective management of authors’ rights and projecting the performing right to becoming the most-important music right in much of nineteenth century Europe. Not so in the Anglo-American world...

2.2.2.2 The Recognition of the Performing Right in England

In England the system of collective management and performing rights in particular was embraced rather reluctantly. This is because it was somehow believed that

the money made by publication, which was much larger in England than in France, was so good that the composers were satisfied with it, and they considered that if the performing right were exercised, it would seriously interfere with the profits accruing from publication.¹⁴⁶

A prominent publisher of the late seventeenth century, John Boosey,¹⁴⁷ was so confident of this position that he claimed that composers of the time would happily wave their claim to a performing right, even if it were made available to them. Boosey argued that composers were in fact, “in the habit of paying singers handsomely to sing their songs” as they reckoned that this gave advertisement to their songs, so that “the composers would not dream of exacting a royalty for that performance.”¹⁴⁸ Ehrlich takes the argument further, reasoning that it was “the idiosyncrasies of

¹⁴² McFarlane *id* at 49.

¹⁴³ For a full account of what happened see Gervais (ed) *Collective Management of Copyright* (2010) 171 – 172 and the discussion under 2.2.23(a) *infra*.

¹⁴⁴ The union morphed into the extant French performing rights society, SACEM, on 28 February 1851. *Ibid* 172.

¹⁴⁵ See Ficsor *Collective Management* 37 at para 72. The author asserts that the system of collective management formed earlier by Beaumarchais in respect of dramatic rights only gave rise to a system of “partial collective management”. *Id* 38 at para 73.

¹⁴⁶ McFarlane *Performing Right* 74. McFarlane further observes that at this stage the only source of income for authors and composers appears to have been from outright sales of their works to publishers, printers or producers. *Id* at 29.

¹⁴⁷ Whose publishing company was later called Boosey & Hawkes, which still exists today. See <http://www.boosey.com/pages/aboutus/History> (date of use: 08 December 2017).

¹⁴⁸ McFarlane *Performing Right* 75. It has been stated that this practice of composers - and publishers - paying singers (in essence *users* of their works) to perform their compositions - in the hope of publicising the compositions to entice the public to buy sheet music relating to the compositions - rather than the performers paying to use the music, was an earlier form of the dreaded practice of “payola” prevalent in the music industry today. McFarlane *ibid*. Barnett and Burrell *Controversies of the Music Industry* 128 describe payola as “unscrupulous methods of gaining airplay” and recognise that it emanated from “payments publishers made to performers, particularly big band leaders, to perform their songs”, and later evolved, in the emergence of radio broadcasting, to mean “payments to DJs by record promoters”. The word “payola” itself is said to be a word play between the words “pay” and “Victrola”, Victrola being “the first brand of record player”. Stanwick and Stanwick *Business Ethics* 379. The shift of the payola practice from payment of performers by publishing companies to payment of disc jockeys by record labels is expressed in this manner: “By the 1950s listener loyalty to disc jockeys was so firmly established that the success of any record depended on the preferences of the disc jockey. To solicit

English music publishing, and its market” – in which contractual relationships between publishers and composers was not congenial, and the composers had a weak bargaining position and lacked in “*esprit de corps*” – that gave rise to this situation.¹⁴⁹ Ehrlich contrasts this situation with the conditions in France, where authors were more active and united and took the lead in the recognition of the performing right. Ehrlich contends that, in the absence of author activism, the publishers themselves would be expected to have championed the recognition of the performing right in England. He then concludes that the only reason why music publishers did not do this is “the prevailing opinion among them that the balance of advantage lay elsewhere: in sales of sheet music”, observing:

More than in any other country, apart from the USA, where, significantly, performing right also had to wait until 1914, music publishing in England depended upon sales rather than performance.¹⁵⁰

Perhaps the importance and potential of revenue generation from printing, even for works meant for the stage, is best illustrated by the case of *Macklin v Richardson*.¹⁵¹ In *Macklin*, the defendants had employed someone to attend a performance of the author’s work, which, though performed on numerous occasions since its production, had never been published by the author. The defendants published one Act of the transcribed play in their magazine, arguing that, because the play had been publicly performed, the public performance “gave a right to any of the audience to carry away what they could, and make any use of it”; and further that the plaintiff did not suffer any damage “as he

their favour, record companies began to shower the disc jockeys with money, stocks, or gifts (commonly known as payola).” <https://www.britannica.com/art/disc-jockey#ref277960> (date of use: 08 December 2017). The payola scandal erupted in 1959, when more than three hundred disc jockeys admitted to having received payola in a federal investigation in the United States. Prominent among these was Alan Freed, well-known for promoting the emerging rock-and-roll music style, whose career ended with the payola revelations. This led to the amendment of the Federal Communications Act in 1960, which outlawed “under-the-table payments”, requiring broadcasters to disclose if airplay for a song had been purchased. Although the practice faded for some time as a result of this, evidence has shown that it has re-emerged over the years, when record companies engaged *independent promoters* “to do their dirty work”. See in this regard Stanwick and Stanwick *Business Ethics id* 379 – 382; see also <http://performingsongwriter.com/alan-freed-payola-scandal/> (date of use: 08 December 2017). It is said that the anti-payola law was “weak, the penalties insignificant, and the will to enforce it virtually non-existent.” Parker *Music Business* 78. For a historical discussion of the payola practice see Segrave *Payola in the Music Industry*, generally. This footnote on the practice of payola is relevant to show that the practice not only influences airplay for purposes of influencing the public’s interest in particular music recordings (thereby hoping to increase record sales); on the other hand it also determines the allocation of performing right royalties in respect of both musical compositions and sound recordings (in relation to the so-called needle-time rights). In South Africa the concern over the practice of payola has become a topical issue in recent times, with about 13 out of 19 music compilers for the SABC being accused of being involved in the practice. See <http://www.channel24.co.za/Music/News/accused-sabc-staff-take-bribes-for-payola-20171021>; <https://mg.co.za/article/2007-09-19-sa-artists-vent-fury-over-airplay-payola> (date of use: 08 December 2017). Recently a South Africa DJ, just like Alan Freed in the 1960’s, was fired by the SABC for accepting payola. See <https://www.musicinafrica.net/magazine/south-african-radio-dj-fired-over-payola> (date of use: 08 December 2017).

¹⁴⁹ Ehrlich *Harmonious Alliance* 3 – 4.

¹⁵⁰ Ehrlich *id* at 4 – 5. In this regard Ehrlich refers to the existence of “piano mania” in both England and America, which, he observes, was, together with *amateur performance*, “the mainsprings of the music market” in these countries. Ehrlich refers to the “enormous demand for sheet music in Britain”, where annual sales amounted to about 20 million pieces by the end of the nineteenth century, with popular hits selling some 200 000 copies, “even under normal conditions”. This sale of sheet music was in the end linked to piano ownership “which existed on a scale unmatched elsewhere in Europe” – which is what he means by “piano mania”. The amateur performance of sheet music using pianos – supported by the sale of “simple piano pieces and ‘educational’ music”, which provided training in elementary piano, scales and exercises – became the lifeblood of the English music publishing industry. See Ehrlich *id* at 5.

¹⁵¹ (1770) Amb. 694.

has, and will continue to receive the advantage arising from the representation upon the stage”.¹⁵² The court (per Lord Commissioner Smythe) rejected this argument, ruling:

It has been argued to be a publication, by being acted; and therefore the printing is no injury to the plaintiff: but that is a mistake; for besides the advantage from the performance, the author has another means of profit, from the printing and publishing; and there is as much reason that he should be protected in that right as any other author.¹⁵³

Macklin was accordingly granted a perpetual injunction against the defendants, who were also ordered to pay his costs. Bathurst, who was sitting with Smythe in the hearing, made this observation: “The printing [of the work] before the author has, is doing him a great injury”.¹⁵⁴ This is instructional, especially in view of the fact that the work was meant for stage, because it illustrates the value that was placed in the printing of even such a work (which would not normally derive its commercial value from print rights).¹⁵⁵ The prevailing position at the time was that, while the author could control the performance of his unpublished work under the common law, once a play was published the existing legislation did not prevent anyone from performing it without the author’s authorisation.¹⁵⁶ In view of this, when the right of public performance was eventually recognised, *it was seen as a right separate and distinct from copyright*. This position followed the understanding of the times as perhaps reflected by Aston J, speaking for the majority in *Millar v Taylor*, after rhetorically confirming that, in purchasing a literary composition “at a shop”, the purchaser would not have thought that he bought the right to be the printer and seller of the work:

... The improvement, knowledge, or amusement, which he can derive *from the performance*, is all his own: but the right to the work, *the copy-right* remains in him whose industry composed it.¹⁵⁷

In this regard Deazley has observed:

The public performance of print works, whether literary, artistic, or indeed musical, *was simply not conceived as falling within the protection provided by copyright as traditionally understood*. Until this point in time copyright, whether one considered it a common law or a purely statutory right, operated to prevent the unauthorised reproduction of a work in the same medium in which the protected work was given tangible form. Books, engravings and musical scores were all considered to be, and protected as, *print phenomena* ...¹⁵⁸

¹⁵² *Id* at 696.

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid*.

¹⁵⁵ In this regard Deazley “*Commentary on Dramatic Literary Property Act 1833*” 2008 www.copyrighthistory.org (date of use: 09 December 2017) notes: “That the work in question was capable of, indeed originally conceived for, performance upon the stage was not necessarily relevant.” Deazley does however, note a tacit earlier recognition of the performance right in the court’s ruling.

¹⁵⁶ See for example in this regard the decisions in *Coleman v Wathen* (1793) 5 D. and E. 245, and *Murray v Elliston* (1822) 5 B. & Ald. 657, where the courts refused to grant protection in respect of the public performance of works that had been published by the copyright owners.

¹⁵⁷ (1769) 4 Burr. 2303, at 2342. Emphasis added.

¹⁵⁸ Deazley “*Commentary on Dramatic Literary Property Act 1833*” 2008 www.copyrighthistory.org (date of use: 10 December 2017).

The first statutory recognition of the right of public performance in England was in relation to dramatic works.¹⁵⁹ Deazley¹⁶⁰ recounts the events that led to this recognition of the right: Two of the major metropolitan theatres, Covent Garden and Drury Lane had carried out a number of prosecutions against various minor theatres for performing so-called “legitimate drama” (i.e. spoken drama), thus violating patents initially granted to them in 1662. When certain theatrical managers were convicted and fined a large sum as a result, the managers, together with “performers and spectators alike”, felt the need to petition parliament for a change in the laws relating to dramatic performances. This cause was taken up by Edward Bulwer-Lytton, a novelist and would-be popular dramatist, who proposed the formation of a Select Committee to enquire into “the state of the laws affecting dramatic literature, and the performance of the drama”. In this regard Bulwer-Lytton bemoaned the state of the English laws dealing with dramatic literature, arguing how “infinitely more harsh and consistent” the laws were compared to those prevailing in France. He made the case that the House of Commons had been “indifferent” to the state of dramatic copyright, “which ought to be the most sacred of all” property, and charged, quite emotionally,¹⁶¹ that if Shakespeare himself was still alive, his plays would be “acted every night all over the kingdom”, “and Shakespeare himself, the producer of all, might be starving in a garret.”¹⁶²

As Deazley recounts, it seems that this emotional deference to Shakespeare achieved its intended objective, as the House yielded to the petition and appointed the proposed Select Committee under the chairmanship of Bulwer-Lytton. In the hearings that ensued the desirability of the French system of protection for dramatic rights was a recurring theme and the French model was scrutinised to highlight its benefits. These efforts led to the enactment of the Dramatic Literary Property Act of 1833, which, as Deazley observes, was “a variation of [the] French model”. The act came to be popularly known as the “Bulwer-Lytton’s Act” as a result of Bulwer-Lytton’s involvement in its enactment.¹⁶³ The Act made it explicit that it applied in respect of dramatic works – it applied to “the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece of entertainment”. *It thus did not apply to musical compositions.*

The Act in essence extended the protection granted to literary works in terms of the 1814 Act in respect of “printing and reprinting”, to dramatic works, but went further in that it granted a right of “representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever”.¹⁶⁴ The Act applied in respect of both published and unpublished works,¹⁶⁵ and it

¹⁵⁹ Just as it was in regard to the *grand droit* in France in 1777.

¹⁶⁰ See Deazley “*Commentary on Dramatic Literary Property Act 1833*” 2008 www.copyrighthistory.org (date of use: 10 December 2017).

¹⁶¹ Or as Stephens has noted, “in a high-minded flow of rhetoric”. Stephens *The Profession of the Playwright* 91.

¹⁶² Deazley “*Commentary on Dramatic Literary Property Act 1833*” 2008 www.copyrighthistory.org (date of use: 10 December 2017).

¹⁶³ See also Dean *Application of the Copyright Act* 119 for a brief discussion of this legislation.

¹⁶⁴ It provided that the author of any such dramatic work would “have as his own property the sole liberty of representing, or causing to be represented”.

¹⁶⁵ In respect of published works the right granted applied if the work was printed or published within ten years before the Act came into force, and endured for twenty eight years, but if the author was alive at the end of this period, it endured for the life of the author. With regard to unpublished works the Act “did not impose any finite term”. Deazley “*Commentary on*

applied in both the United Kingdom and its dominions. Any person who infringed this right was, in respect of each unauthorised “representation” made, liable to pay the greater of “an amount not less than forty shillings”; “the full amount of the benefit or advantage arising from such representation” or “the injury or loss sustained by the plaintiff”, “together with double costs of suit”. It has been observed that as a result of this statute, “for the first time it was possible to make a realistic attempt to enforce dramatic copyright in the provincial theatres.”¹⁶⁶

In light of the foregoing, it is contended that the protection granted in the Bulwer-Lytton’s Act was in respect of *grand rights* (as discussed above) *and not performing rights* as the term is understood today.¹⁶⁷ It granted to the author as his own property, “the sole liberty of *representing*, or *causing to be represented*”, a dramatic work belonging to him, “at a *place of dramatic entertainment*”.¹⁶⁸ This distinction is however, often not maintained and grand rights are also lackadaisically designated as a “performing right” in the English literature.¹⁶⁹ If we were merely concerned with the *grammatical* meaning of the English phrase “performing right” this would be easy to establish. It can easily and without much contestation be explained as “the right to perform”, and in a general sense this is what the right is concerned with. Nevertheless, in the legal sense it would be important to understand the legal meaning imputed to the phrase. To do this it would in turn be important to understand the *historical framing* and development of the right. As D’Alton has observed:

Given the similar contemporary usage of the terms it is important to maintain the distinction, *particularly when considering the historical development, as they arise in different historical periods for different reasons.*¹⁷⁰

In this regard it is submitted that the best understanding of the historical development of the right is to be found in its earlier genesis in France – in particular in the distinction made between *grands droits* (grand rights) and *petits droits* (small rights), as dealt with above. D’Alton has in this regard noted that

... [SACEM, i.e. the French performing right organisation, and the first full collective management organisation operating in the area of musical works] ... had a profound effect upon the establishment and acceptance of a public performance right within common-law jurisdictions.¹⁷¹

Dramatic Literary Property Act 1833 2008 www.copyrighthistory.org (date of use: 10 December 2017); see also Dean *Application of the Copyright Act* 119.

¹⁶⁶ Stephens *The Profession of the Playwright* 91.

¹⁶⁷ Which, as we asserted, applies in respect of *small* musical works only. In fact, the right granted was the dramatic right, which includes the *grand right* in respect of the performance of dramatico-musical works but also includes (in this case), the *dramatic play right* in respect of dramatic works not incorporating musical works. For a further discussion of the distinction see Shanker, Guinn and Orenstein *Entertainment Law* 8-14 – 8-16. Kohn and Kohn *Music Licensing* 1303 – 1356 provides a more intricate distinction, focussing on the rights licensed by theatrical production companies and agencies; the rights licensed by performing rights societies and the rights licensed by music publishers.

¹⁶⁸ Emphasis added.

¹⁶⁹ For a modern characterisation of the right in this manner see Albinson 2012 *Music & Politics* 1, who asserts that “[p]erforming rights are generally divided into two categories: 1. *grands droits* ... and 2. *Petits droits* ...” For such characterisation in respect of pre-1912 English law see for example Dean *Application of the Copyright Act* 119 and 129; MacGillivray *A Treatise Upon the Law of Copyright* 201 – 231.

¹⁷⁰ D’Alton *Public Performance Right* 160.

¹⁷¹ D’Alton *id* at 161.

As indicated, grand rights relate to the public performance of dramatico-musical works while small rights - also known as *performing rights* - relate to the public performance of pure (i.e. non-dramatic) musical works.¹⁷² This is how the rights were understood and delineated when they were developed in France. In the first formal treatise of the subject of collective management commissioned by the World Intellectual Property Organization (WIPO) Dr. Mihály Ficsor, a former Deputy Director-General of WIPO in charge of copyright and related rights, makes this distinction clear.¹⁷³ The distinction is also clear from the work of Gavin McFarlane, who has studied the historical development of the performing right from an English perspective.¹⁷⁴ While McFarlane's deliberation on the performing right prior to the formation of the *Performing Right Society* (PRS)¹⁷⁵ clearly and admittedly relates the concept to the public performance of dramatico-musical works (which was, in essence, the effect of the English legislation at the time), his reference to the concept after the formation of the PRS is purely in relation to *small rights* musical works.¹⁷⁶ In this regard the author observes:

While this book is an account of the development of the performing right itself, from this point forward a large part of the history must be traced from the development of PRS. This is not to render the rest of the work simply a history of PRS: however the Society was the only organisation in Britain attempting to collect in respect of performing rights on such a vast scale. It fought most of the major battles to establish the principles, and by virtue of its operations became extremely well known. ...¹⁷⁷

In this way the understanding of the concept of “performing rights” as a technical concept in English jurisprudence was henceforth framed within the context of “musical works” rather than dramatic or dramatico-musical works – thus bringing the concept within the distinction contemplated in the French system with the use of the concepts *grands droits* and *petits droits*.¹⁷⁸ Partly owing to “the absence of a similar operation in the field of dramatic literature”, and perhaps also as a result of the guidance of its first general manager – the erstwhile general manager of the London agency of

¹⁷² The instinctive contemporary reference to grand rights as *dramatic performance rights* is perhaps the most colloquially-acceptable reference to the right today. The phrase “dramatic *performing right*” is also excusable, since, by inserting the word “dramatic”, no confusion is created as to whether this is a reference to musical works or not. See MacGillivray *A Treatise upon the Law of Copyright* 204 who uses this phrase. Lipinski *The Librarian's Legal Companion* 344 uses both phrases interchangeably.

¹⁷³ Ficsor M *Collective Management of Copyright and Related Rights* (WIPO, Geneva: 2002). This text is, in fact, an improvement of an earlier text published in 1990 (see Ficsor *id* at 9 – 14 for a background to the writing of the text). Throughout the text Ficsor's usage of the expression “performing rights” is clearly in reference to musical works.

¹⁷⁴ See McFarlane G *Copyright: The Development and Exercise of the Performing Right* (John Offord, Eastbourne: 1980), generally.

¹⁷⁵ The first collecting society in respect of the public performance of musical works in the United Kingdom, formed in 1914. It is today one of the largest performing rights organisations (PROs) in the world.

¹⁷⁶ It is true that McFarlane does allude to a “performing right in records”, but he does so critically and in fact conjectured that such a right might eventually experience demise. See McFarlane *Performing Right* 131 – 141. (We are of course today aware that the needle-time right, which is what McFarlane was referring to, has gained ascendancy rather than declining). In relation to the issue under discussion, McFarlane admits that the performing right contemplated in the 1833 and 1842 Acts imposed a “requirement for a dramatic element in the performing right”; more notably, he admits that “at the time of the 1875 Commission the performing right seemed to be almost entirely exploited in the case of the grand rights.” *Id* at 77. In contrast, McFarlane asserts that, with the enactment of the Copyright Act, 1911, “an effective performing right” was introduced, bringing about a “changed situation” which made it feasible to form the PRS in 1914. *Id* at 94 – 95; 96. The name given to the new collecting society, *Performing Right Society*, may itself be indicative of this paradigm shift in the understanding of the right, as it implied that the administration of “performing right” meant the administration of the public performance right in musical works.

¹⁷⁷ *Id* at 97.

¹⁷⁸ For the early involvement of the PRS in the judicial framing of the performing right see McFarlane *id* 103 – 110.

SACEM¹⁷⁹ – PRS was to champion the development of the performing right in English law as a right in small rights musical works, à la French *petits droits*.¹⁸⁰ It is submitted that the modern usage of the phrase “performing rights” in colloquial speech aligns with this understanding of the performing right. In other words, if one were to mention the expression “performing right” or “performing rights society” what would immediately come to the minds of persons familiar with the workings of the music industry is that this is a reference to *small rights* musical works. It would be unlikely for such persons to ask the question: “Which performing right are you referring to?” This position has also been taken into account by certain national legislations. Thus the expression “performing rights society” is defined in the US Copyright Act as:

... an association, corporation, or other entity that licenses the public performance of non-dramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC, Inc.¹⁸¹

However, if a person were to mention the phrase “performance rights” without elaboration it is likely to elicit the question “which performance rights?”; this is because in this context the phrase could be a reference to rights in musical works (i.e. the performing rights dealt with here); a reference to rights in sound recordings (the so-called needle-time rights); a reference to the performance of dramatico-musical works (the grand right) or even a reference to the performance of any other copyright work in which such a right subsists. In spite of this however, this interchangeable or unqualified use of the two expressions lingers on in textual analyses today. A proper analysis would reveal the fact that this largely arises from the *bungled* development and limited understanding of the performing right in England from its recognition in the Bulwer-Lytton’s Act until the issue was resolved through the enactment of the 1911 Copyright Act and in particular, the formation of the PRS – to which issue we must now return.

There is ample authority to support the position that the “performing right” was less understood before the formation of the PRS in England.¹⁸² One could ascribe this situation to a strained or contrived development of this right in respect of musical works in English law. The Bulwer-Lytton’s Act was clearly not meant to apply to small rights musical works and composers of opera and musical works were able to benefit from it only if their works “were an integral part of [a] dramatic work”.¹⁸³ As highlighted above, the recognition of the right was championed by the minor theatres and playwrights and not by the formal music publishing industry. As indicated, music publishers

¹⁷⁹ See McFarlane *id* at 97 and 131.

¹⁸⁰ See related to this McFarlane *id* at 77.

¹⁸¹ Definition of “performing rights society” in § 101 of the US Copyright Act, 17 US Code § 101 et seq. This is also inherent in the name of the UK performing rights organisation, the PRS, which when expanded is simply Performing Right Society.

¹⁸² McFarlane *id* at 69 acknowledges this, observing that even after the enactment of the Dramatic Literary Property Act the right remained “less well understood ... than it is today” (i.e. when he wrote his book in 1980). He then notes (at 33 n 38) that even after the Copyright Act of 1842 granted a clear performing right in respect of musical works, “[the] right ... was to remain almost totally unexploited ... until ... 1914.”

¹⁸³ D’Alton *Public Performance Right* 161. It is doubtful if any music composers actually did this. McFarlane refers to two composers who had joined the Dramatic Authors Society, which was formed to administer the dramatic performance right. It is said that these composers had, “curiously”, given instructions to the society to collect for them only in respect of “operatic selections” and not in respect of single songs, apparently taking the view “that it would be to the disadvantage of sheet music sales to try to collect for single songs.” McFarlane *id* at 72.

were hostile to the recognition of the right, as they felt that it would encroach upon lucrative print music sales; and composers, who had less protection in England than they had in France, could not take up this cause.¹⁸⁴ Nevertheless, even with dramatic authors the protection provided by the Act was not always certain. Thus it has been acknowledged that "... the operation of the Act was far from straightforward."¹⁸⁵

As stated above, protection under the Bulwer-Lytton's Act was in relation to "representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever".¹⁸⁶ The Act did not use or include the word "performing" or the phrase "performing right", thus clearly implying that the intention was not to protect musical works. This is also confirmed by the fact that the subject-matter of protection was clearly designated as "dramatic pieces", which included a tragedy, comedy, play, opera or farce. Even with this however, it has been observed that the Act still did not bring clarity regarding what constituted the performance of a dramatic work, giving rise to questions as to the meaning of "dramatic piece", "place of dramatic entertainment" and "representation".¹⁸⁷ In relation to musical works an opportunity was lost when the Literary Copyright Act 1842 (the Talfourd's Act, discussed above in relation to print rights) was passed. This Act purported to extend the protection ("benefits") granted to dramatic works under the Bulwer-Lytton's Act to musical compositions. Sections 20 and 21 of the Act granted to the authors of "any dramatic piece or musical composition", "the sole liberty of *representing or performing*, or causing or permitting *to be represented or performed*" such dramatic piece or musical composition.

The effect of sections 20 and 21 of the Talfourd's Act was that in respect of print rights, musical and dramatic works were protected as "books", and in respect of public performance rights they were protected separately as either "musical composition" or "dramatic work".¹⁸⁸ In essence sections 20 and 21 of the Talfourd's Act created two rights – one a copyright in respect of print rights, and the other a public performance right, and these rights were seen as being "quite distinct from one another".¹⁸⁹ In relation to the works the rights were nevertheless the same and expressed in a similar manner. *It is the writer's submission that the lumping together of the public performance right relating to dramatic works, with the right applicable to musical compositions, led to a confused understanding and characterisation of the performing right in English law prior to the setting up of the PRS.* Whereas in France the two rights developed separately and in different historical periods – and were accordingly distinctly identified as either a *grand droit*, in the case of dramatic works and a

¹⁸⁴ See also Brown and Davison *Sounds of the Silents* 249

¹⁸⁵ See Alexander I "Neither Bolt nor Chain, Iron safe nor Private Watchman, Can prevent the Theft of Words': The Birth of the Performing Right in Britain", in Deazley, Kretschmer and Bently (eds) *Privilege and Property* 308.

¹⁸⁶ The writer was able to find copies of both the Bulwer-Lytton's Act and the Talfourd's Act in Burke *Treatise on the Law of Copyright* annexed as Appendix No. I (at 69 – 72) and Appendix No. III (at 79 – 97).

¹⁸⁷ See Alexander I "Neither Bolt nor Chain, Iron safe nor Private Watchman, Can prevent the Theft of Words': The Birth of the Performing Right in Britain", in Deazley, Kretschmer and Bently (eds) *Privilege and Property* 310 – 311 for a discussion of these issues.

¹⁸⁸ See in this regard Dean *Application of the Copyright Act* 129.

¹⁸⁹ MacGillivray *A Treatise upon the Law of Copyright* 201; also Copinger *Law of Copyright* 1 observing that the sole and exclusive right of performing a work in public was "another and analogous right" to copyright. See however Scrutton *Law of Copyright* at 73, saying the opposite i.e. that both rights were known as "copyright" in English law. Scrutton decries the fact that such extensive use of the term "confuses", and expresses a desire that copyright should be limited to the right of publishing in print!

petit droit (or *performing right*), in respect of non-dramatic musical works – this was not the case in England. This lack of distinction between the two rights in legislation caused confusion with regard to the correct legal characterisation of the performing right.¹⁹⁰

To illustrate the point further: under the Bulwer-Lytton's Act protection was given in respect of "dramatic pieces". Thus musical works were only protected to the extent that they satisfied the definition of "dramatic work".¹⁹¹ This is the *grand droit*. The fact that a musical composition was part of a dramatic piece did not imply that it would always be protected however. Thus in the case of an opera, which is a dramatic piece mainly characterised by words (the libretto), the court was not concerned about the fact that "the music of the piece was the main object of attraction" and "the words were a mere vehicle for the music", ruling that the words were protected by the Act as being "a part of a dramatic piece", while not seeing the need to enquire if there was any infringement of the musical composition.¹⁹² The situation was no better under the 1842 Talfourd's Act. When a case was brought before the courts¹⁹³ which should have confirmed if non-dramatic musical works were indeed protected under the statute, the court avoided answering the question by ruling that the work was a dramatic piece.

The case concerned a song, "The Ship on Fire", where the only dramatic action exhibited was expressed by the singer, who sang the song while seated at the piano, and where there was no costume or scenery associated with the performance. The defendant alleged that because the performer merely performed the words of the music composition what was performed was a "song" and not a 'musical composition – furthermore, it was not a dramatic piece because the building in which it was performed was not a "place of dramatic entertainment". The essence of the case was therefore a determination of whether the performing right in respect of musical works applied in respect of all places of public performance, or if it was only limited to a performance in a place of dramatic performance. As can be recalled, the Talfourd's Act extended protection to *musical compositions* while the Bulwer-Lytton's Act extended protection to *dramatic pieces* if they were presented at a *place of dramatic entertainment*. The defendant furthermore argued that the performance did not infringe the musical composition because the composition needed to have the same dramatic character as the dramatic piece contemplated in the 1833 Act (it being argued that the 1842 Act merely brought musical compositions within the operation of the 1833 Act).

Considering the facts of the case one would have expected that the court would rule that the performance was of a musical composition and thus infringed upon the composer's performing right. Certainly this is how this matter would have been resolved today, and, it is submitted, this is how the

¹⁹⁰ The confusion was apparently also evident in the manner in which the right was licensed. In this regard it has been noted: "... [T]he conception of performing rights in Britain at this time was similar to that of sheet music sales", by which is meant the fact that the target user was the performer, while in France the target user was the venue in which the performance took place. Brown and Davison *Sound of the Silents* 251.

¹⁹¹ In this regard "a mere common, ordinary musical song", which required neither acting nor scenery for its production" was held not to be a dramatic work. See *Fuller v Blackpool Winter Gardens* (1895) 2 Q.B. 429, at 442.

¹⁹² *Planché v Braham* (1838) 4 Bing. N.C. 17.

¹⁹³ *Russell v Smith* (1848) 12. Q.B. 217.

matter would have been resolved if the infringement would have occurred in France at the time. However, reflective of the fuddled state of the conception of the “performing right” in English law at the time, the court found the work to be a dramatic piece, thus ruling that because of this, the building in which the work was performed was a place of dramatic entertainment. According to the court, the feeling that the song induced was enough to constitute it a dramatic work rather than a musical work: “It moves terror and pity and sympathy, by presenting danger, and despair, and joy, and maternal and conjugal affection”, the court observed, stating further that “[t]he nature of the production places it rather in the representative than the narrative side of poetry”, thus making it “dramatic in its widest sense”, by which was meant “any piece which on being presented by any performer to an audience would produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience.”

Commenting on the impact of this case McFarlane has observed:

This was one reason for the reluctance of the performing right owners for many years thereafter to exercise the right. There was considerable uncertainty following *Russell v. Smith* as to whether (a) a musical composition had also to contain a dramatic element, as in an opera or an operetta, and (b), whether the unauthorised performance had to be given in a theatre for the 1842 Act to bite. ...¹⁹⁴

Other cases which were decided after the *Russell* decision perpetuated the confusion created by *Russell*, deeming musical compositions that would have ordinarily been considered to be small rights musical works (and it is submitted, would have been so deemed if the cases were decided in France at the time), to be dramatic pieces.¹⁹⁵ From this it would appear that the conception of the performing right in English law (prior to 1912) was that of a performance involving *dramatic entertainment* as conceived in the Bulwer-Lytton’s Act. Thus writing in 1902 MacGillivray defined “performing right” as:

the exclusive right of representing or performing in public dramatic or musical works.¹⁹⁶

This of course arose from combining the protection granted in respect of dramatic works under the Bulwer-Lytton’s Act, with that granted in respect of musical compositions under the Talfourd’s Act. In contrast Scrutton, writing in 1903 – and in what the writer considers to be a more correct description of the expression as it was used at the time – saw the need to call the performing right an “acting right” (thus implying that it was concerned with non-dramatic musical works); and suggested that the term should be limited to being called either a “play-right” or more preferably, a “stage-right”.¹⁹⁷ The

¹⁹⁴ McFarlane *Performing Right* 58.

¹⁹⁵ McFarlane *ibid* points out that such cases “came only very slowly”. See for example *Clark v Bishop* (1872) 25 L.T. 908, where a song sung in a music hall was deemed to be a dramatic piece because “[t]he plaintiff, by his powers of singing, acting and characterisation, had made this song a thing of value”; see also *Roberts v Bignell* (1887) 3 T.L.R. 552, where a song similarly sung at a music hall was deemed a dramatic piece. The confusion around this is evident from the case of *Wall v Taylor* (1883) 11 Q.B.D. 102, where a suggestion was made that, as a result of the Talfourd’s Act, every musical entertainment was to be treated as a dramatic piece; a position rejected by Brett M.R.

¹⁹⁶ MacGillivray *A Treatise Upon the Law of Copyright* 201.

¹⁹⁷ Scrutton *Law of Copyright* 73. See also Copinger *Law of Copyright* 79 noting that “the author ... has two distinct rights in his composition: one, that of copyright proper ...; the other, what may be called the *acting right* or *performing right*, that is to say, the right to prevent other persons from publicly representing or performing the piece without the author’s

problem, it is submitted, arose from the fact that a distinction was not made between the public performance right relating to musical compositions and that relating to dramatic works, when protection was extended to musical compositions in the Talfourd's Act. It is in this regard to be recalled that when providing protection to dramatic works the form of exploitation under the Bulwer-Lytton's Act was expressed as "representing or causing to be represented". When the Talfourd's Act extended protection to musical compositions the expression "performing or causing to be performed" was added, but no distinction was made between dramatic works and musical compositions in this regard. In other words, instead of specifically stating that the act of "representing or causing to be represented" related to dramatic works, and the act of "performing or causing to be performed" related to musical compositions – thus maintaining the distinction made between the *grand droit* and the *petit droit* in French law – both expressions could henceforth be used interchangeably in respect of *either work*.¹⁹⁸

It is submitted that had a clear distinction been made between these two forms of exploitation at this stage – with the concept of "representing" being limited to dramatic performance and that of "performing" being limited to non-dramatic musical performance – a proper jurisprudence relating to the concept of "performing right" would have been developed in English law at that stage. For example, as Alexander has noted, the relationship between copyright and the right of representation was not well understood, and there was ongoing confusion in this regard.¹⁹⁹ In *Planché v Braham*²⁰⁰ the expression "representation" was held to mean "the bringing forward on stage or place of dramatic representation", including the singing of one or more songs from a theatrical piece.²⁰¹ Yet the fact that the terms "represent" and "perform" were used interchangeably in relation to both dramatic works and musical compositions begs the question why a musical composition not intended for or performed on stage or "place of dramatic representation" would be considered to be a "dramatic piece".²⁰²

consent." Emphasis added. In this regard it seems that Copinger saw the wisdom to distinguish between these two forms of performance rights, referring to the one (in relation to dramatic works) as an *acting right*, and the other, in relation to musical works, as a *performing right*. See also Bowker *Copyright* 178 *et seq* who uses the term "playright" interchangeably with "performing right", and Drone *Law of Property* 203, who observes, "The right of publicly representing or performing a dramatic or musical composition is treated under the head of playright" (emphasis added) – thus highlighting the confusion that existed with regard to this right.

¹⁹⁸ In this regard Scrutton *id* at 98, writing in 1903, observed: "... [T]he provisions with regard to musical compositions are almost identical with those ... applicable to plays", having observed earlier (at 96): "Musical compositions in the English law go hand in hand with the drama, probably on account of the double nature of each as adopted to *printing* and to *public performance*, and also because they shade into each other gradually through operas and songs in character. And on any musical composition questions may arise as to the copyrights or performing rights in the air, the words, or the accompaniment, which may be in different hands, while the words of the song may have the character of a dramatic piece." Emphasis added. In writing in this manner, the author seemed to associate the act of *printing* with the musical composition *per se*, and the act of *public performance* with the dramatic work.

¹⁹⁹ Alexander I "Neither Bolt nor Chain, Iron safe nor Private Watchman, Can prevent the Theft of Words': The Birth of the Performing Right in Britain", in Deazley, Kretschmer and Bently (eds) *Privilege and Property* 313 - 314.

²⁰⁰ (1837) 2 Car. & P. 68, at 74.

²⁰¹ Consider also *Wall v Taylor* (1883) 11 Q.B.D. 102 where it was held that the right conferred under the 1842 Act in respect of both musical and dramatic compositions was "the sole right of representing in public".

²⁰² Sometimes conflicting positions were given, such as the divergent position taken on appeal in *Wall v Taylor; Wall v Martin* (1881) 9 Q.B.D. 727 that the right conferred to both dramatic and musical compositions under the 1842 Act was not limited to "places of dramatic entertainment", but in fact that "performing a dramatic piece makes the place where it is performed a place of dramatic entertainment" (per Brett MR, at 108). However, in *Duck v Bates* (1884) 13 Q.B.D. 843 he seemed to have realised his mistake, confessing that he may have been interpreted as going too far in *Wall v Taylor; Wall*

Regarding the charge of confusion in English law relating to these concepts the writer is not alone. Writing in 1912 Bowker made this observation:

The English law as to dramatic and musical copyright and playwright and performing right, has been most confusing if not contradictory, and authorities differ, as do MacGillivray and Scrutton, in its interpretation.²⁰³

As McFarlane has observed, by the mid-nineteenth century there was a “general dissatisfaction with the whole condition of the law of copyright”, which is why a Copyright Commission was convened in 1875/6 under the chairmanship of Lord John Manners to address the issue.²⁰⁴ McFarlane specifically mentions the “restricted operation of the performing rights” as being one area of dissatisfaction leading to the formation of the Commission²⁰⁵ – confirming the view expressed in this discussion. McFarlane reports that “[a]t the end conclusion of their deliberations [the Commissioners] handed down a searing indictment on the state of the law” and the treatment of the rights of “printed publication” and “public performance” in particular; prompting McFarlane to observe: “... [I]t is doubtful whether the extent of the concepts involved was fully understood at the time.” The writer’s contention is that at least in respect of the performing right, the nuances relating thereto were not fully understood or appreciated. During the hearings conducted as part of this Commission, it was submitted that it was not clear, in relation to the protection of musical compositions under the 1842 Act (the Talfourd’s Act)

whether the draftsman of the 1842 Act intended this only to apply to dramatico-musical works such as operas, but it does appear that the interpretation that was being put on it was that all musical works at this time were caught, *if the performance were in a place of dramatic entertainment*.²⁰⁶

This makes it clear that the ambit of the performing right as contemplated in British copyright law prior to the enactment of the Copyright Act, 1911 was of a limited and confused state.²⁰⁷ Because of

v Martin because the statute made it clear that certain performances at certain places (e.g. private and domestic performances), thus a representation had to be a “public” representation, i.e. “a representation to which any portion of the public are freely admitted with or without payment.” In the case *Bowen LJ* acknowledged (at 849): “We have to construe a statute which it is not easy to interpret; the subject matter is difficult, and the words used are vague.” The court’s emphasis on a representation having to be a “public representation” was nevertheless a precursor to the modern understanding of the right of public performance and would be used to expand on this concept. See for example *Harms Ltd and Chappell v Martans Club Ltd* [1927] Ch 526 where *Duck v Bates* was applied and *Jennings v Stephens* [1936] Ch 469 where it was distinguished. In the United States it seems that a better understanding of the concept of “dramatic composition” existed around the time of *Wall v Taylor*. In the case of *Fuller v Bemis*, related by Bowker *Copyright* 177 – 178 the US Circuit Court in New York held that a dramatic composition had to “tell some story”, further observing: “The plot may be simple ... but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary. A series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, telling no story, portraying no character, depicting no emotion, is not a dramatic composition.”

²⁰³ Bowker *Copyright* 181.

²⁰⁴ McFarlane *Performing Right* 61.

²⁰⁵ *Ibid.*

²⁰⁶ *Id* at 63.

²⁰⁷ In some later cases the courts sought to resolve the issue left hanging in *Russel v Smith* (see n 193 supra), namely the question whether the 1833 and 1842 statutes applied in respect of every public performance of a musical work. Thus in *Wall v Taylor*, *Wall v Martin* (1881) 9 Q.B.D. 727 the court found that the right conferred in respect of musical compositions under the 1833 and 1842 statutes was a general right of public performance, with Cave J observing: “No sensible reason was, or as it seems to us could be given why the right of performing a musical composition should be so limited (to a performing right in places of dramatic entertainment) and it is to us quite impossible to conceive any ground for a distinction between performing a musical composition at a place of dramatic entertainment or at a place of entertainment of any other kind.” This position was more expressly articulated at the turn of the twentieth century in the leading case of

this state of affairs it has been observed that “only the owners of the performing right in what were felt to be unarguably dramatic works were attempting to enforce that right.”²⁰⁸ In other instances no confusion existed: it was expressly argued that *petits droits*, while recognised and used in France were not suitable for England and were “impossible” there – a situation of “*autres pays, autres mœurs*”.²⁰⁹ This attitude was perpetuated by the activities of Harry Wall,²¹⁰ who had used

Fuller v Blackpool Winter Gardens [1895] 2 Q.B. 429, where the court confirmed the judgment of the lower court that a song sung in character costume was not a dramatic piece – thus curtailing the prevailing trend where musical compositions seen as being meant for the stage, whether theatre or music hall, would be deemed to be dramatic pieces. In the case *Esther MR* observed that the determining factor for whether a song is a dramatic piece or not is the “character of the composition when it was first written and published”, arguing: “If the dress of the singer could have that operation, the singer and not the author of the song would be the person who caused it to be a dramatic piece.” The court reviewed the previous cases where songs were held to be dramatic pieces and (quite defensively) observed that it was “not necessary to determine whether each of these cases was rightly decided or whether the reasons given in each for holding the song to be a dramatic piece [were] satisfactory”, arguing that each case had to be decided on its own attendant circumstances. For a song to be a dramatic piece, Smith LJ observed, “it must be such a song that for its proper representation, acting, and possibly scenery, formed a *necessary ingredient*”. Emphasis added. Thus it appears that at this stage a clearer distinction between the *grand droit* (in the form of a dramatico-musical work) and the *petit droit* (in the form of non-dramatic musical works) was beginning to develop. As MacGillivray *A Treatise Upon the Law of Copyright* 209 has observed: “There must be more than the dramatic flavour, there must be the *dramatic form*; that is to say, the work must be so constructed as to be obviously intended for reproduction by means of acting with scenic effect.” Emphasis added. The word “reproduction” used here is perhaps better expressed by the word “adaptation” – but adaptation was not, at this stage, an identified act of exploitation of a copyright work.

²⁰⁸ *Id* at 58. This position is supported by Alexander *Copyright Law and the Public Interest* 136, who notes: “Most music publishers were firmly of the view that only songs used in conjunction with dramatic works, or performed in theatre, music halls or as parts of operas were subject to the statutory penalties.” Even in the area of dramatic works however, the legislation was not always effective. It has been suggested that this may be one reason why the Dramatic Authors Society (DAS), which was set up to deal with the administration and enforcement of the “performing right”, was effective for only a period of fifty years before facing its demise. See Alexander *id* at 130 – 134. It has been observed that the DAS was “in effect, Britain’s first copyright collection society.” Deazley “*Commentary on Dramatic Literary Property Act 1833*” 2008 www.copyrighthistory.org (date of use: 12 December 2017). McFarlane places the year of the society’s formation in 1832, a year before the enactment of the Dramatic Literary Property Act, and suggest that it was formed “probably in anticipation of the new statutory right for dramatic authors in the *Dramatic Copyright Act 1833*.” Regarding this society McFarlane however notes that “no one had any notion that a society such as the Dramatic Authors Society had existed, an no organisation that [he had] contacted in Britain or abroad [had] any record that it existed.” McFarlane *Performing Right* 65. Although certain successes had been reported in respect of the DAS, other problems were highlighted, such as internal disunity, where certain prominent members left the society; non-compliance from the provincial theatre managers, who moved “from theatre to theatre”, and did not pay, being not accustomed to paying for performing plays, and “either avoided or did not understand the new system”; expensive and ineffective enforcement of the rights under the common law system; and the inability of the society to institute infringement proceedings in its own name as a result of the Treasury’s refusal to register is under the Friendly Societies Act 1875. Alexander I “Neither Bolt nor Chain, Iron safe nor Private Watchman, Can prevent the Theft of Words’: The Birth of the Performing Right in Britain”, in Deazley, Kretschmer and Bently (eds) *Privilege and Property* 309 – 311.

²⁰⁹ “different countries, different customs”. These are words attributed to William Boosey, a prominent publisher of the time, in opposition to attempts for form a collecting society similar to SACEM in Britain. Boosey, who was later to become the first president of the PRS, referred to “vexatious rights of performance that never have been, and never will be, understood here”. Ehrlich *Harmonious Alliance* 6. By referring to performing rights as “vexatious” and alluding to a “strong prejudice” against the enforcement of such rights in England Boosey was apparently referring to the activities of one Harry Wall (McFarlane calls him Thomas Wall but Ehrlich and others insist his real name was Harry Wall). Harry Wall was an “informer” or more appropriately, “common informer”, defined as “a person who sues for a penalty which is given to any person who will sue for it, as opposed to a penalty which is only given to a person specially aggrieved by the act complained of.” See Rapalje and Lawrence *A Dictionary of American and English Law* 654. The practice of common informers developed in medieval England when there was no police force and the public was allowed to sue for penalties. The practice persisted for centuries until many of the laws permitting this were abolished by the Common Informers Act 1951 (14 & 15 Geo. 6, c. 39). Wall, who did not claim to represent the interests of composers or the public, but was merely “seek[ing] to protect my own interests – singularly selfish individual that I am”, saw an opportunity in the penal provisions of the Dramatic Property Act 1833 and its extension to musical compositions in the Literary Copyright Act 1842 – and, operating under the name Copyright and Performing Right Protection Office (sometimes called Authors’, Composers’ and Artists’ Copyright Protection Office) started to prosecute persons who performed the musical compositions of mainly deceased composers, demanding payment of the penalty of £2 provided for in the legislation. Wall was notorious for using heavy-handed tactics (like demanding payment to reveal the works under his control) and often pounced on unsuspecting offenders without first giving them notice and often waiting for them to infringe the performing right so he could prosecute them (rather than giving them prior warning not to infringe the right). Wall was also successful in enforcing payment of the penalty in court on a number of occasions and, in this regard, was accused of “unscrupulous manipulation of performing right” and in hindsight is considered to ‘the world’s first “copyright troll”’. See generally Ehrlich *Harmonious Alliance* 2 – 3, 6; McFarlane *Performing Right* 79 – 89; Deazley, Kretschmer and Bently (eds) *Privilege and Property* 318 – 326.

²¹⁰ See *ibid*.

underhanded means to enforce the performing right in musical works. Wall's activities led to widespread antagonism to the system of performing rights in musical works, "soured public opinion for a generation, and perpetuated opposition to its future use, however restrained and scrupulous".²¹¹

Wall's unscrupulous actions formed part of the evidence given during the 1875/6 Copyright Commission and eventually led to the enactment of two statutes, namely the Copyright (Musical Compositions) Act 1882 and the Copyright (Musical Compositions) Act 1888. On face value these statutes appeared to lend credence to the performing right in musical works; this can be seen as one positive outcome from Wall's controversial practices, where in reaction the performing right was brought to the spotlight and parliament was forced to closely consider it. The Preamble to the 1882 Act made it explicit that it was enacted to "to amend the law relating to copyright in musical compositions, and to protect the public from vexatious proceedings for the recovery of penalties for the unauthorised performance of the same" – an unequivocal reference to Wall's dubious activities. A prominent feature of the 1882 Act was its requirement (sections 1 – 3) that, if the owner of a performing right wanted to exercise (i.e. retain) the performing right, he was obliged to ensure that a notice stating that the performing right was reserved was printed on the title page of every published copy of the musical work.²¹² What would prove to be a shortcoming of the Act was the fact that it applied in respect of compositions first published after the passage of the Act.

A further provision (section 4) related to the fact that, where the plaintiff failed to recover more than the statutory penalty contemplated in the 1833 Act, the cost payable would be at the discretion of the trial judge. This was seen as a measure to deter Wall and others like him from pursuing his vexatious litigation at the pain of not being able to recover his costs. It has however been observed that this objective was not achieved as Wall "appear to have been fairly active in the country courts", at times using the strategy of instituting multiple infringement actions which enabled him to recover more than the minimum statutory penalty, thus, it appears, escaping the provisions of section 4 of the 1833 Act (as the provision appears to have been applicable only where he was not able to recover the minimum penalty fee).²¹³ As a consequence, the Copyright (Musical Compositions) Act 1888 was enacted to deal with this loophole, and in its preamble made it explicit that it was "expedient to further amend the law relating to copyright in musical compositions and to further protect the public from vexatious proceedings for the recovery of penalties for the unauthorised performance of the same", thus recognising the persisting activities of Wall.

²¹¹ Ehrlich *Harmonious Alliance* 2.

²¹² This appears to be the earliest form of the practice of reservation of rights on the physical copies of copyright-protected works. Today a typical CD or DVD sleeve or cover contains words similar to this: "All rights of the copyright owner reserved. No unauthorised reproduction, copying, hiring, lending, public performance or broadcasting is permitted." A reservation of rights is required in terms of the Buenos Aires Convention of 1910, although the practical force of this requirement has been nullified by the fact that members of this Convention are also members of the Berne Convention 1886 (article 4 of the 1908 revision), which prohibits the imposition of any formalities as a requirement for the granting of copyright protection. Britain had in fact to ultimately repeal both the 1882 and 1886 Acts before this requirement of reservation for the performing right was found to be in conflict with its obligations under the Berne Convention. See McFarlane *Performing Right* 89 – 91.

²¹³ See McFarlane *id* at 87.

In section 1 the 1888 Act made it explicit that, despite the provisions of the Bulwer-Lytton's Act, the penalty or damages for the unauthorised performance of a musical composition was at the absolute discretion of the trial judge, and that if the justice of the case so demanded, the judge could award an amount less than the penalty stipulated in the Bulwer-Lytton's Act or even award a nominal fee. The Act also made it explicit that it applied in respect of works published both before and after its passage, thus preventing a situation where the unscrupulous activities of Wall and his ilk would continue unabated in respect of works published before the Act. The Act further dealt a blow to Wall by exempting certain persons from liability for infringement of the performing right, namely the proprietor, tenant or occupier of any place where an unauthorised performance took place, unless such person wilfully caused or permitted the unauthorised performance and knew that the performance was unauthorised (section 4).²¹⁴

These amendments finally put an end to Wall's activities, but, it has been observed, also "put an end to the effective operation of the performing right", which Wall had exploited "to the fullest permissible limit" – with composers, who were intended to be the beneficiaries of the system, suffering the most.²¹⁵ It had to take changes in the manner in which music was being consumed in the United Kingdom, largely as a result of piracy and technological developments, to change the mind-sets of music publishers to be more welcoming to the significance of the performing right. The advent of the gramophone at the turn of the twentieth century greatly reduced the demand for concert-hall entertainment; this, coupled with the ease with which sheet music could be "photographed or lithographed" and sold cheaply by street hawkers resulted in great losses for the music publishers.²¹⁶ This prompted parliament to pass the Musical (Summary Proceedings) Copyright Act of 1902, which gave powers of seizure and destruction of pirated copies. The effectiveness of the legislation was however, limited as it made no provision for criminal sanctions. Another problem was the difficulty in finding "any substantial person" to proceed against for infringement.²¹⁷ In desperation, members of the Music Publishers Association made an announcement in April 1905 that they would no longer accept music for publication nor enter into new agreements for the payment of singers of new publications.²¹⁸

This situation led to the passing of the Musical Copyright Act 1906, which introduced criminal sanctions for printing, reproducing, selling, exposing or offering or possessing for sale any printed copies of sheet music, or possessing any plates for purposes of making unauthorised copies of such

²¹⁴ This is clearly the precursor to the regime for secondary or indirect infringement of copyright in English copyright law; a system imported to South African copyright law. Thus s 23(3) of the Copyright Act provides: "The copyright in a literary or musical work shall be infringed by any person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of the copyright in the work: Provided that this subsection shall not apply in a case where the person permitting the place of public entertainment to be used was *not aware and had no reasonable grounds for suspecting* the performance would be an infringement of the copyright." Section 27(3) of the Act imposes criminal sanctions for such activity. For a discussion of secondary or indirect infringement see Dean *Handbook of Copyright Law* (2015) 1-81 – 1-86, particularly 1-85 – 1-86.

²¹⁵ McFarlane *Performing Right* 88 – 89. McFarlane in fact insists that the Acts of 1882 and 1888 were merely "stopgap reforms" that placed the system of performing rights "on probation", and "ensured that no copyright society collecting for musical performances could be set up until after their repeal ..." McFarlane *ibid*.

²¹⁶ McFarlane *id* at 93.

²¹⁷ Garnett, Davies and Harbottle *Copinger and Skone James* 43. McFarlane *ibid*.

²¹⁸ McFarlane *ibid*.

music. Police were authorised to enter premises and to search for pirated copies. While the piracy legislation was effective in stamping out piracy and in fact persisted until it was repealed in the 1956 Copyright Act, the advent of mechanical reproduction of musical works using the new gramophone technology meant that sheet music sales was no longer a viable source of revenue for the music publishers. This “acted ... to bring to an end the complaisant attitude of the music industry to the performing right”, so that both music publishers and composers “began to think of the performing right as a possible source of income.”²¹⁹ At the time Britain was thinking seriously about introducing reforms to its copyright laws, particularly as a result of its involvement in the preparatory work of the Berne Convention of 1886.²²⁰

While Britain ratified the Berne Convention in December 1887, this did not give rise to a comprehensive reform of UK copyright law. It was the 1908 revision of the Berne Convention in Berlin (the Berlin Act) that prompted the formation of a Copyright Committee in 1909 to consider and make recommendations to UK copyright law to ensure compliance with the Berne Convention.²²¹ The 1909 Committee studied the text of the Berlin Act article by article, and in the end recommended the enactment of an Act to consolidate and amend UK copyright law in conformity with the requirements of the Berne Convention. Accordingly the Copyright Act 1911 received royal assent on 16 December 1911, repealing all previous legislation relating to copyright with the exception of the Musical (Summary Proceedings) Copyright Act of 1902 and the Musical Copyright Act 1906 and a section from the Fine Arts Copyright Act, 1862. More relevantly, section 1(2) of the new Act introduced a simple and more effective right of performing the work in public, without encumbering it with convoluted concepts like “representation”, “place of dramatic entertainment” and “dramatic piece”. This development made it easy for the aptly-named Performing Right Society (PRS), one of the world’s major performing rights societies today, to be formed in 1914.²²²

2.2.2.3 A Closer Consideration of the History of Collective Management of Copyright in Musical Works

In the foregoing discussion we alluded to the fact that the right of public performance was, from the early days, construed within the system of collective management. In much later times and through the influence of technology the right of reproduction (in the form of the *mechanical right*) would also be largely administered through the system of collective management.²²³ It is important, in completing this chapter on the historical development of music copyright, to also consider the historical development of the system of collective management of rights.

²¹⁹ Ibid.

²²⁰ Garnett, Davies and Harbottle *Copinger and Skone James* 44.

²²¹ Prior to this Britain dealt with international copyright matters through the International Copyright Act of 1844 and subsequently the International Copyright Act, 1886, with the latter applying British copyright law to all its dominions, so that “a work produced in one of the possessions received protection not only in the United Kingdom but in all of the rest of them.” Garnett, Davies and Harbottle *ibid*.

²²² For a further discussion of the founding and operations of the PRS see Ehrlich *Harmonious Alliance*, generally, and McFarlane *Performing Right* 89 – 129; 143 – 185.

²²³ For a further discussion of the system of collective management see Chapter 6 *infra*.

(a) *The Historical Development of the Collective Management of Public Performance Rights*

As alluded to earlier, the well-rehearsed history of the system of collective management of copyright traces the origin of the system to 18th century France. At the centre of the quest for the recognition of authors' rights and the organising of authors into a formidable collective force was the versatile Pierre Augustin Caron de Beaumarchais – author, playwright, musician, publisher and many other things.²²⁴ This earlier quest was concerned with the public performance of musical works in the dramatic field. Beaumarchais contested the fact that actors, rather than authors, held a prominent position within the *Comédie Française* – the French state theatre which “held a monopoly on the performance of plays” and “pressured authors to abandon their rights.”²²⁵ Beaumarchais argued that an author should be associated with the revenues generated by such author's work in the work's economic life, and on this basis he, together with twenty other writers, created a bureau of theatre legislation (*Bureau de législation dramatique*) in 1777, which gave rise to a collection agency, Agence Framery.²²⁶ This agency evolved into the *Société des Auteurs et Compositeurs Dramatiques* (SACD) in 1829, essentially “the first society dealing with collective management of authors' rights”, which at the time related to the rights of authors of plays and other dramatic works.²²⁷

Using his strong political connections, Beaumarchais's struggle for the recognition of authors' rights yielded fruits in 1791, when France passed the first law on author's rights, thus recognising the concept of authors' rights “for the first time anywhere in the world.”²²⁸ The 1791 law, which recognised the right of public performance, was followed in 1793 by a law recognising the authors' rights of reproduction.²²⁹ Equally enamouring, albeit sobering, is the history of collective management in the area of musical works. The importance of collective management in this area had become more and more apparent - in spite of it being understood that the laws of 1791 and 1793 applied to musical works, promoters of concerts and other music users (e.g. theatre owners) continued to publish musical works without authorisation and to perform the works without paying compensation to the authors.²³⁰ The stated reason for this is that the composers “[found] it impossible to keep an account of all the occasions and places at which their works were played.”²³¹ This is the very need that collective management was designed to solve. As further observed:

²²⁴ See in this regard http://www.newworldencyclopedia.org/entry/Pierre_Beaumarchais (date of use: 10 October 2017). See also generally Lever *Beaumarchais*.

²²⁵ Gervais *Collective Management of Copyright* (2010) 171.

²²⁶ *Ibid.*

²²⁷ Ficsor *Collective Management* 18. SACD is still active today in the field of collective management of dramatic rights – see <https://www.sacd.fr/en> (date of use: 10 October 2017). See further in this regard CISAC http://www.cisac.org/content/download/1127/19620/file/CISACUniversity_The_History_of_Collective_Management_FINAL.pdf (Date of use: 10 October 17). The second collecting society to be formed, *Société des gens de lettres* (SGDL) was in the field of literary works, and its first general assembly met in 1837. The society is still in existence today. See <https://www.sgdl.org/> (Date of use: 11 October 2017).

²²⁸ CISAC http://www.cisac.org/content/download/1127/19620/file/CISACUniversity_The_History_of_Collective_Management_FINAL.pdf *ibid.*

²²⁹ See the discussion above under 2.2.2.1.

²³⁰ McFarlane *Performing Right* 56; Billboard *ibid.*

²³¹ McFarlane *ibid.*

There was nothing that the rights owners could do individually to protect themselves, so their only recourse was to set up an association whose aim was to create a centralized collection and distribution mechanism to ensure that its members received fair remuneration for the use of their works.²³²

The opportunity to do so came from an unsuspecting incident, in what has been called a “piquant slice of French social history.”²³³ It seemed like any other day when, in 1847, Ernest Bourget, a composer, went to *Les Ambassadeurs*, a concert café, to order sugar water.²³⁴ While there, Bourget was infuriated to notice that some of his compositions were being performed without his authorisation and without compensation, while he himself was required to pay an inflated fee for the sugar water.²³⁵ Consequently he refused to pay for the sugar water unless he himself was paid for the performance of his compositions. When the manager of *Les Ambassadeurs* refused to do so, Bourget successfully brought action against the café at the business court of the Seine (Tribunal de Commerce de la Seine), and *Les Ambassadeurs* was prevented from using Bourget’s compositions without compensation and its manager ordered to pay a substantial sum of damages.²³⁶

Armed with this victory, Bourget, with the assistance of others,²³⁷ formed a union, the *Agence Centrale pour la Perception des droits des Auteurs et Compositeurs de Musique* in 1850, which evolved in 1851 into the first collecting society in respect of musical works, *Société des Auteurs, Compositeurs et Editeurs des Musique* (SACEM), one of the largest performing rights societies in the world today. In this regard Ficsor has observed:

Great new possibilities were opened for composers and text-writers of non-dramatic musical works by that court decision. It was clear, however, that they would not be able to control and enforce their newly identified rights individually. That realization led to the foundation of ... the still functioning ... SACEM ...²³⁸

²³² Billboard 22 May 1993 at 61.

²³³ Ibid.

²³⁴ Or rather “sugared ice water”. See Schwabach *Intellectual Property* 151.

²³⁵ CISAC http://www.cisac.org/content/download/1127/19620/file/CISACUniversity_The_History_of_Collective_Management_FINAL.pdf ibid. Hardy *Music Publishing* 5 points out that it was the performance by the café’s string band of Bourget’s composition, “Bluettes”, that led to his indignation.

²³⁶ Gervais *Collective Management of Copyright* (2010) 171. See also CISAC http://www.cisac.org/content/download/1127/19620/file/CISACUniversity_The_History_of_Collective_Management_FINAL.pdf ibid. Varied accounts are given to what actually happened. Other accounts for example do not make reference to the inflated fee, merely stating that Bourget was unhappy that he had to pay the bill while the café was not prepared to pay for the performance of this music. It is also suggested that in the ensuing argument, “Bourget offered *Les Ambassadeurs* a settlement: if the club let him have his glass of sugar water for free, the band would be allowed to play the song for free”, an offer which *Les Ambassadeurs* rejected, leading to the litigation. See Hardy *Music Publishing* 5 – 6. In McFarlane’s account the incident took place in the presence of Victor Parizot, and it is stated: “There they heard one of Bourget’s works being performed, and when the time came to pay the bill for their refreshments, they declined, on the ground that the proprietor of the café had not paid Bourget for the use of his composition.” McFarlane *Performing Right* 56. Schwabach *Intellectual Property* 151 suggests that Bourget was accompanied by “two other composers, Victor Parizot and Paul Henrion” (so also Billboard 22 May 1993 at 61); while Ficsor *Collective Management* 19 suggests that the incident involved Bourget, the composers Victor Parizot and Paul Henrion, and their publisher (Jules Colombier). In Gervais and Hardy (ibid)’s account, Henrion, Parizot and Colombier’s involvement came at the stage where they assisted Bourget to form the first union which was aimed at collecting payments from café owners in respect of public performances of musical works.

²³⁷ See ibid.

²³⁸ Ficsor *Collective Management* 19.

In this regard it is important to note that the formation of SACEM, and other performing rights societies that were formed afterwards, signalled, for the first time, the advent of a system of “fully developed collective management”.²³⁹ Neither SACD, in the area of dramatic works, or SGDL in the area of literary works, were fully-fledged CMOs.²⁴⁰ To date, the fullest system of collective management is that represented by authors’ performing rights societies.²⁴¹ Thus although collective management of mechanical rights is an important area in the collective management of musical works, it too is not a system of full collective management.²⁴² This is an important observation that needs to be taken into account by policy makers, legislatures and courts in Africa and other developing countries when seeking to understand the operations of CMOs.²⁴³

After the formation of SACEM in France similar CMOs sprang up in other European countries. These include SIAE in Italy (1882); AKM in Austria (1897); the predecessor to SGAE in Spain (1899) and the predecessor to GEMA in Germany (1903).²⁴⁴ SACEM “became the prototype for all such organizations”²⁴⁵ In this regard it has been curtly observed that “SACEM ... had no counterpart anywhere in the world up to the last years of the 19th century.”²⁴⁶ The system of collective management arrived even much later in the Anglo-American world, with both ASCAP (USA) and the PRS (UK)²⁴⁷ formed in 1914.²⁴⁸ Prior to this SACEM had operations in the UK through appointed agents, albeit in respect of the performance of foreign and not British music.²⁴⁹ Other performing rights societies were formed in Poland (1918); Czechoslovakia (1919); Uruguay (1919); Belgium

²³⁹ Ficsor *ibid.*

²⁴⁰ This position still holds today. As Ficsor *id* at 57 has observed: “Collective management of rights in dramatic works is the most typical – and most traditional – example of a form of partial collective management, namely an agency-type collective management ...”

²⁴¹ Ficsor *id* at 37 at para 71.

²⁴² See further the discussion below in Chapter 6.

²⁴³ Without a full understanding of the nuances involved, there is a danger that regulators and the courts may “paint all collecting societies with the same brush” when formulating regulations or when adjudicating upon cases relating to collecting societies. An understanding of the nuances would, on the other hand, enable regulators and the courts to understand that they need to have a differentiated approach when dealing with collecting societies, depending on the nature of the collecting societies’ operations. For example, while performing rights societies generally operate on the basis of receiving assignment of copyright, mechanical rights societies generally do not. See further the discussion below in Chapter 6.

²⁴⁴ Ehrlich *Harmonious Alliance* 165. Ehrlich states that the Spanish performing right society was formed in 1901 but stronger evidence shows that it was in fact in 1899, initially in the name of *Sociedad de Autores Españoles* (SAE) and becoming *Sociedad General de Autores de España* (SGAE) in 1932. See <http://www.sgae.es/en-en/SitePages/corp-historia.aspx> (date of use: 13 October 2017).

²⁴⁵ Ehrlich *id* at 1. In fact this was so much so that when a decision was made to start a performing rights society in the United Kingdom, provisionally called the *Authors, Composers and Music Publishers Society* and later the Performing Right Society Limited (PRS), it was resolved that the society would be “organized ‘upon lines similar to those governing the SACEM’”. Ehrlich *id* at 16.

²⁴⁶ *Billboard* 22 May 1993 at 64.

²⁴⁷ Now PRS for Music - <https://www.prsformusic.com/> (date of use: 13 October 2017).

²⁴⁸ Reference needs to be made here to the Dramatic Authors Society (DAS), formed in 1832 and which eventually administered dramatic performance rights as provided for under the Copyright Act of 1833 (the Bulwer-Lytton’s Act). The society was in existence for some fifty years. Details about the society are however fuzzy, it being noted that “no one in the copyright world today was aware of the earlier existence” of the society ... [and] when and why it became defunct nobody is now able to say.’ This society however, was clearly long defunct when the PRS was formed in 1914. See generally in this regard McFarlane *Performing Right* 65 – 74.

²⁴⁹ Ehrlich *Harmonious Alliance* 1 – 21 generally.

(1922); Sweden (1923); Switzerland (1923); Canada (1925) and Portugal (1925),²⁵⁰ amongst others, culminating in the formation of CISAC²⁵¹ in 1926. In this regard it has been observed:

Cooperation developed rapidly among those organizations through bilateral contracts of mutual representation of each other's repertoires, and they felt the need for an international body to coordinate their activities and contribute to a more efficient protection of authors' rights throughout the world.²⁵²

McFarlane observes that it was the Italian society SIAE, which represented both dramatic and non-dramatic musical works, that "brought together representatives of societies operating in both these fields" to form CISAC, which was "open to all societies operating in the field of authors rights."²⁵³ The formation of CISAC was a major milestone in the collective management of authors' rights. As has been observed: "The fundamental objective of CISAC member societies – their basic rationale and very *raison d'être* – is collective management of authors' rights."²⁵⁴ According to its statutes, CISAC is "an international, non-governmental, not for profit organisation" domiciled in France.²⁵⁵ The role of CISAC in organising authors' societies worldwide and in promoting the efficient administration of authors' rights is evident from its stated purposes.²⁵⁶ Today CISAC is comprised of 239 (two hundred and thirty nine) member societies in 121 (one hundred and twenty one) countries, and can correctly make the claim of being "the world's leading network of authors' societies."²⁵⁷

(b) The Historical Development of the Collective Management of Mechanical Rights

Alongside performing rights societies, mechanical rights societies have played a pivotal role in the collective management of musical works. The concern here relates to the reproduction of musical works. This development happened against the backdrop of the well-known decision of the US Supreme Court in the case of *White-Smith Music Publishing Company v Appollo Company*, decided earlier in the year.²⁵⁸ As discussed in Chapter 3 *infra*, the Supreme Court in this case refused to recognise the authors' right to authorise the mechanical reproduction of musical works by means of piano players and player pianos. The US Congress was swift in responding,²⁵⁹ enacting the US Copyright Act, 1909, which introduced the concept of mechanical rights in US copyright law, securing copyright in the exploitation of musical works through "the parts of instruments serving to

²⁵⁰ Ehrlich *id* at 165 – 166.

²⁵¹ Confédération Internationale des Sociétés d'Auteurs et Compositeurs – the International Confederation of Societies of Authors and Composers.

²⁵² Ficsor *Collective Management* 19.

²⁵³ McFarlane *Performing Right* 146.

²⁵⁴ Ficsor *Collective Management* 19.

²⁵⁵ See Articles 2 and 4 of the CISAC Statutes, available at <http://www.cisac.org/What-We-Do/Governance/Statutes> (date of use: 13 October 2017). Article 4 states that the General Assembly may transfer CISAC's domicile elsewhere.

²⁵⁶ These purposes, contained in Article 6 of the CISAC Statutes, include: (i) promoting respect for the economic and legal interests of authors and publishers; (ii) promoting respect for the moral interests of authors; (iii) encouraging the efficient collection and distribution of royalties; (iv) assisting in the establishment of administrative infrastructures necessary for the creation and effective operation of societies in territories where no such societies exist, and (v) providing encouragement and assistance for developing and strengthening societies in countries where such societies exist but "are not fully effective". CISAC Statutes *ibid*.

²⁵⁷ <http://www.cisac.org/Who-We-Are> (date of use: 13 October 2017).

²⁵⁸ 209 U.S. 1 (1908). See the discussion *infra* in Chapter 3.

²⁵⁹ This was also in response to lobbying from the publishers. See Kohn and Kohn *Music Licensing* 7.

reproduce mechanically the musical work.”²⁶⁰ Two years later the UK followed suit through the enactment of the Imperial Copyright Act of 1911.²⁶¹

It can be contended that the embracing of mechanical rights in the Anglo-American world greatly boosted the nascent field of mechanical rights and served to profile it internationally, as these markets unquestionably shaped and championed the new music recording industry.²⁶² Because the recording industry became more active and effective in the Anglo-American world, it was only natural that the mechanical right would thrive better in these markets, just as the performing right had found its best expression in Continental Europe.²⁶³ Nevertheless, France’s role in the development of collective management in the area of mechanical rights cannot be ignored. It is reported that after Vives won the case for the recognition of mechanical rights in France, he successfully instituted other cases against record companies and began collecting mechanical royalties. He eventually sold his agency to one Vaseille, who founded a collecting society named Societe Generale de L’Edition Phonographique (EDIFO).²⁶⁴ Vaseille in turn sold his shares in EDIFO to one George Delavenne, credited with “building a really effective and far-reaching organization.”²⁶⁵

Thus EDIFO is credited with helping to form the Mechanical Copyright Licences Company (MECOLICO) in the UK, which was formed “in anticipation of the Copyright Act of 1911”,²⁶⁶ furthermore, EDIFO established branches in Turin, New York and Buenos Aires and formed AMMRE in Berlin.²⁶⁷ In 1924 MECOLICO merged with the Copyright Protection Society (CPS) to form the Mechanical-Copyright Protection Society (MCPS), the UK mechanical rights society which is still in existence today.²⁶⁸ Particularly, under the directorship of Alphonse Tournier, who “spread the gospel of mechanical rights throughout Europe”, EDIFO helped form mechanical rights societies in Switzerland, Scandinavia, Yugoslavia, Belgium and Romania.²⁶⁹ It can however be said that it was the formation of BIEM²⁷⁰ as a pan-European collecting agency in 1927, with Tournier as its director, that represents the zenith of EDIFO’s exploits.²⁷¹

²⁶⁰Section 1(e) of the US Copyright Act, 1909, read with the proviso thereto. Emphasis added.

²⁶¹ Section 2(d) of the British Copyright Act, 1911 (also known as the Imperial Copyright Act). As noted in Chapter 4 *infra*, this Act was incorporated *holus bolus* in South Africa through Schedule III of the Patents, Designs, Trade Marks and Copyright Act of 1916.

²⁶² This observation is made for the simple reason that the main exploiters of the mechanical right are record companies, that need to reproduce musical works for purposes of making music records. See for a brief history of the recording industry <https://www.iasa-web.org/sound-archives/brief-history-record-industry> (date of use: 16 October 2017).

²⁶³ This is in spite of the fact that it the right was recognised earlier in France and that it was Continental Europe that championed the *recognition* of the right in the Berne Convention.

²⁶⁴ Billboard 22 May 1993 at 62.

²⁶⁵ *Ibid.*

²⁶⁶ See http://self.gutenberg.org/articles/Mechanical-Copyright_Protection_Society#History;https://www.prsformusic.com/about-us/history (date of use: 16 October 2017).

²⁶⁷ Billboard 22 May 1993 at 62.

²⁶⁸ See http://self.gutenberg.org/articles/Mechanical-Copyright_Protection_Society#History;https://www.prsformusic.com/about-us/history (date of use: 16 October 2017).

²⁶⁹ Billboard 22 May 1993 at 62.

²⁷⁰ Bureau International des Sociétés gérant Les Droits d’enregistrement et de Reproduction Mécanique (BIEM), available at www.biem.org (date of use: 13 November 2017).

²⁷¹ See in this regard Billboard 22 May 1993 at 62. When BIEM was first founded its role was, unlike CISAC, that of “real management” of the rights of the societies it represented, by negotiating licence agreements with the recording industry and collecting licence fees. See Ficsor *Collective Management* 51. BIEM initially represented French, German and Italian repertoires, but with time “it took over the management of more or less the entire European repertoire.”

After the formation of BIEM EDIFO started to experience a downward spiral. This was particularly as a result of declining revenues due to the negative impact of the Great Depression on the recording industry; and concerns from members regarding the management and financial strategy of EDIFO.²⁷² This led to the liquidation of EDIFO in 1935, with the Union Syndicale de Defense Professionnelle des Auteurs, Compositeurs et Editeurs (USACE), formed earlier as a result of dissatisfaction with the running of EDIFO, taking over much of the repertoire once administered by EDIFO.²⁷³ USACE formed the *Societe Civile des Auteurs, Compositeurs et Editeurs pour le Controle des Droits de Reproduction Mecanique* (ACE), which, with the assistance of SACEM, evolved into the extant *Societe pour L'Administration du Droit de Reproduction Mecanique des Auteurs, Compositeurs et Editeurs* (SDRM),²⁷⁴ formed in 1935.²⁷⁵ Of this organisation it was noted:

The creation of [SDRM] was the culmination of a protracted and often frustrating fight with the emergent French recording industry to secure for rights owners payment for the mechanical reproduction of their works.²⁷⁶

It has been noted that this fight “involved a peaceful revolution” at the end of which the concept of mechanical rights was implanted, “discreetly, peacefully but profoundly” in people’s minds.²⁷⁷ As indicated above, EDIFO helped found MECOLICO in the UK, which eventually led to the founding of the MCPS, and also established a branch in New York. In the United States however it is the Harry Fox Agency²⁷⁸ that has played a prominent role in the administration of mechanical rights. The predecessor to the Harry Fox Agency was formed in 1927 by the National Music Publishers’ Association (NMPA, formerly the Music Publishers’ Protective Association, itself founded in 1917 to prevent the practice of music publishers having to give payola to vaudeville theatres for performing their music²⁷⁹).²⁸⁰ When the agency was first formed it was only concerned with the administration of the publishers’ synchronisation rights in relation to the use of musical works in films. In 1936 the

Ficsor *ibid.* In 1968 BIEM experienced a major organisational change, resulting in the management of the repertoires of the various collecting societies being returned to them.

Ficsor *ibid.* See also www.biem.org/index.php?option=com_k2&view=item&layout=20&Itemid=442&lang=en (date of use: 13 November 2017). Today BIEM performs a function similar to CISAC, “[assisting] in collaboration between its member societies and to help in solving problems that arise between individual members”, and represents some fifty five societies in fifty eight countries. *Ibid.* In addition to this general function BIEM, unlike CISAC, is particularly involved in the negotiation of a Standard Agreement with the International Federation of the Phonographic Industry (IFPI), the international umbrella body for the recording industry. The Standard Agreement determines the conditions for the use by record companies of the repertoire of the member societies of BIEM, “to the extent that there is no compulsory licence or statutory licence in their territory.” *Ibid.* On 2 December 2013 BIEM and the IFPI agreed to renew the Standard Agreement, which had expired in June 2000, with effect from 1 January 2014. www.ifpi.org/content/library/BIEM_IFPI_agreement_011213.pdf (date of use: 13 November 2017). The current agreement could be terminated by either party at any time from 30 December 2016; this not having happened, it continues to be in force for additional periods of one year each unless terminated by either party by giving six months’ notice of termination. www.biem.org/index.php?option=com_k2&view=item&layout=20&Itemid=442&lang=en (date of use: 13 November 2017).

²⁷² Billboard 22 May 1993 at 62.

²⁷³ *Ibid.*

²⁷⁴ See <https://sdrm.sacem.fr/en> (date of use: 13 November 2017).

²⁷⁵ Billboard 22 May 1993 at 62.

²⁷⁶ *Ibid.* SDRM came “under the overall administration of SACEM” in 1970, while retaining its legal autonomy with an independent board of directors. *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ <https://www.harryfox.com/> (date of use: 14 November 2017).

²⁷⁹ See Variety May 4 1917 <https://archive.org/stream/variety46-1917-05#page/n3/mode/2up/search/%22payments+end%22> at 3 (date of use: 14 November 2017).

²⁸⁰ See Herlihy and Zhang 2016 *Global Media and China* 392.

activities of the agency were extended to include the licensing of electrical transcriptions of radio programs, and in 1938 this was extended to include the licensing of mechanical rights in sound recordings.²⁸¹

An anecdotal account associates the name *Harry Fox Agency* to a Russian immigrant named Harry Fox, a man who entered the music publishing business in 1906 and later worked for the Music Publishers' Protective Association as a clerk, handling synchronisation rights.²⁸² Fox was eventually "given the task of licensing recordings, collecting mechanical royalties, and then distributing those royalties to the appropriate publishers – along with continuing the other services the NMPA had already instituted."²⁸³ In this regard it is stated:

By 1938, Harry Fox had been elevated to the position of General Manager for the NMPA ... Over time, the administration of these duties [i.e. mechanical rights licensing] became associated with him, and the area was collectively known as the Harry Fox Office. He remained the head of the company until his death in 1969, after which the Harry Fox Agency was officially incorporated as a wholly-owned subsidiary of the NMPA ...²⁸⁴

The operations of the NMPA and the Harry Fox Agency were henceforth "merged" until the Harry Fox Agency was again separately managed in the year 2000.²⁸⁵ Meanwhile the Harry Fox Agency relinquished its administration of synchronisation rights, handing the function back to the publishers themselves, and only continued with mechanical licensing and other functions such as reciprocal representation of rights within the BIEM and CISAC systems.²⁸⁶ It has recently been announced that the Harry Fox Agency was acquired by SESAC, one of the three US performing rights societies²⁸⁷ - thus ending over eighty years of the NMPA's control of the agency.²⁸⁸

As concluding remarks for this section it would be useful to highlight certain notable differences between the collective management of performing rights and that of mechanical rights, in particular in the Anglo-American system. In the first instance it can be said that while the collective management of performing rights often represents a system of "full collective management" of rights, as Ficsor terms it – where authors grant to the collecting society "full authorization ... to exercise their exclusive rights",²⁸⁹ often based on an assignment of rights – the collective management of mechanical rights is often a more limited system of rights administration where the rights-holders (often music publishers) retain much control on the exercise of the rights.²⁹⁰ Secondly,

²⁸¹ Poe *Music Publishing* 57.

²⁸² Kohn and Kohn *Music Licesing* 17.

²⁸³ Ibid.

²⁸⁴ <https://secure.harryfox.com/public/userfiles/file/Soundcheck/viewSoundCheck10.pdf> at 3 (date of use: 14 November 2017).

²⁸⁵ Ibid.

²⁸⁶ ²⁸⁶ Poe *Music Publishing* 57.

²⁸⁷ The other two being ASCAP and BMI.

²⁸⁸ See <https://www.nytimes.com/2015/07/07/business/media/music-publishing-deal-driven-by-shift-from-sales-to-streaming.html> (date of use: 14 November 2017).

²⁸⁹ See Ficsor *Collective Management* para 72; with reference also to para 137.

²⁹⁰ In such an agency-type system, "the only or nearly exclusive task of the joint system is the collection and transfer of royalties as quickly and as precisely as possible, at as low cost as possible, and as much in proportion with the value and actual use of the productions involved as possible." Ficsor *id* at para 37.

and related to the first observation – while the control of music publishers is conspicuous in relation to mechanical rights societies,²⁹¹ it is understood that performing rights societies “[were] founded by authors and composers who had then ‘admitted the publishers’”, thus making it necessary “‘not [to] curtail the benefits of authors and composers’”. Thus the CISAC Statutes and Professional Rules make it mandatory for authors (creators) to be admitted as members of a performing rights society.²⁹²

In light of the foregoing, performing rights societies (PROs) have thus typically been termed “authors’ societies”, and in this regard it has been observed: “The *raison d’être* of an author’s society is the collective management of authors’ rights.”²⁹³ In this regard the system of reciprocal representation of the rights of authors across the world – where one PRO enters into reciprocal agreements with other CISAC-member PROs, to represent the rights of their members in its territory and for them to represent the rights of its members in their territories – is more prevalent and established in the performing rights environment.²⁹⁴ In contrast, the prevalent practice in the Anglo-American system is that mechanical rights societies may only enter into reciprocal agreements in relation to the rights they administer if the publisher has specifically mandated the collecting society to do so, or where the author is not signed to a publisher.²⁹⁵

²⁹¹ Thus Ficsor *id* para 116 notes: “In mechanical rights organizations, music publishers are usually in quite a strong position”. So for example the Harry Fox Agency only admits publisher members. See “Frequently Asked Questions”, https://www.harryfox.com/find_out/faq.php (date of use: 15 November 2017). The MCPS, which is owned by the UK Music Publishers Association (MPA), only admits writer members if they are not signed to a publisher - <https://www.prsformusic.com/join/writer/join-mcps> and <https://www.prsformusic.com/about-us/governance/mcps-board> (date of use: 15 November 2017). In South Africa, although the former National Organisation for Reproduction Rights in Music (NORM) in theory was open to the admission of authors as members, it was largely controlled by the publishing industry. The South African Recording Rights Association Limited (SARRAL) on the other hand (also no longer in existence – see Chapter 6 below), though a mechanical rights society, can be said to have been a true authors’ society, because it treated authors and publishers equally. The same can be said of the current Composers, Authors and Publishers Association (CAPASSO), which is in structure very similar to the former SARRAL, although certain restrictions in the scope of rights that it is mandated to administer can be detected, as dealt with in Chapter 6 below.

²⁹² See in this regard Article 6 of the CISAC Statutes, generally, available at www.cisac.org/What-We-Do/Governance/Statutes. See also Rule 5(a) of the CISAC Professional Rules for Musical Societies, available at www.cisac.org/What-We-Do/Governance/Professional-Rules, where it is stated: “Each Member *shall* at all times be open to Creators and publishers of all nationalities” (date of use: 15 November 2017). Emphasis added. Earlier versions of the CISAC Statutes only made reference to “authors”, providing that “only societies managing authors’ rights” could be admitted as ordinary members, where “a society managing authors’ rights” was defined as “has as its aim, and effectively ensures, the advancement of the moral interests of authors and the defense of their material interests”. See Ficsor *id* at paras 30 – 31.

²⁹³ Alikhan *Socio-economic Benefits of Intellectual Property Protection* 133. See also Ficsor *id* at para 30.

²⁹⁴ The reciprocity contemplated in such reciprocal relations is one that facilitates the administration of the rights throughout the world within the auspices of the principle of national treatment under the Berne Convention. It is thus *formal reciprocity* rather than *material reciprocity*. See in this regard Dreier and Hugenholtz *Concise European Copyright Law* 8, who observe: “National treatment under the BC [Berne Convention] is a principle of formal rather than of material reciprocity because protection of an author in another Member State of the BC *merely depends upon both States adhering to the BC and not on the level of copyright protection which the home country of the author grants to authors of that other country.*” Emphasis added. It is thus common cause that the law of protection for the works of foreign nationals is the law of the Berne Member State which is the host country (i.e. the law of the country in which the rights are being exercised), and not the country of origin. See further in this regard Von Lewinski *International Copyright Law* 105.

²⁹⁵ This is because in practice publishers generally assign their rights to their affiliates or counterparts in other parts of the world through sub-publishing agreements, which (the affiliates or counterparts) then enter into direct relationships with the local mechanical rights agency. Thus, except in the limited instances in which this is not the case there is generally no need for reciprocal relations between the collecting societies. Thus it has been stated in respect of the Harry Fox Agency: “HFA only issues mechanical licenses to record companies distributing in the U.S. However, for publishers without international sub-publishing arrangements, HFA does maintain reciprocal representation agreements with over 30 foreign collecting societies and the territories they represent. This enables HFA to collect non-U.S. royalties for publishers who have designated HFA to do so.” https://www.harryfox.com/find_out/faq.php (date of use: 15 November 2017). With regard to the position in the UK it has been observed that “writer members of MCPS can collect foreign mechanicals through

2.3 Conclusion

In the foregoing discussion the writer traced the early development of music copyright from its existence as part of the Medieval system of royal privileges, culminating in the formal recognition of the copyright system with the passing of the Statute of Anne. The discussion particularly highlighted the divergent courses followed by French and British law in this development. In this regard it was demonstrated that, while England was the architect of the copyright system and the reproduction right in printed works, France championed the development of the performing right. The year 1777 was an important one in this history, with the right of public performance (albeit, at this stage, in relation to dramatic and dramatico-musical works) being cemented in France and the right of printing and publishing musical compositions being recognised in England.

More conspicuously, the study highlighted the historical struggle of English copyright law to formulate a clear understanding of the proper contours of music copyright in general, and a proper understanding of the ambit of the performing right in musical works, in particular. In part because of the influence of the Dramatic Literary Property Act, 1833 (the Bulwer-Lytton's Act), it would appear that musical works were framed within the construct of dramatico-musical works and thus for some time, protection would not be granted until a musical composition was also performed in a "place of dramatic entertainment". The enactment of the Literary Property Act, 1842 (the Talfourd's Act) and subsequent legislation did not succeed in resolving the problem, and not until 1911 was the matter resolved. To the contrary, while ambiguity and an improper delineation of the rights involved led to an uphill struggle in the formulation of English music copyright law, "the first French literary property rights, sufficiently well-defined and broad in scope, remained in their almost original formulation for more than one hundred and fifty years."²⁹⁶

When one man, Harry Wall, dared to exercise a proper performing right in musical works in England, this was based on ulterior motives and was thus mired in controversy, engendering public apathy.²⁹⁷ The legislature's response to this was short of exemplary, being reactive rather than principled and thus further crippling the proper development of the performing right. It was left to the Imperial Copyright Act, 1911, to usher a new era for the protection and proper delineation of copyright in musical works and the amalgamation of the performing right with the system of music copyright. Wall's effect on the development of the performing right in England, to be felt for some time thereafter, is attributable to the hostilities and difficulties experienced by the PRS in its initial attempt to enforce the performing right. In this regard it has been stated:

MCPS if they have no publisher or if they agree with the publisher to collect their own share", which is prevalent in the case of classical music. See Dann and Underwood *Music Business* 115.

²⁹⁶ Teilmann *British and French Copyright* 24.

²⁹⁷ See Scott *Sounds of the Metropolis* 35 noting: "The British public viewed copyright law with much suspicion because of the notorious activities of Harry Wall in the 1870s."

He more than any other single reason explains the time lag between the commencement of the collection of royalties in their respective countries for French and British composers.²⁹⁸

We then reflected on the origins and development of the system of collective management of copyright, when it dawned upon rights-holders that the effective enforcement of their newly-won rights could only be realised through joint effort. We noted in this regard the slow pace in the implementation of the system of collective management of copyright in the United Kingdom as compared to the position in France; and the reasons that informed this situation. Collective management of rights in musical works was eventually to become a formidable system of rights management by rights-holders which remains extant, vibrant and potent to this day. In this regard it has been observed that “[f]or many authors / composers in Africa collective management is the only system from which they can ever hope to earn royalties.”²⁹⁹

The historical understanding of the development of music copyright undertaken herein is, it is submitted, necessary for the full understanding of the scope of musical copyright today. It is also necessary for understanding the reasons for the manner in which music copyright is currently dealt with. While going back to Medieval times in order to understand this historical development might appear excessive, we can, in this regard, agree with the words of Windeyer J in *Attorney-General (Vict) v Commonwealth*.³⁰⁰

We are concerned with the law of to-day, not with the law of the Middle Ages. The only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law to-day by seeing how it took shape.

²⁹⁸ McFarlane *id* at 88.

²⁹⁹ Baloyi 2014 *MEIEA* 66 – 67.

³⁰⁰ (1962) 107 CLR 529, at 595.

Chapter 3: The Further Development of Music Copyright: The Role of Technological Developments and the Imperial Copyright Act

“Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”¹

¹ Per Stevens, in *Sony Corporation of America et al. v Universal City Studios, Inc., et al.* 464 U.S. 417 at para 12.

3.1 The Role of Technological Developments in the Further Development of the Reproduction Right in Musical Works

3.1.1 Introduction

The advancement of technology has always presented problems in relation to the protection of copyright and music rights in particular.² Just as the meaning of “books and other writings” in the Statute of Anne was interpreted to extend to printed music in *Bach v Longman*, and just as the meaning of “author” was extended to include a music composer, so it has become necessary over the years to extend or re-interpret copyright law to include new forms of musical exploitation.³ Over the years various technologies have had a major impact on the development of copyright law. Writing on how new forms of reproduction have affected the development of copyright law, Skone James has observed:

Copyright is a right whose legal recognition has closely followed every expansion in the forms of reproduction. It originally arose from the creation of the art of printing and, though recognised in England as having subsisted at common law, it was not of practical importance until the production of printed copies of literary works gave rise to the first Copyright Act in the reign of Queen Anne. The production of printed copies of musical notation gave rise to the copyright protection of music and a parallel development gave rise to the protection of dramatic works. As a natural consequence of protecting the reproduction of musical and dramatic works, followed the protection of performing rights in such works. The next development was the creation of mechanical or semi-mechanical means of reproducing works ... The last development of this kind which had occurred before the Act of 1911 was the manufacture of gramophone records ...⁴

In the twentieth century the major technologies that have had a major influence on the development of copyright law are recording technology, film technology, radio technology and television and video technology. An understanding of the historical development of these technologies is useful in understanding the concomitant development of copyright law in response to these technological developments. Accordingly, a brief account of these technological developments is provided here. Thereafter it is shown how these technologies have shaped the development of copyright law, in particular the reproduction right. This analysis will be helpful in understanding the full nature of the reproduction right in musical works in South Africa today, and the technologies that have shaped the development of this right. It needs in this regard to be mentioned that, after it was shaped in this manner, the reproduction right in musical works has remained largely unchanged throughout the world, especially in common-law jurisdictions.⁵ It will more particularly highlight how this right is

² In this regard Yu 2015 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632914 1 observes that “copyright law co-evolves with changing technological developments [and] its history is naturally filled with repeated challenges to its concepts and ensuing responses to these challenges.”(Date of use: 16 June 2016).

³ See in this regard Carrol 2005 Florida Law Review 907 generally, and at 956 – 961 in particular.

⁴ Skone James 1957 *Copyright Soc’y U.S.A.* 119 – 120.

⁵ This has been so to the extent of retaining the words used to describe the technologies that shaped this right, such as the use of the phrases “mechanical right” and “transcription right” – even though music is no longer produced by mechanical means today, and transcription no longer happens the way it happened traditionally.

applied in the music industry, in particular how the right has been fragmented to cover segments of the music reproduction market (e.g. the mechanical reproduction market; the synchronisation market etc.)⁶ – something that one will not be able to appreciate from a simple reading of the Copyright Act.

3.1.2 An Overview of the Historical Development of Technologies Affecting Music Reproduction

3.1.2.1 The development of recording technology

In the area of mechanical reproduction, the early technologies that gave rise to the necessity to adapt copyright law were: (i) the music box, invented in 1796 by Antoine Favre, a Swiss watchmaker; (ii) player pianos,⁷ popular from the 1800s to the 1920s; and (iii) the phonograph and gramophone, developed in the late 1800s.⁸ In particular because of the increasing use of player pianos with their use of perforated rolls instead of sheet (i.e. printed) music, the market for sheet music was in the decline during this period. As a result music publishers sought to extend the protection given in respect of sheet music, to the new piano rolls.⁹ It was however, Thomas Edison's invention of the phonograph and Berliner's subsequent invention of the gramophone that brought matters to a head. This situation is well-captured by Copinger, as follows:

In the year 1886, the date of the Berne Convention, the only mechanical means generally known for reproducing music were musical boxes and Barbary organs. When, therefore, at the request of the Swiss delegates to the Conference of Powers which preceded that Convention, it was, in the interests of a national Swiss industry, declared by Article 3 of the Final Protocol that mechanical reproduction of musical airs should be no infringement of copyright, musical composers did not feel that they were abandoning rights of any great value to themselves. But when instruments were invented capable of reproducing not one or two tunes, but any number of tunes, and even the words of songs, by means of perforated rolls, discs and cylinders, and it was found that these evidently supplied a public need and met with a ready market, composers became perturbed. ...¹⁰

Although the “earliest known” device for producing and reproducing music mechanically – the “Banu Musa” or hydraulic / water organ – “remained the basic device to produce and reproduce music mechanically until the second half of the nineteenth century”,¹¹ it was Edison's 1877 invention of the cylinder phonograph, itself modelled upon Scott de Martinville's¹² phonautograph of twenty years earlier – which revolutionised the industry for the mechanical reproduction of musical works.¹³ This is because while earlier devices could only record music, it was Edison's invention that introduced the

⁶ For the concept of the fragmentation and segmentation of rights see Chapter 8 below.

⁷ Or piano players, pianolas, reproducing pianos.

⁸ Kohn and Kohn *Music Licensing* 720 – 722.

⁹ Attempts in this regard were for example made, unsuccessfully, in the US cases of *Kennedy v. McTammany* 33 Fed. Rep. 584, *Stearn v. Rosey* 17 App. D.C. 562, and *White-Smith Music Publishing Company v Apollo Company* 209 U.S. 1 (1908); and in the English decisions of *Boosey v. Whight* (1899, 1 Ch. 836; 80 L. T. R. 561).

¹⁰ Copinger *Law of Copyright* 256.

¹¹ Fowler 1967 *Music Educators Journal* 45.

¹² Edouard-Léon Scott de Martinville.

¹³ See Crane 2017 <http://illuminate.usc.edu/206/spread-the-sound-a-brief-history-of-music-reproduction/> (date of use: 15 October 2017).

technology of replaying the recorded sound.¹⁴ Edison's phonograph was perfected by Emile Berliner, who, in 1899, invented the gramophone and replaced Edison's rotating cylinder phonograph with the flat disc vinyl phonograph record. Berliner's flat disc phonograph record "essentially finalized the now-common disc design seen in records everywhere"¹⁵ and in fact, signalled the advent of what is today a gigantic music recording industry with networks spanning the entire globe.¹⁶ The market was ripe for the introduction of *mechanical rights* in musical works.

3.1.2.2 The development of film technology

Copyright law was also required to adapt in response to the fledgling film industry, which showed itself to be a force to be reckoned with at the turn of the twentieth century. Although our interest is in how film technology impacted upon the development of music rights, it would be important to understand how film technology itself evolved to give rise to the need for music rights protection. Although films were recognised as a work eligible for copyright protection in their own right as early as the 1908 revision of the Berne Convention, the technology for film developed over time. In this regard it is important to note that the earlier development of photography was essential in the development of cinematography.¹⁷ The earliest demonstration of motion picture technology happened in California in 1877 through the so-called Muybridge photographs. Eadweard Muybridge, an English photographer, used twelve equally-spaced cameras to photograph a galloping horse in a sequence of shots in order to demonstrate that at some stage, all four hooves of a galloping horse left the ground.¹⁸ To counter criticisms, Muybridge gave lectures on animal locomotion throughout the United States and Europe, using a zoopraxiscope, "a lantern he developed that projected images in rapid succession onto a screen from photographs printed on a rotating glass disc, *producing the illusion of moving pictures*."¹⁹ This was the precursor to the modern cinema.

Later developments gave rise to single cameras capable of taking a sequence of photographs at regular rapid intervals. In this regard the name of Thomas Edison again features, and it is he who is credited with inventing the motion picture camera – the Kinetograph – in 1889, although his camera in fact relied on earlier technologies.²⁰ The first film projection machine, the Phantoscope, was developed by Charles Francis Jenkins with the financial assistance of Thomas Armat.²¹ Armat, who later bought rights to the Phantoscope, perfected his own version of the Phantoscope and later sold the rights to manufacture the machine to Thomas Edison. With Edison's involvement the

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ For the concept of global networks in respect of the recording industry see Watson 2012 <https://dspace.lboro.ac.uk/dspace-jspui/bitstream/2134/21415/1/Pre-pub%20version%20with%20title%20page.pdf> generally. (Date of use: 15 October 2017).

¹⁷ In this regard it has been observed: 'Initially the cinema was also regarded merely as another way of producing images with a machine, the only factor which distinguished it from photography being that the pictures "moved". *Early cinema* was primarily concerned with the production of animated pictures with no specific cinematic form of representation. ... [T]he cinema was seen merely as an extension of photographic expression ...' Salokannel *Rights in Audiovisual Productions* 10 – 11.

¹⁸ See Kohn and Kohn *Music Licensing* 1087.

¹⁹ <https://www.britannica.com/biography/Eadweard-Muybridge> (date of use: 15 March 2018). Emphasis added.

²⁰ Kohn and Kohn *Music Licensing* 1088. At this stage the motion picture was not exhibited through projection but through the Kinetoscope, a cabinet into which one would peep to view the motion picture, revealingly termed a *peep show*. Ibid.

²¹ <https://www.fi.edu/case-files/francis-jenkins-phantoscope> (date of use: 15 March 2018).

Phantoscope, now marketed as the Edison Vitascope, paved the way for emergence of a viable film industry.²² At this stage motion pictures were still “silent pictures” with no synchronised recorded sound and with the music “supplied either by a piano player or by an orchestra”.²³

The development of technology to synchronise recorded sound to films, and in particular the use of music in synchronisation with the soundtrack of the film, introduced a new source of income for owners of copyright in musical works through the issuing of *synchronisation licences*, namely the permission to synchronise music in timed-relation to the soundtrack of a film.²⁴ This was made possible through Warner Bros. Pictures’ Vitaphone system, which they had bought from AT&T and used to synchronise music and sound effects in the film, *Don Juan* in 1926, albeit without speech at this stage.²⁵ The inclusion of a presentation of the filmed remarks of Will Hayes, the director of the Motion Picture Producers and Distribution Association of America, in the film, and Al Jolson’s audible remarks in the 1927 film, *The Jazz Singer*, marked the birth of “talking pictures” or “talkies”.²⁶ The development of this technology was described in the case of *Alden-Rochelle, Inc., et al v American Society of Composers, Authors and Publishers et al*²⁷ as follows:

... At first the sound part of talkies was recorded on phonograph discs which were so operated that they synchronized with the pictures projected on the screen on the screen. Later, the speech of the actors, the music and sound effects, were recorded on the “sound track” of the film, which paralleled the pictures, so that when the pictures were projected on the screen the sound was heard by the audience. ...²⁸

Film had an early history in South Africa also. A 1910 account refers to a bioscope visit that had “such a good reception” that a second visit was organised, paid and proved successful, with the pictures “clearly shown ...and ... free from flicker, being evidently carefully selected.”²⁹ Moreover,

²² Ibid. See also Kohn and Kohn *Music Licensing* 1088 – 1089, where it is highlighted that the emergence of the modern film industry itself happened in France, when French filmmakers started using the new film technology beyond merely conveying animated photographs and using it to tell stories. This commenced with the making of a 14-minute, 30-scene film narrative titled *Voyage to the Moon*, by the filmmaker Georges Méliés in 1902, followed by the making of *The Great Train Robbery* in the United States by Edwin S. Porter in 1903, acclaimed as being “the first narrative film to achieve true temporal continuity of action” and leading to the establishment of the first film theatres termed “nickelodeons”. The rest, as they say, is history.

²³ See *Alden-Rochelle, Inc., et al v American Society of Composers, Authors and Publishers et al* at 891.

²⁴ Arising from *synchronisation rights*.

²⁵ Kohn and Kohn *Music Licensing* 1092. The system of synchronisation of sound and music in film had been in existence at different levels of development from the early days of film. Thus as far back as 1899 Edison had issued sheet music in conjunction with the release of the films, *The Astor Tramp* and *Love and War*. This use of music “in conjunction with films” – where the music was termed *special music* – was also not uncommon during the early nickelodeon era, and can be traced to operatic films as early as 1904. Also, in 1907, a version of *The Merry Widow* was offered with a complete musical score synchronised with the picture. See Wierzbicki *Film Music* 43. This trend continued until the early 1920s, when Lee De Forest developed a sound-on-film process called Phonofilm for use in theatres, which the public expressed much interest in. The major Hollywood studios however, expressed no interest in the system, as ‘they viewed “talking pictures” as an expensive novelty with little potential return’, and it was left to Warner Brothers, then a minor studio, to take a gamble on this technology by buying the Vitaphone system – a gamble that proved very successful and revolutionised the film industry by introducing the system of “talking pictures”. See <https://www.britannica.com/art/history-of-the-motion-picture/The-pre-World-War-II-sound-era> (date of use: 15 March 2018). It is also useful to note that this first synchronisation of music in *Don Juan* led to a copyright infringement dispute in which ASCAP claimed that the Warner Brothers had used the music without authorisation, with Warner Brothers settling the matter out of court. See Wierzbicki *id* at 92.

²⁶ Kohn and Kohn *id* at 1092 – 1093.

²⁷ 80 F. Supp. 888 (1948).

²⁸ *Id* at 892.

²⁹ Herbert *A History of Early Film* 22.

the account goes further to show that two theatres existed in the Rand, with the one presenting “biograph and vaudeville”, and a new theatre presenting “picture shows and vaudeville” at regular intervals, and already “[raking] in the shekels during the holidays.”³⁰

3.1.2.3 The development of radio technology

The introduction of radio and television technologies ushered in the high-tech entertainment industries of the twentieth century, where recording and film technologies were taking to a higher level.³¹ Recording technology was adapted for radio in the form of electrical transcriptions,³² while film technology became the platform for the new television industry. It has been observed that the invention of radio technology cannot be ascribed to one person, but rather to “continuous contributions from a variety of inventors over the span of time beginning in 1873 to about the start of the twentieth century” – beginning with James Clark Maxwell, who introduced the concept of electromagnetic energy as a form of energy existing in waves.³³ This concept was validated by Henrich Hertz, who conducted experiments proving the existence of electromagnetic waves which were later termed the Hertzian waves.³⁴ Hertz was nevertheless not interested in the Hertzian waves as being a source of communication and “did not appreciate the monumental practical importance of his discovery.”³⁵

It was left to Guglielmo Marconi, credited as being the “father of radio”, to perfect the art of radio telegraphy, securing the world’s first patent in this regard in 1896 and later developing the first practical radio-signalling system and the first transoceanic transmission.³⁶ In 1906 an American inventor, Lee de Forest, invented the vacuum tube (audion), and is credited with contributing to the beginning of the electronic age.³⁷ It was the Joseph Horne Company that facilitated the commercial use of radios from its primary use as wireless communication for the military. This the company achieved by beginning to sell radio receivers through newspaper adverts. This, coupled with the first informal transmission of sports results, music and talk by Frank Conrad in the early 1920’s from a make-shift “radio station” located at his garage, became the breeding ground for American

³⁰ Ibid.

³¹ High-tech industries are defined as “industries having high concentrations of workers in STEM (Science, Technology, Engineering and Mathematics) occupations.” See Wolf and Terrell 2016 <https://www.bls.gov/opub/btn/volume-5/pdf/the-high-tech-industry-what-is-it-and-why-it-matters-to-our-economic-future.pdf> 1 (date of use: 20 March 2018). For the inclusion of the media and entertainment industries among high-tech industries see Florida and King 2016 <http://martinprosperity.org/media/Startup-US-2016-Industrial-Clusters.pdf> (date of use: 20 March 2018). Of radio the following was observed: ‘From about 1920 to 1945, radio developed into the first electronic mass medium, monopolizing “the airwaves” and defining, along with newspapers, magazines, and motion pictures, an entire generation of mass culture.’ <https://www.britannica.com/topic/radio> (date of use: 20 March 2018).

³² These were “recordings made exclusively for radio broadcasting” and made popular during the “golden age of radio” – i.e. the period from the late 1920s until the 1950s. See Browne and Browne *United States Popular Culture* 263 and the discussion under 3.1.4 below.

³³ See http://web.bryant.edu/~ehu/h364proj/sprg_99/corvigno/historyradio.htm (date of use: 20 March 2018).

³⁴ Ibid.

³⁵ <https://www.famousscintists.org/how-hertz-discovered-radio-waves/> (date of use: 20 March 2018).

³⁶ http://www.radiohof.org/guglielmo_marconi.htm (date of use: 20 March 2018).

³⁷ The audion was able to amplify the changing volume and pitch of speech and to modulate weak signals. See http://web.bryant.edu/~ehu/h364proj/sprg_99/corvigno/historyradio.htm and <https://www.britannica.com/technology/Audion> (date of use: 20 March 2018).

broadcasting.³⁸ In South Africa it has been observed that the history of broadcasting “can be traced back to 1923, when the first wireless broadcast was made in Johannesburg”, leading eventually to the formation of the national broadcaster, the South African Broadcasting Corporation (SABC).³⁹

3.1.2.4 The development of television and video technology

Early television technology was based on radio technology and used the model for broadcast radio.⁴⁰ In this regard it has been observed that “the period of transition from radio to television that is associated with the 1950s in western countries saw the wholesale recycling of radio programmes as the basis for new television shows.”⁴¹ Prior to this the Russian, Boris Rosing, had experimented with the technology of transmitting images in the early 1900s, with John Logie Baird and Charles Francis Jenkins developing a system of mechanical television in the early 1920s.⁴² It was however, the demonstration of electronic television in 1927, when Philo Taylor Farnsworth successfully scanned images with a beam of electrons, that marked the beginning of modern television.⁴³ The Radio Corporation of America (RCA), which had dominated radio, invested in the development of electronic television and made its first regular television broadcasts in 1939, during which year it also started selling television sets.⁴⁴ It was only around 1949 however, that commercial television began in earnest.⁴⁵

Synchronisation technology played a major role in the development of television, just as it did in the case of film.⁴⁶ While it has been said that at its early development television, like radio in the 1920’s, “initially traded on being a live medium” – essentially “radio with pictures” – “[i]t did not take broadcasters long ... to realise that they needed a method of recording content ‘offline’ for subsequent transmission, and of recording live broadcasts for future use.”⁴⁷ This is where synchronisation became relevant. Television producers began to increasingly rely on film-originated material and recorded film-based television programming capable of being used at different times. Telecine technology using the telecine machine for transferring motion-picture film into video became crucial for non-live television programming.⁴⁸ Music inevitably became an integral part of synchronised television programming, and this trend came to a head during the era of “music television” in the 1980s, championed by MTV.⁴⁹ It has been observed that television has transformed

³⁸ http://web.bryant.edu/~ehu/h364proj/sprg_99/corvigno/historyradio.htm *ibid.*

³⁹ <http://www.sahistory.org.za/dated-event/south-african-broadcasting-corporation-sabc-introduces-its-first-national-news-service> (date of use: 20 March 2018).

⁴⁰ See <https://www.britannica.com/technology/television-technology> (date of use: 21 March 2018).

⁴¹ Moran and Malbon *Global TV Format* 22.

⁴² See <https://www.nyu.edu/classes/stephens/History%20of%20Television%20page.htm> (date of use: 21 March 2018).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ See Enticknap *Moving Image Technology* 98.

⁴⁷ *Id* at 174.

⁴⁸ See in this regard <http://www.gautengfilm.org.za/news/news-archive/2008/december-2008/351-the-role-of-the-telecine-machine> (date of use: 21 March 2018). For more information on the telecine machine see Wheeler *Practical Cinematography* 78 – 79.

⁴⁹ Although it has been observed that earlier forms of the music video have been in existence the era of the “illustrated song”, first demonstrated in 1894 when George Thomas used a “magic lantern” to project a series of still images on a screen simultaneous to a live musical performance, it was it was the advent of MTV that brought music videos to the limelight. See in this regard Eiss *Mythology of Dance* 319, noting: “Music Videos, under various rubrics (“illustrated song,”

radio's content and role; and although broadcast radio remained "the most widely available electronic mass medium in the world", its importance has not matched that of television.⁵⁰

The development of video technology is very much related to the development of television technology. Video technology itself is a relatively-new invention, coming to the fore when the television industry started using videos in the late 1950s.⁵¹ Earlier video cameras were huge machines mounted on wheeled pedestals and comprised of vacuum tubes that could get extremely hot.⁵² Over time the cameras became smaller and portable, culminating in the VHS and Betamax tape formats of the 1970s and the "camcorders" of the 1980s.⁵³ Under UK law in terms of the Imperial Copyright Act it has been observed that a video tape recording would be protectable under the Act as a series of photographs on the ground of it being produced by "a process analogous to photography", since both processes use a process of light "to produce a permanent record of an image."⁵⁴ In the United States the so-called *Betamax* case⁵⁵ provides a good illustration of how the introduction of technology – in this case video technology – has often created tension with regard to copyright protection. When Sony developed the Betamax video tape recording format in the 1970s the television networks were concerned that these videotape recorders (VTRs) facilitated the home recording by VTR consumers of television programmes in which they held copyright.

In 1976 Universal Studios and Walt Disney Productions instituted proceedings in the US District Court for the Central District of California. They sought no relief from the Betamax consumers but alleged that Sony and the distributors of the VTRs were liable for copyright infringement because of their marketing of the VTRs. They thus sought money damages and an equitable accounting of profits from Sony *et al*, as well as an injunction against the manufacture and distribution of the Betamax VTR.⁵⁶ In 1979 the District court ruled in favour of the Betamax manufactures, denying relief to the television networks. On appeal, the Ninth Circuit overruled the District court's decision, ruling that Sony *et al* were liable for contributory infringement of copyright.⁵⁷ Upon appealing to the US Supreme Court, the court, in a narrow majority (5-4) held in favour of Sony *et al*, ruling that private, non-commercial *time shifting*⁵⁸ at home amounted to fair use and thus did not infringe copyright. The court made the following important observations in relation to the interaction of technology with copyright law:

"filmed insert," "promotional film or clip or video or simply promo," "song video or clip," "film clip") go back as far as the beginnings of film, mainly created as a marketing device to promote the sales of a song or a film. However, in the 1980s, driven by MTV's use of them, they gained a higher status as a form of artistic expression worthy of consideration completely on their own merits, beyond their value for marketing."

⁵⁰ <https://www.britannica.com/topic/radio> (date of use: 22 March 2018).

⁵¹ <https://www.livewatch.com/history-and-evolution-of-the-video-camera> (date of use: 22 March 2018).

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Kamina *Film Copyright* 27.

⁵⁵ *Sony Corporation of America et al. v Universal City Studios, Inc., et al.* 464 U.S. 417.

⁵⁶ *Sony Corporation id* 420 at para 2.

⁵⁷ *Id* at para 3.

⁵⁸ Time shifting is "[t]he practice of recording of a broadcast with the intention of watching or listening to it later at a more convenient time." https://en.wiktionary.org/wiki/time_shifting (date of use: 22 March 2018).

... From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment – the printing press – that gave rise to the original need for copyright protection. Repeatedly, as new developments have occurred ... it has been Congress that has fashioned the new rules that new technology made necessary. ...⁵⁹

In the dissenting judgment a history of US copyright law and how it was extended to provide protection for new forms of usages, and the impact of new technology in general, was recounted:

This Nation's initial copyright statute was passed by the First Congress. Entitled "An Act for the encouragement of learning," it gave an author "the sole right and liberty of printing, reprinting, publishing and vending" his "map, chart, book or books" for a period of 14 years. ... Since then, as the technology available to authors for creating and preserving their writings has changed, the governing statute has changed with it. By many amendments, and by complete revisions in 1831, 1870, 1909, and 1976, authors' rights have been expanded to provide protection to any "original works of authorship fixed in any tangible medium of expression," including "motion pictures and other audiovisual works." ...⁶⁰

Proof of actual harm, or even probable harm, may be impossible in an area where the effect of a new technology is speculative, and requiring such proof would present the "real danger ... of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances." ... When the use is one that creates no benefit to the public at large, copyright protection should not be denied on the basis that a new technology that may result in harm has not yet done so. ...⁶¹

3.1.3 *The Further Development of the Reproduction Right in Response to Technological Developments*

3.1.3.1 **The Development of the Mechanical Right - a Response to Recording Technology**

(a) The Recognition of the Mechanical Right in France and in International Law

In Chapter 2 an account was given of how the performing right took root and flourished in France, as compared to the situation in Britain. It was also pointed out that the market for printed music and print rights was not as successful in France, and in this regard the Anglo-American world took the lead. What is also evident is that, unlike in the case of performing rights, developments regarding the recognition of authors' rights in the area of *mechanical reproduction* (as opposed to the manual copying of sheet music) also had a late arrival, not only in France but elsewhere also. In France attempts to construe the law of 1793 as being also applicable to mechanical reproduction faced resistance.⁶² France had entered into a commercial treaty with Switzerland dated 30 June 1864, in

⁵⁹ *Sony Corporation of America et al. v Universal City Studios, Inc., et al.* 430 – 431 at para 24.

⁶⁰ *Id* at 460 – 461 para 65.

⁶¹ *Id* at 482 para 87.

⁶² See Billboard 22 May 1993 61; McFarlane *Performing Right* 56;

which it undertook to pass a law to exclude mechanical reproductions from the ambit of the 1793 decree.⁶³ This law was passed in 1866. In this regard the following has been noted:

The process of winning recognition of the fact that mechanical reproduction of copyright works in France was covered by the decree of 1793 was also complex and protracted. In May, 1866, at the behest of a Swiss government anxious to protect its developing music box industry, the French government passed a law which provided that the manufacture and sale of instruments which mechanically reproduced music in the private domain did not constitute an unauthorized use and was not in breach of the law of 1793.⁶⁴

The terms of this 1866 law found their way into the Berne Convention when it was enacted in 1886.⁶⁵ In this regard the Final Protocol of the 1886 Convention stated under No. 3, after an “animated discussion”:

It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical works in which copyright subsists shall not be considered as constituting an infringement of musical copyright.⁶⁶

At the 1896 Paris revision of the Berne Convention the question of the authors’ rights to authorise the mechanical reproduction of the works again came to the fore. In explaining the rationale for the granting of immunity in respect of mechanical reproduction of copyright in the Final Protocol of the 1886 Convention the French delegation observed that

the Berne Convention had in mind those instruments which included their own notation and had a reproduction capability limited to certain airs. The immunity should not ... apply in fairness to instruments which were capable of playing an infinite number of airs by introducing – in the form of perforated cards – *notations which are external to them, movable and unlimited in number. There was no longer a fusion between instrument and notation, the latter being but an edition in a particular form, which could not be lawful without the author’s consent.*⁶⁷

Presumably the Swiss music box fell within the category of instruments where “there was ... fusion between instrument and notation”. Since then however there had been wide-reaching technological developments in the area of mechanical reproduction of musical works, where indeed the instruments manufactured involved “notations which [were] external to them”. Berliner’s perfection of the phonograph by introducing the flat disc phonograph revolutionised recording technology and in essence paved the way for the development of the modern recording industry. In light of this

⁶³ <http://global.oup.com/booksites/content/9780198259466/15550026> 207 (date of use: 15 October 2017).

⁶⁴ Billboard 22 May 1993 at 61. The Swiss music box industry was connected to its watchmaking industry, with Charles Reuge credited for establishing the first musical pocket watch in 1865. <https://www.reuge.com/the-ateliers/history/> (date of use: 20 July 2019).

⁶⁵ <http://global.oup.com/booksites/content/9780198259466/15550026> 207 (date of use: 15 October 2017). Ironically it was the Swiss government, in a campaign led by the writer Victor Hugo and other authors comprising the *International Literary Association* (later *the International Literary and Artistic Association*), that convened the conference called “to deal with the international protection of authors of literary or artistic works”, which culminated in the enactment of the Berne Convention of 1886. Ibid; also <http://www.wipo.int/about-wipo/en/history.html> (date of use: 15 October 2017).

⁶⁶ <http://global.oup.com/booksites/content/9780198259466/15550026> 206 – 207 (date of use: 16 October 2017).

⁶⁷ *Id* at 207. Emphasis added.

development it is reported that a retired French tax official named Vives instituted proceedings against Pathe-Marconi, a recording company, on behalf of a group of music publishers, in 1903, under the conviction that France's 1866 law did not apply in respect of music recordings. Vives argued that records were not "mechanical instruments" but "[constituted] a form of musical reproduction which was covered by the law of 1793."⁶⁸ The music publishers had authorised Vives to administer their mechanical reproduction rights, at his own risk, in return for forty percent of any proceeds derived from that. Vives lost the 1903 proceedings and appealed in 1905, succeeding on appeal. Regarding this it has been noted:

This decision constituted the first recognition by French jurisprudence that royalties were due to rights owners for the mechanical reproduction of their works on phonographic cylinders and discs – a major advance on the Berne Convention of 1886.⁶⁹

The question as to what rights authors had in respect of the use of their works through the new mechanical devices came to a head at 1908 Berlin conference convened to revise the Berne Convention.⁷⁰ In the discussions that ensued in this regard the following was observed:

Since 1896 the manufacture of mechanical musical instruments has undergone an unexpected development; substantial industries have formed in various countries, and thousands of copies of pieces of music in ever increasing numbers have been reproduced.⁷¹

Accordingly the German delegation called for the reconsideration of the issue and in the end managed to sway opinions. Thus Final Protocol No. 3 of the 1886 Convention was replaced by Article 13 of the 1908 revision, which provided the following:

The authors of musical works shall have the exclusive right of authorizing: (1) the adaptation of those works to instruments which can reproduce them mechanically; (2) the public performance of the said works by means of these instruments.

Thus the mechanical right in musical works was finally recognised in international law. In justifying the insertion of this new provision the following observation was made:

The right of the author and the right of the inventor of instruments must not be weighed against each other; the latter may have achieved wonders, shown true genius, but his right stops at that of others; he cannot appropriate a raw material which does not belong to him and, in this case, the raw material is precisely the musical expression. It matters little what method is used and how difficult it may or may not be to read the disk or the cylinder, the musical expression is nonetheless incorporated in that disk or that cylinder. Why should the author's consent not be just as necessary for this particular type of incorporation as it is for the reproduction of a musical work by means of printing? We see no reason to make a distinction. Authors thus suffer a material injury, since large profits are made from the

⁶⁸ Billboard 22 May 1993 at 62.

⁶⁹ Ibid.

⁷⁰ See Sterling *World Copyright Law* 20.

⁷¹ <http://global.oup.com/booksites/content/9780198259466/15550026> 207 (date of use: 16 October 2017).

reproduction of their works without them receiving any remuneration; their interest seems to be at least as deserving as that of the manufacturers. ...⁷²

(b) The Recognition of the Mechanical Right in the United States of America

In America it was the significant growth of in particular, player pianos, that provided the conditions necessary for the recognition of the mechanical right.⁷³ The hope that music publishers had “that their copyrights would prevent unauthorized embodiment of a performance of a musical composition in player piano rolls or other mechanical devices” was nevertheless dashed in the US Supreme Court case of *White-Smith Music Publishing Company v Appollo Company*,⁷⁴ where this issue came to a head.⁷⁵ In the case the ‘appellee’ was involved in the manufacture of piano players and player pianos, musical instruments adapted to be used with perforated rolls of music. The appellant instituted proceedings, alleging that the appellee was infringing its copyright in two musical compositions published in the form of sheet music. It was alleged by the appellant that the appellee had used perforated rolls, in conjunction with the piano players or player pianos and through a particular mechanism, to ‘reproduce in sound the melody recorded in the two pieces of music copyrighted by the appellant.’⁷⁶ Upon analysis of the facts, the parties’ submissions and the law, the court dismissed the appeal and upheld the decision of the court *a quo*. On arriving at its judgment the court held:⁷⁷

When we turn to the consideration of the act it seems evident that Congress has dealt with the tangible thing, a copy of which is required to be filed with the Librarian of Congress, and wherever the words are used (copy or copies) they seem to refer to the term in its ordinary sense of indication reproduction or duplication of the original. ... We cannot conceive that the amendment of ... the act ...providing a penalty for person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained [referring to the recognition of performing rights in the act], can have the effect of enlarging the meanings of the previous sections of the act which were not changed by the act. ... What is a copy? ... “A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.” ...

⁷² *Id* at 208.

⁷³ See in this regard Abrams 2010 *Santa Clara High Tech. L.J.* 217 – 218. Abrams, quoting Sanjek (at n 10) reports that out of every eight of the 354,545 pianos manufactured in 1909, one was a player piano.

⁷⁴ 209 U.S. 1 (1908).

⁷⁵ Abrams 2010 *Santa Clara High Tech. L.J.* 218. See also Jones 2010 *European Journal of Law and Technology* 4, who notes that the development of recording technologies ‘that allowed for the first time performances to be both captured and copied’ presented the major challenge of technology to copyright in the 19th century, with piano rolls becoming ‘the first flash point’ in this regard.

⁷⁶ *White-Smith Music Publishing Company* op cit note 99, at 9. The process of making the perforated piano rolls was explained by Day J as follows (at 10): ‘Speaking in a general way, it may be said that these rolls are made in three ways. First. With the score or staff notation before him the arranger, with the aid of a rule or guide and a graduated schedule, marks the position and size of the perforations on a sheet of paper to correspond to the order of notes in the composition. The marked sheet is then passed into the hands of an operator who cuts the apertures, by hand, in the paper. This perforated sheet is inspected and corrected, and when corrected is called “the original.” This original is used as a stencil and by passing ink rollers over it a pattern is prepared. The stenciled perforations are then cut, producing the master or templet. The master is placed in the perforating machine and reproductions thereof obtained, which are the perforated rolls in question. Expression marks are separately copied on the perforated music sheets by means of rubber stamps. Second. A perforated music roll made by another manufacturer may be used from which to make a new record. Third. By playing upon a piano to which is attached an automatic recording device producing a perforated matrix from which a perforated music roll may be produced.’

⁷⁷ At 16 – 17. The long quote is deliberate and necessary in that it highlights the thinking of the courts and the legislature generally and their apprehension against extending copyright protection to new modes of exploitation.

The court went further to note that while it was true, broadly, that ‘a mechanical instrument which reproduces a tune copies’, this was ‘a strained and artificial meaning’.⁷⁸ On remarking as to why it did not consider the perforated roll to be a copy of sheet music the court noted:

After all, what is the perforated roll? The fact is clearly established in the testimony ... that even those skilled in the making of these rolls are unable to read them as musical compositions, as those in staff notation are read by the performer. ... [T]hey ... are not intended to be read as an ordinary piece of sheet music, which to those skilled in the art conveys, by reading, in playing or singing, definite impressions of the melody. These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination.⁷⁹

In response to *White-Smith* the US Congress enacted the Copyright Act of 1909⁸⁰, ‘an act to amend and consolidate the acts respecting copyright’. The Act introduced the concept of **mechanical rights**, providing, with respect to the author’s exclusive right to ‘print, reprint, publish, copy, and vend the copyrighted work’, a further exclusive right ‘to make any arrangement or setting of [the copyrighted work] or of the melody of [the copyrighted work] in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced’.⁸¹ More particularly these provisions secured copyright in respect of the exploitation of musical works through ‘the parts of instruments serving to reproduce mechanically the musical work.’⁸² The Act introduced the system of payment of mechanical royalties to authors under a

⁷⁸ *Id* at 17. The reasoning of the court in this regard was as follows (at 17 – 18): ‘When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies as that term is generally understood, and as we believe it was intended to be understood in the statutes under consideration. ... The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer. Also it may be noted in this connection that if the broad construction of publishing and copying contended for by the appellants is to be given to this statute it would seem equally applicable to the cylinder of a music box, with its mechanical arrangement for the reproduction of melodious sounds, or the record of the graphophone, or to the pipe organ operated by devices similar to those in use in the pianola. ...’

⁷⁹ *Id* at 18. It is this line of argument that prompted the international community to phrase the *right of reproduction* to mean the reproduction of a work ‘in any manner or form’. Although all member states of the Berne Convention recognised the right, in principle, it was not until the Stockholm conference in 1967 that the right appeared in the Convention. As noted, ‘the problem was to find a formula wide enough to cover all reasonable exceptions but not wide as to make the right illusory.’ WIPO *Guide to the Berne Convention* 54. It is now recognised that the phrase ‘in any manner or form’ is ‘wide enough to cover all methods of reproduction: ... mechanical or magnetic recording (discs, cassettes, magnetic tape, films, microfilms, etc), and all other processes known or yet to be discovered.’ WIPO *Guide to the Berne Convention* *ibid.* [Emphasis added].

⁸⁰ Copyright Act of 1909, Pub. L. 60 – 349, 35 Stat. 1075 (Mar. 4, 1909; *repealed* Jan. 1, 1978) (hereinafter US Copyright Act, 1909). The court in *White-Smith* had in effect, invited Congress to make such an intervention, having remarked (at 18): ‘It may be true that the use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislative and not to the judicial branch of the Government.’

⁸¹ Section 1(e). The rationale for the enactment of the 1909 was expressed by President Theodore Roosevelt as being the need to urgently revise US Copyright laws because ‘[t]hey are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection ...’ The House Report on the Copyright Act of 1909 http://ipmall.info/hosted_resources/lipa/copyrights/The%20House%20Report%201%20on%20the%20Copyright%20Act%20of%201909.pdf at 2. (Date of use: 26 September 2013). [Emphasis added]

⁸² Section 1(e) of the US Copyright Act, 1909, read with the proviso thereto.

system of compulsory licensing, and in this regard it was observed that this concept 'grew out of a concern in Congress that the music industry was going to develop into a gigantic monopoly ...'⁸³

(c) The Recognition of the Mechanical Right in the United Kingdom

The reason the recognition of the mechanical right in the United Kingdom is discussed after discussing the recognition of the right in the USA is because the right was recognised a little bit later in the United Kingdom, to be particular, two years later in 1911. While British publishers and composers had, for a long time, benefitted immensely from revenues derived from sales of sheet music, by the turn of the twentieth century this source of income began to dwindle as a result of rampant piracy of copies of sheet music, technological developments arising from the invention of the gramophone record, and the concomitant new practice of "[m]ass production and trans-Atlantic sales techniques".⁸⁴ This, together with the decline of concert outlets and the growing recognition of the importance of a proper performing right, led to "a realisation that a review of copyright law was required, both in order to conform with the international requirements of the Berne Convention, and to rationalise the confused jumble of legislation ... which then existed."⁸⁵

The courts' ruling in *Boosey v Whight*⁸⁶ in relation to the question of perforated rolls had also compounded the situation. In this case it was held that perforated rolls did not infringe rights in sheet music. On appeal⁸⁷ the Master of the Rolls, similar to the ruling of the US Supreme Court in the *White-Smith*⁸⁸ case, made this observation:

The plaintiffs are entitled to copyright in three sheets of music It means that they have the exclusive right of printing or otherwise multiplying copies of those sheets of music But the plaintiffs have no exclusive right to the production of the sounds indicated by or on those sheets of music; ... nor to any mechanism for the production of such sounds or music. The plaintiff's rights are not infringed except by an unauthorised copy of their sheets of music. ... The defendants have taken those sheets of music and have prepared from them sheets of paper with perforations in them, and these perforated sheets, when put into and used with properly constructed machines or instruments, will produce or enable the machines or instruments to produce the music indicated on the plaintiff's sheets. But is this the kind of copying which is prohibited by the copyright act; or rather is the perforated sheet made as above mentioned a copy of the sheet of music from which it is made? Is it a copy at all? Is it a copy within the meaning of the copyright act? ... [T]o play an instrument from a sheet of music which appears to the eye is one thing; to play an instrument with a perforated sheet which itself forms part of the mechanism which produces the music is quite another thing.⁸⁹

⁸³ Passman *All you need to know about the Music business* 247.

⁸⁴ McFarlane *Performing Right* 93.

⁸⁵ McFarlane *id* at 94.

⁸⁶ 1899, 1 Ch. 836; 80 L.T.R. 561.

⁸⁷ 1900, 1 Ch. 122; 81 L.T.R. 265.

⁸⁸ 209 U.S. 1 (1908). In fact the US Supreme Court placed reliance on the *Boosey* case in its ruling, since *Boosey* was heard before *White-Smith*. See pp 13 – 14 of the *White-Smith* case.

⁸⁹ *Boosey v Whight* supra n 86.

As a result of the *Boosey* ruling, the Musical Copyright Act, 1906,⁹⁰ enacted to combat the rampant problem of piracy that had arisen at the turn of the century, was explicit in providing that “‘pirated copies’ and ‘plates’ shall not, for the purposes of this Act, be deemed to include perforated music rolls used for playing mechanical instruments, or records used for the reproduction of sound waves, or the matrices or other appliances by which such rolls or records respectively are made.”⁹¹ An attempt in *Newmark v National Phonograph Co.*⁹² to convince the court that the *Boosey* decision was nullified by the enactment of the Musical (Summary Proceedings) Act, 1902,⁹³ was not successful, with the court holding that a phonographic record was not a “sheet of music” as contemplated in the Talfourd’s Act. In *Mabe v Connor*⁹⁴ the court upheld the *Boosey* principle, going further to state that a pianola roll was not a musical work as contemplated in the Musical (Summary Proceedings) Act, 1902 and thus could not be subjected to a seizure as a pirated copy under that Act. Another attempt in *Monckton v The Gramophone Co.*⁹⁵ to argue that, in spite of the existing regime for copyright protection not providing relief, mechanical contrivances infringed a composer’s common law copyright, was also met with resistance by the court.

The combination of these developments led to the enactment of Copyright Act, 1911 (so-called Imperial Copyright Act), which, in section 1(2)(d), provided that the author’s “sole right” included the right, in respect of literary, dramatic or musical works, “to make any *record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered*”⁹⁶, and to authorise such action. This development was far-reaching in that it recognised the fact that musical works could be infringed by their unauthorised use by means of the new technologies of *recording, perforated rolls and film*, “or other contrivances by means of which the work may be mechanically performed or delivered”. Thus a new ray of hope that composers could now recover the losses experienced through the decline of the sheet music industry and its replacement by new technologies, emerged. The use of perforated rolls in conjunction with player pianos, and to a limited extent, the use of the phonograph and the gramophone, were the main form of commercial music exploitation after the demise of the sheet music industry.⁹⁷ As observed, during this period the music business was dominated not by major record labels but by song publishers and

⁹⁰ 1906, 6 Edw. VII. c. 36.

⁹¹ Section 3, Musical Copyright Act, 1906 *ibid*.

⁹² (1907) 23 T.L.R. 439.

⁹³ 1902, 2 Edw. VII. c. 15.

⁹⁴ (1909) 1 KB 505.

⁹⁵ (1912) 106 L.T. 84.

⁹⁶ Section 1(2)(d), British Copyright Act, 1911 (also known as the Imperial Copyright Act). This Act was incorporated *holus bolus* into the Patents, Designs, Trade Marks and Copyright Act of 1916 in South Africa, in Schedule 3 thereof.

⁹⁷ In this regard, although phonograms and gramophones were already in existence and the first commercial musical recordings were introduced in 1889, it has been observed that “the automatic player piano called the pianola, which used perforated rolls ... for many years rivalled the gramophone in popularity.” See Chanan *Repeated Takes* 34. See also Hull *Recording Industry* 2. Regarding the gramophone and phonograph the following was said: “... Prior to the 1920’s, when its attitudes began to soften, the musical establishment saw the gramophone as an abomination, as a mere toy, that had about as much capacity of producing real music as nursery soldiers Concerns were also expressed about the impact the phonograph would have on active music-making An allied concern was the fact that the technology of recording, prior to its electrification in the mid-1920s, was not conducive to musical reproduction of the highest quality and involved many auditory compromises. ...” Symes *B. J. Music Ed.* 2004 164 – 165. See also <https://www.pbs.org/wgbh/pages/frontline/shows/music/inside/cron.html> (date of use: 14 March 2018).

big vaudeville and theatre concerns.”⁹⁸ This trend continued until it was interrupted by the 1929 Great Depression and the maturing of sound recording and radio technology.⁹⁹

This development came about mainly as a result of the 1908 revision of the Berne Convention, which required that authors were to be given protection in respect of the reproduction of their works by mechanical means.¹⁰⁰ As has been observed, section 1(2)(d) of the Imperial Copyright Act “in the simplest fashion completely [covered] the control of mechanical reproduction in conformity with the convention of Berlin.”¹⁰¹ The majority of the parliamentary committee formed to report to the English Parliament regarding the changes that needed to be made to ensure compliance with the Berlin text of the Berne Convention were in favour of granting composers full control in this regard.¹⁰² Fierce lobbying from the manufacturers of the mechanical devices and contrivances however, led to the introduction of a form of compulsory licensing in respect of mechanical reproduction.¹⁰³ This was effected through section 19(2) of the Imperial Copyright Act, which in essence required a composer who had given a licence to someone to reproduce his work mechanically and where copies of the work had been issued to the public pursuant to such a licence, to do so in respect of another person who subsequently wanted to reproduce the work mechanically, upon payment of certain prescribed royalties.

(d) The Continuing Significance of the Mechanical Right

The coming onto centre stage of the three music-intensive technologies of *sound recording*, *audio-visual technologies (film, television and video)* and *radio* completely revolutionised the twentieth-century music sector and led to its rapid global expansion. In English common-law jurisdictions this was made possible through the three rights introduced in section 1(2)(d) of the Imperial Copyright Act, namely the *mechanical right* (the sole right to make any record); the *synchronisation right* (sole right to make any cinematograph film, relevant for film, television and video) and the *electrical transcription right* (the sole right to make any contrivance by means of which the work may be mechanically performed or delivered, relevant for radio broadcasting).

It is however, the mechanical right and recording technology that have had the most far-reaching impact for the music industry in the twentieth century, resulting in music record sales growing to

⁹⁸ See <https://medium.com/@Vinylmint/history-of-the-record-industry-1920-1950s-6d491d7cb606> (date of use: 14 March 2018).

⁹⁹ <https://www.theguardian.com/music/2003/mar/28/classicalmusicandopera.artsfeatures> (date of use: 15 March 2018).

¹⁰⁰ See Garnett, Davies and Harbottle *Copinger and Skone James* 45 and 118. See also ..., who notes that the introduction of mechanical rights in the Berne Convention was done “during a period when the record industry had already established itself as an important new distributor of music” and “in recognition of the competitive needs of this new industry”. Shepherd *et al Popular Music of the World* 490.

¹⁰¹ Bowker *Copyright* 208.

¹⁰² Garnett, Davies and Harbottle *id* at 118.

¹⁰³ This compulsory licence is a precursor to the provisions of s 14 of the Copyright Act 1978 and, before them, s 9 of the 1965 Copyright Act. The original purpose of the licence was that it “prevented music publishers from limiting the recording of a song to one record company only.” Overall the licensing of mechanical rights is based on rates determined statutorily, or through negotiations between the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM) as a representative body of authors and music publishers; and the International Federation of the Phonographic Industry (IFPI), as a representative of record labels. See Shepherd *et al* *ibid*.

\$14.6 billion with 1.2 billion records sold by the end of the century.¹⁰⁴ The mechanical right, and in particular the compulsory licensing system associated with it, facilitated the use of musical works by means of records, so that, as observed, record companies did not have to compete for a song but only for the performance of the song.¹⁰⁵ This also created a balance between the interests of music publishers as owners of copyright in musical works, and record labels as owners of copyright in sound recordings¹⁰⁶ : record labels could use musical works once they were used by another record label – without the need for prior authorisation. Outside performing rights, mechanical rights have consistently remained a large and important source of income for owners of copyright in musical works.¹⁰⁷ This trend has continued in spite of the advent of digital technology and the negative impact it has generally had on the recording industry.¹⁰⁸ What has, in fact happened in many cases is that the mechanical right has been extended to include digital usages such as downloads, ringtones and interactive streams.¹⁰⁹ The recent ruling by the US Copyright Royalty Board (CRB) in which the Board increased the mechanical royalty rates payable to songwriters, from 10.5% to 15.1% - an increase of 43.8% representing “the biggest rate increase granted in CRB history” – is another indicator of the continuing relevance of mechanical rights in the music industry value chain.¹¹⁰

3.1.3.2 The Development of the Synchronisation Right – a Response to Film, Television and Video Technology

¹⁰⁴ See Hull *Recording Industry* 2. It has been said that songwriters would have earned in excess of \$4 billion in mechanical rights royalties since 1976 in the United States. Alhadeff and McChrystal 2011 *Global Business and Economics Review* 76.

¹⁰⁵ Chanan *Repeated Takes* 35. In this regard Shepherd *et al Popular Music of the World* 490 have observed that the Berne Convention introduced the compulsory licensing system “in recognition of the competitive needs” of the recording industry, preventing music publishers “from limiting the recording of a song to one record company only.” This was in fact the problem identified by the US Congress in introducing the US Copyright Act, 1909, where it was observed that eighty-seven members of the Music Publishers Association controlling 381,598 compositions had granted the Aelonian Company, the dominant manufacturer of piano rolls, exclusive rights to manufacture piano rolls of their compositions. In return they were to get ten percent of the retail selling price of the piano rolls. This left out 117 music publishers with control over 503,597 compositions. See Abrams 2010 *Santa Clara High Tech. L.J.* 219 – 220.

¹⁰⁶ Chanan *id* at 34 – 35.

¹⁰⁷ See Alhadeff and McChrystal 2011 *Global Business and Economics Review* 76.

¹⁰⁸ Alhadeff and McChrystal *ibid* indicate that from 2001, when the digital revolution emerged, mechanical licence royalties amounted to about the same amount as that for performing rights (as opposed to almost the same level as performing rights prior to this). This is still significant, considering the drastic decline in record sales during the period. Although the sale of physical records showed a decline of 7.6% in 2016, this is symptomatic of the shift from physical records to online exploitation, especially as a result of the “streaming revolution”. Global recorded music has itself showed a growth of 5.9% for the same period, bolstered by digital sales (in particular streaming revenue, which grew by 60.4% and offset the decline of 20.5% in digital download revenue). It has been established that digital revenue now accounts to 50% of total recorded music revenues. See IFPI Global Music Report 2017 <http://www.ifpi.org/downloads/GMR2017.pdf>, generally. (Date of use: 15 March 2018). Despite these trends however, the CISAC Global Collections Report shows that actual publisher and songwriter royalty revenues for mechanical rights and synchronisation rights grew by 19.4%. This information was made possible “through increased scope of reporting in the USA with the inclusion of collections from the Harry Fox Agency.” CISAC Global Collections Report <http://www.cisac.org/Cisac-University/Library/Royalty-Reports/Global-Collections-Report-2017>, at 18 and generally (date of use: 15 March 2018). The reference to improved reporting as a result of collection information from the Harry Fox Agency relates to the fact that the Harry Fox Agency, the main US agency administering mechanical rights on behalf of publishers and which had not been a member of CISAC, was bought by SESAC, a member of CISAC. See https://www.sesac.com/News/News_Details.aspx?id=2253 (date of use: 15 March 2018). Previously CISAC information on mechanical rights collections was skewed because it did not include the Harry Fox information.

¹⁰⁹ *Id* at 76 – 77. Article 9(1) of the Berne Convention (Paris Text) made this extension of the mechanical right (as a genre of the reproduction right) possible, by expressing the reproduction right as “the exclusive right of authorizing the reproduction of [the work], in any manner or form.”

¹¹⁰ See http://nmpa.org/press_release/crb-dramatically-increases-rates-for-songwriters/ (date of use: 15 March 2018). This followed litigation instituted by the National Music Publishers’ Association (NMPA) and the Nashville Songwriters Association (NSAI) on the one, representing music publishers and songwriters, and Google, Amazon, Apple, Spotify and Pandora on the other, as users.

An account was given above of the developments that led to the maturation of cinematography or film technology. It was shown that this began with the perfection of a technique for the sequencing of photographs to give an illusion of motion. In light of this, it comes as no surprise that “[c]inematograph films were not protected as such in either British pre-1911 registration nor in South African pre-1916 legislation” and that in both cases, “they were regarded as series of photographs, each individual frame being a photograph and thus an artistic work, their musical scores ... treated as musical works and their scripts ... treated as dramatic works.”¹¹¹ In pre-1912 British legislation photographs were protected under the Fine Arts Copyright Act, 1862;¹¹² musical works protected initially under the Statute of Anne and subsequently under the Literary Copyright Act, 1842 (the Talfourd’s Act) and dramatic works under both the Dramatic Literary Property Act, 1833 (the Bulwer-Lytton’s Act).¹¹³

Taking cognisance of the intensive developments taking place in the field of cinematography at the turn of the twentieth century, article 14 of the 1908 Berlin revision of the Berne Convention introduced protection for films (“cinematograph productions”) and made the following provision:

... Cinematograph productions shall be protected as literary or artistic works, if, by the arrangement of the acting form or the combinations of the incidents represented, the author has given the work a personal and original character.

Without prejudice to the rights of the author of the original work the reproduction by cinematography of a literary, scientific or artistic work shall be protected as an original work.

The above provisions apply to reproduction or production effected by any other process analogous to cinematography.

In like fashion, section 14 of the 1908 revision introduced protection to authors, in the following manner:

Authors of literary, scientific or artistic works shall have the exclusive right of authorizing the reproduction and public representation of their works by cinematography.

This provision was thus broad enough to include usage of the works by means of synchronisation with the soundtrack of a film. At this stage however, the technique for synchronisation was at its infancy stage and would only become popular in the 1920s with Warner Brothers’ Vitaphone. UK law was equally forward-looking in making it possible for synchronisation rights to be protected,¹¹⁴ so that, as Kamina has observed, in the United Kingdom:

¹¹¹ Dean *Application of the Copyright Act 352*.

¹¹² 25 & 26 Vict. c. 68.

¹¹³ For a discussion of the pre-1912 protection of musical and dramatic works see Chapter 2 above.

¹¹⁴ Section 1(2)(d), discussed further down.

The introduction of sound films in the late 1920s did not create problems in terms of protection; the soundtrack (the optical recording of sounds on the film strip) could be protected as a 'contrivance by means of which sounds may be mechanically reproduced' under section 19(1) of the 1911 Act ...¹¹⁵

This of course is a reference to the protection accorded to the soundtrack recording itself, but section 1(2)(d) of the Imperial Copyright Act also accorded protection in respect of the use of a musical work for purposes of making a cinematograph production, as fully dealt with below. The approach of the Imperial Copyright Act, in line with the provisions of article 14 of the Berne Convention, was to accord protection not to the film strip or film recording, but to the various copyrightable elements of which the film production is comprised (e.g. the "cinematic" dramatic work, the sequence of photographs, the musical work, the sound recording).¹¹⁶ Under the Imperial Copyright Act a cinematographic production "where the arrangement or acting form or the combination of incidents represented give the work an original character" was protected as a genre of a dramatic work.¹¹⁷ "Cinematograph" was defined to include "any work produced by any process analogous to cinematography".¹¹⁸ This wording was similar to that used in the Berne Convention.

In essence therefore, films under the Imperial Copyright Act were protected either as dramatic works or photographs (as "artistic works"), depending on whether or not it had a plot and actors.¹¹⁹ Thus while in the case of a feature film (or fiction) with dramatic action two copyrights would have subsisted (i.e. in both of the dramatic work and the photographs); in the case of a documentary film without a plot and actors protection would only have vested in the individual frames of the film's photographs.¹²⁰ The two forms of protection for film have been said to be cumulative, so that "a film which could not meet the requirements of originality for a dramatic work could still be protected a series of photographs."¹²¹ With the incorporation of the Imperial Copyright Act into South African copyright law legislation South Africa also followed a similar course of action.¹²²

Prior to the enactment of Imperial Copyright Act the position with regard to the use of "music in picture theatres" was not clear. Writing in 1911 prior to the enactment of the Imperial Copyright Act, Bennett observed:

¹¹⁵ Kamina *Film Copyright* 27.

¹¹⁶ See Kamina *id* at 20.

¹¹⁷ Definition of "dramatic work" in s 35(1) of the Imperial Copyright Act. This form of protection for cinematographic productions was clearly based on the protection afforded in article 14 of the 1908 revision of the Berne Convention and was in line with the English Parliament's objective to align UK copyright law with the Berne Convention.

¹¹⁸ Definition of "cinematograph" in s 35(1) of the Imperial Copyright Act.

¹¹⁹ See Dean *Application of the Copyright Act* 315.

¹²⁰ Dean *id* at 315 – 316.

¹²¹ Kamina *Film Copyright* 20.

¹²² Dean notes in this regard: "In conferring copyright on sound recordings and cinematograph films, albeit somewhat indirectly, the 1911 Act created two new categories of works eligible for copyright. ... [T]his may have had a significant effect on the approach in the South African legislature in 1916." Dean *Application of the Copyright Act* at 160. For the incorporation of the British 1911 Act into South African law see Chapter 4 below. It is useful to note that in spite of both the 1965 Copyright Act and the 1978 Copyright Act creating a *sui generis* category of copyright in cinematograph films, cinematograph productions protected as dramatic works under the 1916 Act have continued to exist parallel to the *sui generis* cinematograph films in both Acts (see section 14, read with the Sixth Schedule of the 1965 Act; and section 43(c) of the 1978 Act).

Pictures require the enlivening influence of music to increase their attractiveness, and many showmen, on the plea that a piano or gramophone was a subsidiary part of the performance, introduced automatic musical instruments, only to find that the law quickly stepped in and prohibited their use. There is still a doubt as to the legal position, and the exhibitors who desire to keep clear of the “myrmidons of the law” would do well to save the expense of ultimate legislation, and apply to the licensing authorities for the license.¹²³

As indicated, in addition to making provision for the protection of cinematograph films as a protectable copyright work (albeit as either a dramatic or photographic work), section 1(2)(d) of the Imperial Copyright Act granted to authors of copyright in musical works the sole right to make a cinematographic film “by means of which the work may be mechanically performed or delivered, and to authorize any such acts”. This therefore was the introduction of the *synchronisation right* in musical works in the United Kingdom, where the use of musical works in synchronisation with the motion picture would need to be authorised by the author of copyright in the musical work. This the Imperial Copyright Act did at a time when synchronisation of sound and music with motion pictures was not a common practice yet. This recognition of the rights of authors of copyright in musical works at the time of introduction of protection for cinematograph films again demonstrates the attention given to rights in musical works under the Imperial Copyright Act, after the controversy of the earlier centuries. Furthermore, unlike in the case of mechanical rights, where compulsory licensing was possible, the synchronisation licence was to be a privately-negotiated licence between the copyright owner and the user (i.e. the film producer).¹²⁴

Seeing that the United States dominates the global film industry and thus practices from that country have had a major influence on international practices, it would be important to also consider the development of the synchronisation right in that country. In the United States the synchronisation right became prominent after the advent of “talking pictures” (“talkies”) towards the end of the 1920’s, as described above under 3.1.2.2. Earlier in 1923 theatre owners had, following a number of lawsuits instituted by ASCAP, the US performing rights organisation (PRO), procured a blanket licence for the public performance of musical works used in conjunction with films.¹²⁵ This prompted the film studios to engage in-house composers to compose music on a “work-for-hire” basis, as a way of avoiding having to pay for existing musical works.¹²⁶ When synchronisation technology was introduced, synchronisation licences were required in addition to the public performance licences. To avoid this, the film studios acquired music catalogues from a number of music publishers who were members of ASCAP, but the independent music publishers continued to demand payment for synchronisation rights.¹²⁷ In relation to this it would be important to bring to light the impact that the

¹²³ Bennett *Handbook of Kinematography* 266. The licence referred to here fell under the category of “Music, Music and Dancing and Stage Plays Licenses”.

¹²⁴ Shepherd *et al Popular Music of the World* 490.

¹²⁵ See *Alden-Rochelle, Inc., et al v American Society of Composers, Authors and Publishers et al* 80 F. Supp. 888 (1948) at 892.

¹²⁶ Wierzbicki *Film Music* 214.

¹²⁷ See *Alden-Rochelle, Inc., et al v American Society of Composers, Authors and Publishers et al* 80 F. Supp. 888 (1948) at 892. Also Kohn *Music Licensing* 1094 – 1095.

acquisition of the music catalogues of ASCAP-member publishers by the film studios – in a quest to avoid paying for synchronisation rights - has had an impact on another equally important right, namely the right of public performance of musical works incorporated in films. This arose from a collusive practice that emerged between the major studios, ASCAP, ASCAP's members and the music publishers whose catalogues were controlled by the studios.

In respect of rights in new musical compositions the major studios would, in the case of composers who were ASCAP members, only require the composers to assign to them the synchronisation right.¹²⁸ In the case of non-ASCAP members however, the studios required the composer to also assign to them the public performance right at the time of assigning the synchronisation right. This practice was brought to light by the testimony of Harry Fox, a representative of the Harry Fox Agency which was mandated by the studios to negotiate these licences, in the *Alden-Rochelle* case:

The acquisition of the synchronization rights from the copyright owners of musical compositions is generally arranged by Mr. Fox, who has operated an agency for that purpose since 1937. He testified that when he is asked by a producer to obtain the rights for a musical composition which is to be incorporated in a motion picture he gets in touch with the owner of the copyright. ... If the copyright of the musical production is owned by a person who is not a member of Ascap, Fox tells the owner that both the synchronization rights and the right to publicly perform the music of the film are to be acquired by the producer. ... There is no separate figure fixed for the performance rights and another figure for the synchronization rights, in making the deal. ... If the owner of the copyright is a member of Ascap, Mr. Fox does not include the performance rights in acquiring the synchronization rights for the producer. The producers know, of course, that the performing rights have a value distinct from the synchronization rights, because of their ownership of music publishing corporations, which are members of Ascap, and through which the producers derive considerable revenue from Ascap's separate licensing of the performance rights to the exhibitors. ...¹²⁹

The *Alden-Rochelle* court held that this arrangement between ASCAP and its members and those members' arrangements with the motion picture producers was unlawful and in breach of the US anti-trust laws.¹³⁰ This brought to an end the practice in the United States whereby a performing right licence was required from ASCAP and other PROs whenever movie theatres exhibited a film in which musical works were performed. In providing its *ratio decidendi* the *Alden-Rochelle* court made the following observations:

Almost every part of the Ascap structure, almost all of Ascap's activities in licensing motion picture theatres, involve a violation of the anti-trust laws. ... The combination of the members of Ascap in transferring all their non-dramatic performing rights to Ascap, is a combination in restraint of trade and commerce, which is prohibited by § 1 of the anti-trust laws. ... And by barring a member from

¹²⁸ This is because apart from being prohibited by ASCAP from doing so, the studios "[had] a financial interest in the license fees Ascap collect[ed], because those producers own[ed] music publishing corporations which [were] publisher members of Ascap, and thus they share[d] in the one half of Ascap's net receipts which [were] allotted to the publisher members." *Alden-Rochelle* case *id* at 893.

¹²⁹ *Alden-Rochelle* case *id* at 896.

¹³⁰ See also Kohn and Kohn *Music Licensing* 1095.

assigning the performing rights to the motion picture producer at the same time that the recording right is assigned, the channels in which the films may be marketed is narrowed to those exhibitors who have a license from Ascap covering the performing rights of the Ascap music synchronized on the film. That result is accomplished through an unlawful combination with the motion picture producers in violation of § 1 of the anti-trust laws. ...¹³¹

As a result of the *Alden-Rochelle* judgment the practice of *source licensing* in the United States was established, in terms of which “the PROs are prevented from licensing public performance rights directly to movie theatre owners”, and instead, film producers are required to procure performing rights at the same time as the synchronisation rights, “and pass the performance rights along to the theatres that will be showing their films.”¹³² This means therefore that movie theatre owners and other exhibitors of films are not required to procure a public performance licence, as the right would have been transferred to them by the studios. Unlike in the United States however, the recognition of the synchronisation right in South Africa and most other countries, including the United Kingdom, has not affected the obligation of movie theatres and other users to procure a public performance licence from PROs for the use of musical works in theatres and other places of public performance.

3.1.3.3 The Development of the Electrical Transcription Right – a Response to Radio Technology

Section 1(2)(d) of the Imperial Copyright Act granted the author the sole right not only to make “any record, perforated roll, [or] cinematograph film” in respect of the work, but also to make “**any ... other contrivance by means of which the work may be mechanically performed or delivered.**” This couching of the section broadened the scope of usages that would require the prior authorisation of the author by not limiting these to records, perforated rolls and cinematograph films. When therefore, with the advent of radio, it became more convenient to record music-for-radio by means of *electrical transcriptions* (ETs) instead of using commercial records, this provision in the Imperial Copyright Act safeguarded the rights of authors of musical and lyrical works. As with the case of sound recordings and films therefore, the Imperial Copyright Act was forward-looking in this regard. The ingenuity of the Imperial Copyright Act becomes more evident when considering perceived deficiencies in the US Copyright Act, 1909, as noted in a 1949 Billboard article:

... Because of the length of time [the US Copyright Act, 1909] has been in force and because of the great strides made in the field of science since its enactment, the statute has become inadequate in many respects. ... Since 1909 there have been developed new rights with respect to music. There are

¹³¹ *Alden-Rochelle* case *id* at 893 - 894.

¹³² US Copyright Office 2015 <https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> 34 (date of use: 15 March 2018). In this regard it has nevertheless been observed that “[i]n the context of motion pictures, source licenses do not typically encompass non-theatrical performances, such as on television. Thus, television stations, cable companies and online services such as Netflix and Hulu must obtain public performance licenses from the PROs to cover the public performance of musical works in the shows and movies they transmit to end users.” *Ibid*. It is also important to note that this anti-trust restriction on the licensing of performing rights by way of film exhibitions does not apply to the smaller US PROs such as SESAC and GMR. See *id* at n 119. (GMR refers to Global Music Rights, a new US PRO founded in 2013 – see <https://globalmusicrights.com/> - date of use: 15 March 2018).

for instance the motion picture synchronization right, the right to manufacture an electrical transcription and the television right. These rights could not possibly have been specifically provided for in 1909 for they were not known at that time. When the Congress of 1909 incorporated the compulsory license provision in the copyright statute it necessarily had in mind certain types of mechanical devices which were then in existence, namely the phonograph record and the player piano roll. It could not have had in mind an electrical transcription of which a very limited number of pressings are made, not for the purpose of sale, but for the purpose of radio advertising and other public performance for profit, because the device was not then in existence. Yet there are persons who believe that the antiquated compulsory license provision actually extends to and permits the manufacture of electrical transcriptions. ...¹³³

In contrast, UK copyright law did not see the need for change until 1956 when a new Copyright Act was enacted. The major changes in this regard were in regard to the recognition of broadcasts as *sui generis* works, particularly in light of the maturation of radio broadcasting and the emerging television broadcasting industry.¹³⁴ In the report of the Gregory Committee which led to the enactment of the 1956 Act, it was made explicit that UK law was in compliance with international treaty law in relation to copyright protection. Furthermore, the recognition of rights in sound recordings and films was taken as a *fait accompli* and the need for protection was seen in relation to broadcasts.¹³⁵ Similarly the legislation did not see the need to specifically provide for electrical transcription rights. Section 1(2) of the Imperial Copyright Act was clear: copyright was defined as “the sole right to produce or reproduce the work or any substantial part thereof *in any material form whatsoever*”, thus including ETs.

ETs were a type of “instantaneous recording” made by a “direct to disc process”, which became popular in the radio days of the 1930s and 1940s.¹³⁶ The distinction between ETs and normal recordings was that ETs were made for radio broadcasting and not for sale to the public; and “had

¹³³ Billboard 20 Aug 1949 at 20. Having indicated this, it would nevertheless seem that in practice the 1909 Act was seen as providing protection (albeit not without uncertainty) to composers for use of their works in electrical transcriptions. See in this regard Notes 1940 *The Yale Law Journal* 562 observing that music publishers, “being the sole copyright owner” were the stronger bargainer in respect of revenues derived from music recorded for broadcasting purposes. Protection in respect of electrical transcriptions would be justifiable on the ground that the compulsory licensing provisions provided for in the US Copyright Act 1909 only applied in respect of *mechanical rights* and would not be applicable to electrical transcription rights because electrical transcriptions were not commercially released to the public. The intellectual property rights of performers in the form of a “common law copyright” were recognised in the celebrated case of *Waring v WDAS Broadcasting Station*, 327 Pa. 433, 194 Atl. 631 (1937). In the federal case of *RCA Manufacturing Company v Whiteman* 28 F. Supp. 787 (S.D.N.Y. 1939) the record manufacturer’s right to be protected against unfair competition was recognised. This right was augmented where a performer assigned his common law copyright to a manufacturer, as was the case in the *RCA* case.

¹³⁴ The 1956 Act arose from a 1952 report of the Gregory Committee (the Gregory Committee Report of 1952) constituted to consider whether a review of UK copyright law was necessary in light of “technical developments” since the enactment of the 1911 Act, as well as the 1948 revision of the Berne Convention and the UNESCO Universal Copyright Convention of 1952. As observed, “The Committee in fact found no serious difficulty in dealing with the changes in the law necessary in order to enable the Conventions to be ratified. ... What the Act of 1956 in fact does, is to provide that copyright is to subsist in every television broadcast and in every sound broadcast made by the British Broadcasting Corporation or the Independent Television Authority ... These copyrights are additional to and are not to interfere with the ordinary literary, musical or dramatic copyrights, if any, subsisting in the material televised or broadcast or, subject to certain limitations, in any copyright subsisting in any gramophone records or films used for the purposes of such broadcasts. The results of these provisions is to create new rights for the protection of those concerned with the broadcasting of programmes which do not incorporate existing copyright material and additional rights where the programmes do include such material. ...” Skone James 1957 *Copyright Soc’y U.S.A.* 117 and 123.

¹³⁵ See Gregory Committee Report, 1952 at 117.

¹³⁶ See Holmes *Guide to Music Technology* 146.

higher quality audio than was available on consumer records.”¹³⁷ ETs have been used for introductory music themes for radio shows, musical compilations for syndicated radio programs and background music for radio commercials.¹³⁸ To use music in this way radio stations needed to procure an *electrical transcription licence*, which gave rise to *electrical transcription rights* as a genre of the reproduction right in musical works. Recounting the origin of ETs in the United States Browne and Browne have observed:

ETs evolved from long-playing records designed for talking movies. Most broadcasters considered recorded programming inferior to live programming, but transcriptions were less expensive than live talent. The term “electrical transcription” originated as an attempt to evade government regulations requiring broadcasters to announce phonograph records. Technically, stations that played electrical transcriptions were not playing records and did not have to announce ETs as such.¹³⁹

It has been observed that “electrical transcriptions were indispensable from the mid ‘30s to the late ‘40s,” at one stage being estimated to have an annual market value of \$10 million and being seen as a good source of income for performers (e.g. from recording commercial jingles for spot announcements).¹⁴⁰ The use of ETs was however, not without controversy. In the USA radio stations and other users of transcription records lobbied strongly for legislation against the rights of composers and performers to receive payment for the recording and use of electrical transcriptions.¹⁴¹ Furthermore, in the early 1940s the American Federation of Musicians (AFM), under its president, the notorious James Caesar Petrillo, introduced an industry-wide ban for the recording by AFM members of what he termed “canned music”.¹⁴² Petrillo believed that the use of electrical transcriptions was responsible for the decline in employment opportunities for AFM musicians in relation to live performances.¹⁴³ In a bid to force radio stations and other record users to employ union musicians rather than using recording musicians Petrillo announced that ‘the 140,000 members of his ... organization [would] not make “records, electrical transcriptions or any other form of electrical reproduction of music”’; but excluded recordings for motion-picture soundtracks and private recordings for home use – “provided that the recordings did not find their

¹³⁷ Hull, Hutchison and Strasser *The Music Business* 327.

¹³⁸ See Kohn and Kohn *Music Licensing* 1066 – 1068.

¹³⁹ Browne and Browne *United States Popular Culture* 263.

¹⁴⁰ https://ipfs.io/ipfs/QmXoypizjW3WknFiJnKLwHCnL72vedxjQkDDP1mXWo6uco/wiki/Electrical_transcription.html (date of use: 15 March 2018).

¹⁴¹ See Notes 1940 *The Yale Law Journal* 561 and n 16. The intellectual property rights of performers in the form of a “common law copyright” were recognised in the celebrated case of *Waring v WDAS Broadcasting Station*, 327 Pa. 433, 194 Atl. 631 (1937). In the federal case of *RCA Manufacturing Company v Whiteman* 28 F. Supp. 787 (S.D.N.Y. 1939) the record manufacturer’s right to be protected against unfair competition was recognised. This right was augmented where a performer assigned his common law copyright to a manufacturer, as was the case in the *RCA* case.

¹⁴² See <https://78records.wordpress.com/category/radio-transcriptions-2/> (date of use: 15 March 2018). The AFM was (and remains) a powerful union and membership of the union was essential for any professional musician who wished to record or broadcast their music. The union introduced a rule prohibiting its members from assigning their broadcasting rights to the radio networks, and could withhold such consent even where the musicians had assigned such rights to the broadcasters. *Ibid.*

¹⁴³ *Ibid.*

way onto the airwaves or commercially issued records.”¹⁴⁴ This resulted in some radio networks prohibiting the playing of recorded music until much later.¹⁴⁵

Reference was also made to a “triangular dispute” that existed between users of music records, performers and composers, and it was lamented that composers were receiving “double payment” in that, apart from being paid for electrical transcription rights, “they [were] already paid through ASCAP for broadcasts of their music, whether “live” or “canned.”¹⁴⁶ The loser in this triangle was the performer, seeing that “[b]roadcasters were] naturally opposed to any addition to the \$3,500,000 annual fees paid to ASCAP”, while ASCAP was itself “militantly hostile to any increase in the strength of a rival for this radio revenue.”¹⁴⁷ ETs, which were preferred for having less surface sound than commercial recordings and for their suitability for spot advertising; and remained indispensable for about fifteen (15) years, were ironically displaced by commercial recordings. This happened in the era of the radio “disc jockey” (DJ), when studio consoles began to incorporate tape recorders and recording stores began to send free music records to the DJs.¹⁴⁸

In spite of the foregoing, the concept of *electrical transcriptions rights* has persisted and is now used not only in respect of radio programming but in respect of any form of audio-only recording of musical works “for purposes other than distribution to the public for private use”.¹⁴⁹ In this regard although *electrical transcription rights* are also concerned with the reproduction of musical works by means of sound recordings, they must not be confused with *mechanical rights*.¹⁵⁰ Today electrical transcription licences are used to license the usage of musical works through radio broadcasts (themes, introductions, syndicated radio programs, commercial advertising); background music services (e.g. DMX, Muzak, Playnetwork); digital jukebox services; in-flight use in airlines; ringbacks and server copies used to facilitate music streaming or transient copies.¹⁵¹

3.1.4 The Recognition of the Rights of Performers and Owners of Copyright in Sound Recordings

3.1.4.1 Introduction

Although this thesis is primarily concerned with the protection of musical works, an analysis of the historical development and the impact of technology would not be complete without also considering the evolution of rights in sound recordings. This need further arises from the fact that sound recordings have been the main “carrier” and means of exploitation for musical works since the

¹⁴⁴ Ibid.

¹⁴⁵ See Notes 1940 *The Yale Law Journal* 562 n 21; also <http://www.modestoradiomuseum.org/et.html> (date of use: 15 March 2018).

¹⁴⁶ Notes 1940 *The Yale Law Journal* 562 and n 25. It is reported that music publishers were forced to modify their demand for fifty percent (50%) of the gross license revenues when broadcasters offered to split the revenue “three ways among artists, recorders, and publishers.” Ibid.

¹⁴⁷ *Id* at 563 n 31.

¹⁴⁸ <http://www.otrsite.com/articles/artwb006.html> (date of use: 15 March 2018).

¹⁴⁹ Kohn and Kohn *Music Licensing* 1065.

¹⁵⁰ Mechanical rights are concerned with the distribution of music recordings (e.g. CDs and digital records) to the public, for private consumption. See Kohn and Kohn *id* at 1066.

¹⁵¹ See generally Kohn and Kohn *id* at 1066 – 1074.

technology was developed in the nineteenth century. In international copyright law the rights of performers and producers of sound recordings (also termed “phonograms”) are generally referred to as “neighbouring rights” or “related rights” (or so-called *droits voisins du droit d’auteur*, in French).¹⁵²

It has been observed that, in the narrow sense, these expressions are used to refer to the rights provided for under the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*.¹⁵³ The expressions can nevertheless be used in a broader sense to include protection for other newly-introduced rights, such as those relating to the protection of published editions and databases.¹⁵⁴ We are of course, for present purposes, only concerned with the rights of performers and producers of sound recordings. In this regard it is also important to note that in England and many common-law jurisdictions the rights of producers of sound recordings are generally protected as copyright.¹⁵⁵ There has also been a trend among certain common law jurisdictions to grant a copyright or copyright-type protection for the rights of performers. Thus in England it has been observed that “[t]he property rights that performers now enjoy ... are equivalent to copyright”.¹⁵⁶ In South Africa however, performers’ rights do not find protection under the Copyright Act¹⁵⁷ but in related legislation, namely the Performers Protection Act.¹⁵⁸

3.1.4.2 The Historical Development of Rights in Sound Recordings and Performances

In the discussion on the development of the mechanical right above the fierce lobbying of the manufacturers of the mechanical devices and contrivances used to reproduce musical works in the United Kingdom was referred to. This, as indicated, led to the introduction of a system of compulsory licensing of recordings, as long as copies of such recordings had been issued to the public.¹⁵⁹ The further effect of the manufacturers’ lobbying however was the introduction of s 19(1) of the Imperial Copyright Act, which accorded to the owners of the “original plate” the right to be recognised as the author of such plate.¹⁶⁰ Such protection was however, “in like manner as if such contrivances were musical works”, thus according to the owners of the mechanical contrivances the same exclusive

¹⁵² See Garnett, Davies and Harbottle *Copinger and Skone James* 5. It has been observed that the expression “neighbouring rights” has designated as such “because it does not directly protect the original artistic creation of the author” and the work protected is merely derived from such original artistic creation. See Torremans *Intellectual Property Law* (2013) 10.

¹⁵³ The “Rome Convention” of 1961.

¹⁵⁴ Garnett, Davies and Harbottle *Copinger and Skone James* 5.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.* See also s 15(1) in Part II of the Canadian Copyright Act, which provides that “... a performer has a copyright in the performer’s performance ...”. In Australian copyright law the performer owns copyright in a sound recording if he is the owner of the record, and becomes a co-owner of copyright as a “tenant in common in equal shares” if another person is the owner of the record but the performer is the person who performed in the sound recording of a live performance. See ss 22 and 97 of the Australian Copyright Act.

¹⁵⁷ Except in so far as this relates to their right to share in a “needle-time” royalty collected by the owner of the copyright in a sound recording in which the performer’s performance is embodied, in terms of s 9A of the Copyright Act, read with s 5 of the Performers Protection Act.

¹⁵⁸ Act 11 of 1967, as amended.

¹⁵⁹ The compulsory licensing system is what has made possible the practice of recording “cover songs”, i.e. the “making [of] a new recording of a previously released song” by means of a record (i.e. not through an audio-visual production such as a video or film). See Nathan and Morgan *The Essentials* 63.

¹⁶⁰ Section 19(1), British Copyright Act, 1911. The section provided that “[c]opyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced ...”.

rights (namely the rights to production, reproduction, public performance, publication and translation) as those accorded authors of musical works.¹⁶¹ Section 19 of the Imperial Copyright Act was dedicated to dealing with this new phenomenon of “mechanical instruments”. In this regard UK law had an early recognition of rights in sound recordings. This is unlike the situation under the US Copyright Act, 1909, which did not recognise the rights of the manufacturers.¹⁶² Federal recognition of the rights of owners of copyright in sound recordings did not take place in the United States until 1972.¹⁶³

The Imperial Copyright Act went further than just according protection to sound recordings made after the commencement of the Act. Although in general the Act made no provision for the retrospective protection of works made prior to 1912 (except with regard to the regime for the granting of substituted rights for copyrights that passed through the 1912 Gateway¹⁶⁴), an exception was created in this regard in relation to sound recordings. As indicated above, while British publishers and composers had benefitted immensely from revenues derived from sales of sheet music, rampant piracy at the turn of the twentieth century coupled with the advent of the new technology of mechanical reproduction brought much consternation to British rights-holders. The situation was exacerbated by the fact that, unlike in neighbouring France, performing rights were not a viable source of income for British rights-holders as a result of poorly-drafted laws. The very existence of the British music industry was therefore under threat. This may explain why the British legislature exhibited much interest in the new recording technologies and clearly saw them as a way of salvaging the beleaguered UK music industry.¹⁶⁵ The exception in relation to the retrospective

¹⁶¹ See also in this regard Dean 1990 <http://www.spoor.com/home/index.php?ipkArticleID=274> (date of use: 25 June 2012). It is noteworthy here that the owner of the plate is termed an author. The 1956 British Copyright Act referred to “the maker” of the sound recording, who is defined as the person who owned the first record embodying the sound recording, while the current Act (1988) defines the author of the copyright in a sound recording as the producer, namely “the person by whom the arrangements necessary for the making of the recording are undertaken.” See Garnett, Davies and Harbottle *Copinger and Skone James* 248 – 250.

¹⁶² It has been said that this was as a result of the Supreme Court decision in *White-Smith*, which ‘had declared that player piano rolls and, by implication, sound recordings could not be “published”’. See *Capitol Records, Inc. v Naxos of America, Inc.* 4 N.Y. 3d 540 (2005), at 552. In this regard it has been further observed that “the protection of sound recording was ... a contested affair.” Marshall *Bootlegging* 107.

¹⁶³ This came about through the enactment of the Sound Recording Act, 1971. See for an in-depth analysis of this situation *Capitol Records, Inc. v Naxos of America, Inc.*, *ibid.* As indicated, the intellectual property rights of performers in the form of a “common law copyright” were not recognised until the case of *Waring v WDAS Broadcasting Station*, 327 Pa. 433, 194 Atl. 631 (1937) and the rights of manufacturers of sound recordings were only recognised under the law of unlawful competition after the case of *RCA Manufacturing Company v Whiteman* 28 F. Supp. 787 (S.D.N.Y. 1939).

¹⁶⁴ See Dean *Application of the Copyright Act* 160. See further regarding the 1912 and 1917 Gateways, the discussion under Chapter 4 below.

¹⁶⁵ This assertion is borne out by the fact that, in a revolutionary manner and clearly diametrical to the international norms reflected in the Berne Convention system, the 1911 (and subsequent) British copyright legislation granted copyright protection to sound recordings, though they did fall within the category of the “literary and artistic works” contemplated in the Berne Convention. In this regard the motivation was clearly to meet the entrepreneurial requirements of the music industry. As Torremans *Intellectual Property Law* (2013) 10 has observed: “The British emphasis on the *entrepreneurial exploitation* aspect of copyright was not shared by those who saw copyright almost exclusively as an expression of reverence for the creating artist and his act of artistic creation. ... The 1911 Act also widened the scope of copyright further. The producers of sound recordings were granted the exclusive right to prevent unauthorised reproductions of their recordings. Significantly, this right was not given to the performing artist, but to the *entrepreneur* involved. ... This right in sound recordings was an important precedent. It indicated that copyright would be flexible enough to offer protection to all works in whose creation new technical possibilities for artistic expression had been used. ...” Emphasis added. It is also important to note nevertheless that this emphasis on entrepreneurship and commercial exploitation has been ascribed to British copyright law from its inception. See Torremans *id* at 9. It has been pointed out that Britain attempted, without success, to introduce copyright protection in respect of sound recordings during the deliberations relating to the 1908 Berlin Revision of the Berne Convention; and faced similar failure when attempting to do so during the 1928 Rome

application of copyright in sound recordings was provided for in terms of section 19(8) of the Imperial Copyright Act, which provided:

... [W]here a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act, copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived.

This means that sound recordings that had been made soon after recording technology was perfected at the turn of the twentieth century would have been retrospectively protected under the Imperial Copyright Act in this manner. Under such circumstances the first owner of the copyright was the person who was the owner of the original plate at the commencement of the Act.¹⁶⁶ Thus where the original owner of the plate had transferred ownership of the original plate to another person or entity, such other person or entity would be the owner of the new copyright under the Imperial Copyright Act. In this regard it needs to be emphasised that this retrospective protection did not apply in respect of rights in the musical works embodied in the mechanical contrivances. The case of *Boosey v Whight* and related cases¹⁶⁷ had made it explicit that the use of musical works in such contrivances did not amount to a reproduction of the musical works. Another proviso relating to the retrospective conferment of copyright in sound recordings related to the fact that copyright was not conferred in this manner in respect of a contrivance where its making “would have infringed copyright in some other contrivance, if this provision had been in force at the time of the making of the first-mentioned contrivance.”

Internationally the question as to the nature of rights that should be accorded performers and record producers raged. In respect of performers the need for protection arose from the fact that the new recording technology made repeated exploitation (or “an exact and faithful recording”) of a performance possible.¹⁶⁸ Furthermore, while it was easy for the United Kingdom to accord copyright protection to commercial enterprises, there were “serious theoretical problems” with accepting such a position in countries that had embraced the author’s rights system, such as Germany and France.¹⁶⁹ Through collaborative work between Germany and Austria to find a solution to these theoretical problems Austria became the first author’s rights jurisdiction to adopt a law that distinguished between authors’ rights and related rights.¹⁷⁰ Eventually other authors’ rights jurisdictions would follow Austria’s example.

Revision of the Convention (together with attempting to introduce, in respect of performing artists, an exclusive right of broadcasting and an author’s right in relation to mechanical recording); it being argued, particularly by France, that these matters fell outside the ambit of the Berne Convention. See Von Lewinski *International Copyright Law* 87 – 88.

¹⁶⁶ Proviso to s 19(8).

¹⁶⁷ See the discussion *supra* under paragraph 3.1.3.1(c).

¹⁶⁸ Dworkin and Taylor *Blackstone’s Guide* 126.

¹⁶⁹ See Sterling *World Copyright Law* 20 – 21.

¹⁷⁰ The Austrian Law of 1936. See in this regard Sterling *id* at 21.

Meanwhile the Brussels Revision conference of the Berne Convention passed resolutions requiring member countries to study ways in which sound recordings could find international copyright without however, affecting authors' rights.¹⁷¹ A Standing Committee of the Berne Convention was accordingly formed and met regularly from 1949, leading to the enactment of the Rome Convention in 1961. This convention, for the first time in international law, accorded protection to the rights of performers, producers of phonograms and broadcasting organisations. Prior to the enactment of the Rome Convention protection for performers was fragmented and diverse, with several authors' rights countries granting protection on the basis of a legal fiction where the performer was seen as being the author of an adaptation of a literary or musical work; while English law merely accorded criminal law protection to performers, through a 1925 legislation.¹⁷²

The distinct protection of sound recordings as a work under UK copyright law was confirmed in the judgment of the Chancery Division in the case of *Gramophone Co. Ltd. V Stephen Carwardine & Co.*¹⁷³ The major significance of this ruling however, was that it was argued that "since a performing right existed in a musical work, logic dictated that there should also be a performing right in a sound recording."¹⁷⁴ In the *Cawardine* case the court made the following observation (per Maugham J):

I will observe in the first place that the company is given a copyright in the record 'in like manner as if the record was a musical work.' It is also to be noted that it has a term of copyright of fifty years from the making of the original plate.¹⁷⁵

Thus the right of public performance in respect of sound recordings (commonly-known as "needle-time" in contemporary parlance¹⁷⁶), was recognised in the United Kingdom. The *Cawardine* case was in fact a test case brought by the EMI recording company, through its subsidiary the Gramophone Company, against Cawardine's Café for the unauthorised playing of records embodying sound recordings owned by the Gramophone Company.¹⁷⁷ Following the *Carwardine* decision Phonographic Performance Limited (PPL) was formed to represent the recording industry and to issue licences in respect of the public performance of sound recordings. With the advent of broadcasting technology the right came to apply in the broadcast environment also, and it is from

¹⁷¹ Sterling *ibid*; Von Lewinski *International Copyright Law* 89.

¹⁷² The Dramatic and Musical Performer's Protection Act, 1925. See also Von Lewinski *id* at 87

¹⁷³ [1934] 1 Ch 450.

¹⁷⁴ Wagenaar and Marx 2012 *Obiter* 308.

¹⁷⁵ At para 456.

¹⁷⁶ The expression "needle-time" itself came to be used when the right of public performance in respect of sound recordings was extended to include usage of sound recordings in broadcasts. In this regard the expression was used to refer to "stylus-on-vinyl time" – the time allotted to playing records on air"; limited to 22 hours a week across all BBC channels in the 1950s. See www.bbc.co.uk/radio1/johnpeel/sessions/ (date of use: 27 April 2018); also Osborne *A History of the Analogue Record* 129. In s 135A(5) of the UK Copyright Act, 1988 needle-time is defined as "the time in any period (whether determined as a number of hours in the period or a proportion of the period or otherwise) in which any recordings may be included in a broadcast or cable programme service". Prior to this the public performance right in sound recordings applied in respect of the public play of sound recordings in jukeboxes, discotheques and other places of public performance. See Billboard 28 Oct 1972 at 56. See also Von Lewinski *International Copyright Law* 213, where this right, in relation to the Rome Convention, is explained as including the "the playing of commercial phonograms to the public (eg in discotheques, bars, restaurants, supermarkets, and any other place open to the public where the sounds from the recording can be heard without the need of any intermediate transmission ...)".

¹⁷⁷ Cloonan 2016 *Social History* 355 – 356.

the use of sound recordings in broadcasts that the term “needle-time” arose. In this regard, until the late 1980’s the essence of the needle-time system in the UK was to limit or restrict the use of sound recordings through broadcasts.¹⁷⁸ As observed:

In essence the system was based on an agreement, made between the major record companies (acting via PPL) and broadcasters (of which the most important was always the BBC) through which the latter agreed to pay PPL a fee for the use of a *specified amount of recorded music* on their outlets for the duration of the contract.¹⁷⁹

The concept of needle-time is thus “a throwback to the time when sound was relayed from a vinyl record via a stylus on a record player.”¹⁸⁰ The restrictive system of needle-time was enforced in the United Kingdom until the Monopolies and Mergers Commission (MMC) enquiry of 1988, which ruled that needle-time restriction was an anti-competitive system and had to be abolished.¹⁸¹ Henceforth, although “needletime continued to exist in [sic] as a system of charging for hours of usage ... the [PPL] was unable to impose restrictions on the amount of time that recorded music could be used for.”¹⁸² Accordingly, since the introduction of Section 175(1) of the UK Broadcasting Act, 1990, which introduced the needle-time provisions into the UK Copyright Act, the system of needle-time used in the UK is now known as a system of “use as of right of sound recordings in broadcasts and cable programme services”¹⁸³ United States law does not recognise a right of public performance in respect of sound recordings except in so far as this relates to the digital performances of sound recordings.¹⁸⁴

¹⁷⁸ See Cloonan 2016 *Social History* 355 – 356, generally.

¹⁷⁹ Cloonan *id* at 355. Emphasis added.

¹⁸⁰ See *National Association of Broadcasters v South African Music Performance Rights Association and Another* [2014] 2 All SA 263 (SCA), at para 9.

¹⁸¹ See Garnett Davies and Harbottle *Copinger and Skone James* at 1865 - 1866. See also Cloonan 2016 *Social History* 364.

¹⁸² Cloonan *ibid*.

¹⁸³ The phrase “use as of right of sound recordings in broadcasts and cable programme services” is the heading given to Section 175 of the Broadcasting Act, 1990 and Sections 135A – 135G of the CDPA, dealing with needle-time. See further in this regard Davies and Cheng *Intellectual Property Law in the United Kingdom* 101 – 102. In this regard the UK system of needle-time rights is similar to that applicable in South Africa in terms of the 2002 amendment to the Copyright Act and the Performers’ Protection Act (see ss 9(c) – (e) read with s 9A of the Copyright Act; and s 5 of the Performers’ Protection Act). There are however, also differences between the UK system and that applicable in South Africa. Notably, while the UK system is a true system of compulsory licensing – see Garnett, Davies and Harbottle *Copinger and Skone James on Copyright* 1865 – the South African system, through legislative oversight “creates an absolute restricted act and it is open to the owner of the copyright in a sound recording to prohibit the use of his work for needletime purposes.” See Dean and Karjiker S *Handbook of African Copyright Law* 1 – 61. The UK provisions relating to needle-time were applicable in South Africa until they were repealed with the passing of the Copyright Act 63 of 1965, which repealed the applicability of the Imperial Copyright Act in South Africa. It has been noted that in its original form the bill that gave rise to the 1965 Act contained provisions for the recognition of needle-time rights, but these were deleted “on the floor” during debate in Parliament, as a result of resistance from the South African Broadcasting Corporation (SABC), the sole broadcaster in South Africa at the time. See in this regard Dean 1990 <http://www.spoor.com/home/index.php?ipkArticleID=274> (date of use: 25 June 2012). After this repeal needle-time rights protection in South Africa would only be restored in 2002.

¹⁸⁴ Through the Digital Performance Right in Sound Recordings Act, 1995. The position that no public performance right subsists in respect of sound recordings and recorded performances was established in a 1940 Second Circuit decision, *RCA . Co. v Whiteman* 114 F.2d 86 (2d Cir. 1940), which has been seen as settled law for the whole country after the US Supreme Court refused to grant a writ of certiorari. In recent times attempts to reassert the existence of a common-law public performance right in respect of pre-1972 recordings received partial success when the California federal district court ruled in favour of such a position. See *Flo & Eddie Inc. v Sirius XM Radio* 2014 U.S. Dist. LEXIS 139053 (CD Cal. 2014). This judgment found support in a New York district court judgment in *Flo & Eddie Inc. v Sirius XM Radio* 62 F. Supp. 3d. 325 (2014). The “victory” gained in this regard was however, short-lived when the Florida Supreme Court ruled that no such public performance right subsists in respect of pre-1972 sound recordings in Florida law and the New York

3.2: The Impact of the Imperial Copyright Act, 1911, in the Reframing of Copyright in Musical Works

3.2.1 Introduction

The impact of the Imperial Copyright Act in the reframing or more appropriately, *proper framing* of copyright in musical works, in the common law system of copyright, needs to be considered more closely.¹⁸⁵ The discussion in Chapter 2 highlighted not only the state of confusion in which pre-1912 British copyright found itself, but more particularly, how such confusion affected musical copyright. No clear distinction existed between *small rights* musical works and *grand rights*, in contrast with the French position where this clear distinction existed. Nowhere was this state of confusion in respect of musical works more evident than in the case of the performing right. The interpretation of the ambit of this right by nineteenth century British courts showed a bias towards dramatico-musical works as opposed to non-dramatic musical works. One of the great achievements of the Imperial Copyright Act is that it disentangled the concept of performing right from the dark jungle of jurisprudential incoherence in which it was framed. Such incoherence included the use of odd concepts like “place of dramatic entertainment”, “dramatic piece” and “representation” – which created uncertainty to owners of copyright in musical compositions as to whether or not the right was also intended to protect musical compositions; and made them reluctant to exercise the right.¹⁸⁶ The Imperial Copyright Act disentangled this confusion by creating a simple, yet potent right “to perform ... the work or any substantial part thereof in public”.¹⁸⁷

The enactment of the Imperial Copyright Act and the extension of its provisions to the various overseas British territories had a significant and far-reaching impact on the law of copyright. In essence, it forged and formulated a new global copyright system that has come to be known as the “common law system” of copyright, distinct in formulation from the authors’ rights (*droit d’auteur*, German *Urheberrecht*) system championed by Beaumarchais in France and adopted widely in Continental Europe.¹⁸⁸ One way in which the Imperial Copyright Act was able to achieve this is that it

Court of Appeals overturned the judgment of the district court. See *Flo & Eddie Inc. v Sirius XM Radio* 2015 U.S. Dist. LEXIS 80535 (S.D. Fla, 2015) and *Flo & Eddie Inc. v Sirius XM Radio* 15-1164-cv (2d Cir. 2017), respectively. Meanwhile the California district court ruling was taken on appeal. On the legislative front the Fair Play Fair Pay Act 2015, aimed at introducing a public performance right for sound recordings in relation to terrestrial broadcasting and other forms of public performance; as well as doing away with the exemption of pre-1972 sound recordings from federal copyright protection, has faced an uphill battle but was recently reintroduced in Congress. See <https://www.congress.gov/bill/115th-congress/house-bill/1836> (date of use: 27 April 2018).

¹⁸⁵ In this regard consider Parker *Music Business* 62 - 63, who argues that the Imperial Copyright Act was the cornerstone of the modern music business.

¹⁸⁶ This was particularly so after the ruling in *Russel v Smith* (1848) 12. Q.B. 217 (see Chapter 2 supra), where the court avoided answering the question whether songs were intended to be protected by the “performing right” legislation, furthering the uncertainty, which became “one reason for the reluctance of the performing right owners for many years thereafter to exercise the right.” McFarlane *Performing Right* 58. See further in this regard Alexander I “Neither Bolt nor Chain, Iron safe nor Private Watchman, Can prevent the Theft of Words’: The Birth of the Performing Right in Britain”, in Deazley, Kretschmer and Bently (eds) *Privilege and Property* 310 – 311.

¹⁸⁷ Section 1(2), Imperial Copyright Act, 1911, incorporated as the Third Schedule to the Patents, Designs, Trade Marks and Copyright Act, 1916.

¹⁸⁸ See in this regard Suthersanen U and Gendreau Y “Introduction: Albion’s Legacy?”, in Suthersanen and Gendreau (eds) *A Shifting Empire* x, observing that the British Imperial Copyright Act was “the first global copyright law”, and “launched a new order, which is often termed as the ‘common law copyright system’.”

limited the ability of the dominions to effect modifications when incorporating the Act into their domestic laws. Thus section 25 provided that, where a dominion elected to declare the Act to be in force within its territory, it had to do so “without any modifications or additions”, except where the modifications or additions related exclusively to procedure and remedies or where necessary to adapt the Act to the circumstances of such dominion. In this way the British Parliament ensured that the confusion that existed previously where the state of copyright law was not clear, would be removed, and ensured that there would be commonality in the substantive aspects of the copyright laws of the various British dominions and possessions, with the law of the motherland.

By formulating particular acts of exploitation based on the type of work concerned and only making provision for a common way of exploitation in respect of all works where appropriate, the Imperial Copyright Act shows that the Legislature fully applied its mind to these matters.¹⁸⁹ The fact that several of these forms of exploitation in respect of the various works have remained unchanged in many modern copyright laws within the common-law tradition displays the foresight and attention to detail exercised by the British Parliament in this regard.¹⁹⁰ The Act itself had a great impact on the development of modern copyright law and ensured an accelerated “catching up” with technological developments, thus according protection in respect of new types of works not protected prior to 1912. Some of the works protected, which aided the development of the entertainment industry in general, are “[s]tories reduced to a material form in a cinematograph film or music reduced to a material form in a gramophone record or other mechanical contrivance”,¹⁹¹ with sound recordings also specifically protected as a separate category of work, and also paving the way for the recognition of cinematograph films as a separate category of work.¹⁹²

¹⁸⁹ For example, the act of exploitation provided for in section 1(2)(b) of the Act (i.e. converting the work into a novel or other non-dramatic work) relates only to a dramatic work; the act of exploitation provided for in section 1(2)(d) (making a record, perforated roll, cinematograph film or other contrivance “by means of which the work may be mechanically performed or delivered”) relates to a literary, dramatic or musical work; while the act of producing or reproducing a work or a substantial part of, and the act of performing the work or a substantial part of, applied separately in respect of each work in which copyright subsisted. In the case of the public performance of a work this oddly, would have included a “performance” of an artistic work (though further in subsection (3) the more correct expression of “exhibition in public” is used in respect of artistic works, but it does not change the fact that in the general description in subsection (2) artistic works are not specifically excluded from the application of the right of public performance). This can however, be excused as the teething troubles of a maiden voyage in the right direction. In fact the British Parliament clearly realised this error when enacting its second major modern copyright legislation, the Copyright Act, 1956 (4 & 5 Eliz. 2 CH. 74), where a clear distinction was made between literary, dramatic and musical works on the one hand, and artistic works on the other, with the acts of exploitation in respect of the former, including the act of performing the work in public, being dealt with in section 2(5)(c); and the acts of exploitation in respect of the latter, with the act of performing the work in public excluded, being dealt with in section 3(5).

¹⁹⁰ For example, although Canadian copyright legislation has undergone several major amendments since its enactment in 1921, section 3(1) of the current version of the Canadian Copyright Act (R.S.C., 1985, c. C-42), although it has added several new forms of exploitation, still to a great extent, mimics the provisions of section 1(2) of the Imperial Copyright Act. Furthermore, section 14(1) of the Canadian Act still makes provision for a reversionary interest similar to that provided for in section 5(2) of the Imperial Copyright Act, while section 60 mimics the system for substituted rights provided for in section 24 of the Imperial Act. For a recent Canadian case that dealt with questions relating to the reversionary interest and substituted rights see *Anne of Green Gables Licensing Authority, Inc. v. Avonlea Traditions, Inc.*, [2000] O.J. No. 740, 2000 CPR LEXIS 3 (Ont. Super. Ct. Mar. 10, 2000).

¹⁹¹ Dean *Application of the Copyright Act* 144.

¹⁹² Another positive way in which the Imperial Copyright Act had an impact in the development of the entertainment industries is through the recognition of so-called “needle-time rights”, namely rights accorded in respect of the public performance and broadcast of sound recordings, for the benefit of both owners of copyright in sound recordings and performers. See for a note in this regard Pistorius “The Imperial Copyright Act 1911’s role in shaping South Africa’s copyright law”, in Suthersanen and Gendreau (eds) *A Shifting Empire* 223 – 225. Cinematograph films were protected as

In the area of musical works the main way in which the Imperial Copyright Act made a contribution is in its proper legal characterisation of musical works as a category of copyright work distinct and separate from dramatico-musical works. Gone were the days when the law made provision for the copyright protection of “books” or literary property, with musical compositions being seen merely as a genre of “books”; or when it was not clear if the performing right would only be applicable to a musical composition if it had *dramatic character* and was performed in a *place of dramatic entertainment*. Indeed musical works were so intricately intertwined with dramatic works in their pre-1912 legal characterisation that it was necessary to extricate them, if they were to have a separate legal development as separate category of copyright work. Scrutton perfectly captures the manner in which pre-1912 musical works were conceived in the following observation:

Musical compositions in the English law go hand in hand with the drama, probably on account of the double nature of each as adopted to printing and to public performance, and also because they shade into each other gradually through operas and songs in character. And on any musical composition questions may arise as to the copyrights or performing rights in the air, the words, or the accompaniment, which may be in different hands, while the words of the song may have the character of a dramatic piece.¹⁹³

As Deazley observed however, “[w]ith the emergence of new sound recording technology the analogy between the song and the book had ... broken down and the existing legislation contained no provision for preventing these oral (as opposed to printed) reproductions.”¹⁹⁴ The Imperial Copyright Act brought certainty to this situation by providing for the separate status of a musical work as a work eligible for copyright protection, distinct from a literary work (even in the form of lyrics) and a dramatic work. Thus section 1(1) of the Act made it explicit that the protections provided for under the Act applied to “every original *literary, dramatic, musical and artistic work*”. Furthermore, as already alluded to, the acts of exploitation in respect of the various works dealt with in section 1(2) were carefully formulated so that they did not all apply in respect of all works at all times, but were generally specified to apply only in respect of particular works. These developments are important for South Africa because, starting with the 1916 Act,¹⁹⁵ modern South African copyright law has largely been shaped by English law.¹⁹⁶ An understanding of these developments will thus add value in understanding the nature of the modern South African copyright protection of musical works, including in particular and understanding of the performing right.

3.2.2 Formulating a Proper Performing Right

a separate category of work under the UK Copyright Act, 1956, where protection was granted in respect of the recorded underlying visual work. See in this regard Kamina *Film Copyright* 71 – 72.

¹⁹³ Scrutton *Law of Copyright* 96.

¹⁹⁴ Deazley *Rethinking Copyright* 87.

¹⁹⁵ The Patents, Designs, Trademarks and Copyright Act 9 of 1916.

¹⁹⁶ Although Dean and Karjiker *Handbook of South African Copyright Law* 1-4E assert that the 1978 Act “really amounts to our legislature departing on an independent course in the field of copyright law”, it is to be acknowledged that the Act still has many features similar to English legislation (in particular prior to the latter’s reform as a result of the influence of EU Court of Justice rulings). – a fact that Dean and Karjiker themselves acknowledge. Our courts continue to rely upon English court decisions in respect of many copyright issues today.

As indicated, under the Talfourd's Act, the public performance of a dramatic work and a musical composition would equally and interchangeably be described as a "representation" or a "performance". This, as indicated, created a lot of confusion as to the proper nature of the right. Section 1(2) of the Imperial Copyright Act resolved this problem by introducing a straightforward right of public performance in respect of all works, while making it explicit in paragraph (c) that dramatization as a form of public performance (i.e. converting a work into a dramatic work) was only possible in respect of works of literary character.¹⁹⁷

In light of the foregoing, a song could never *per se*, under the Imperial Copyright Act, be seen as a dramatic work (or using the description under the old legislation, a "dramatic piece"), merely because it was performed in a place of dramatic entertainment, or because "[t]he plaintiff, by his powers of singing, acting and characterisation, had made [the] song a thing of value", as held under the old legislation in *Clark v Bishop*.¹⁹⁸ Under the Imperial Copyright Act only the dramatization of a *novel* or *similar* literary work could convert such work into a dramatic work; the dramatization of a *song* by a singer – without a plot structure, storyline or dramatic context - could not have had such effect. Having indicated this, in spite of the provisions of section 1(2) of the Imperial Copyright Act the confusion that existed in relation to the meaning of the performing right persisted until the issue was clarified by the courts. Thus Duncan, commenting on the performing right in South Africa and acknowledging that there had, by 1925, been no judicial interpretation of the words "in public" contained in the Imperial Copyright Act, appeared to still view the performing right within the prism of the past era, stating:

... [I]t certainly does seem that the Legislature, in protecting performance "in public," intended to protect the performing rights to the same extent as they were previously protected by virtue of the construction placed by the Courts on the words "place of dramatic entertainment" in the Act of 1833.¹⁹⁹

He was, in this regard, relying on the decision of the court in *Duck v Bates*.²⁰⁰ This of course could not have been further from the truth but it was left to the courts to clarify the issue. The courts did this in a number of cases, some of which are dealt with below:

3.2.2.1 Harms (Incorporated), Limited & Another v Martans Club, Limited²⁰¹

As indicated, by 1925 there had been no judicial interpretation of the meaning of the words "in public" used in section 1(2) of the Imperial Copyright Act. This situation was to be dealt with a year later in the *Martans Club* decision, apparently the first English decision to address this question. The

¹⁹⁷ It is acknowledged that in this state of infancy in the formulation of a modern copyright law the drafters of the legislation did cloud things, as in this case, where the paragraph (c) makes reference not only to a "novel" as being the kind of work that could be dramatized (or converted into a dramatic work), but also mentions "other non-dramatic work" or "an artistic work". It is submitted that by "other non-dramatic work" what was contemplated was a work in the nature of a novel (e.g. a non-fiction work which was not written for the drama). The reference to "artistic work" is unfortunate and it seems to arise from a confusion as to the extent of this type of work – a confusion which, thankfully, was eventually rectified.

¹⁹⁸ (1872) 25 L.T. 908.

¹⁹⁹ Duncan 1925 S. African L.J. 301 – 302.

²⁰⁰ (1884) 13 Q.B.D. 843.

²⁰¹ [1927] 1 Ch. 526 (the *Martans Club* case).

Martans Club decision is important in that it provided clarity on the difference between the protection provided for in respect of the right of “representation” applicable in pre-1912 English legislation and the right to perform the work in public provided for under the Imperial Copyright Act. As indicated above, the performing right in pre-1912 English copyright legislation was shrouded in controversy and was in dire need of proper framing. In this regard the *Martans Club* decision in essence became a bridge that made it possible to transition from the old thinking in relation to the performing right, to a modern articulation of the right as understood within the auspices of the Imperial Copyright Act.²⁰² The transitional nature of the *Martans Club* decision is evident from the fact that the court itself could not completely resist the lure of the word “representation” used in the pre-1912 legislation when dealing with the performance under consideration – in spite of it seeking to clarify the difference between the new and old regimes for the protection of the performing right.²⁰³

The facts of the case were as follows: The plaintiffs were copyright owners in America of a musical play and a musical work forming part of the play (titled “That Certain Feeling”); and their publishing company (Chappell & Co. Ltd). Defendant were owners of the Embassy Club, a private social and dancing “high class club”²⁰⁴ comprised of 1800 members, whose activities were not open to the public (although members could introduce guests upon payment of a fee). On 4 March 1926 the musical work comprised in the musical play was performed by the club’s orchestral band where 150 members had dined and 50 guests were present at the subsequent performance and dancing. The rules of the club placed no limit on the number of guests that could be introduced. The plaintiffs alleged that the performance was “in public” as contemplated in the Imperial Copyright Act and claimed an injunction and damages. The defendants however, denied that the performance was in public. The court *a quo* held that the performance was indeed a performance in public and thus constituted an infringement of the plaintiff’s copyright.

On appeal the defendants argued that the judge of the lower court had erred in that he “thought that whatever was not private or domestic must be public if done in the presence of a number of persons; that he considered the matter too much from the point of view of the composer; and that he relied strongly on the decision in *Duck v. Bates* ... in which the question arose *upon different words of another Act*.”²⁰⁵ It is interesting that counsel for the defendant acknowledged here that the framing of the performing right in pre-1912 legislation was different from its framing under the Imperial Copyright Act. The defendant nevertheless believed that a strict interpretation of the words “in

²⁰² As highlighted above, without this clarification provided for by the courts the confusion that existed with regard to the nature of the performing right persisted, in spite of the clear provisions of the Imperial Copyright Act, with Duncan opining that the Legislature, in protecting performance “in public, ‘intended to protect the performing rights *to the same extent* as they were previously protected by virtue of the construction placed by the Courts on the words “place of dramatic entertainment” in the Act of 1833.’ Duncan 1925 *S. African L.J.* 301 – 302. He could never have been further from the truth.

²⁰³ See for example *Harms v Martans Club* [1927] 1 Ch. 526 at 532, where Lord Hanworth M.R. observes: “In considering here whether or not there has been within s. 2, sub-s. 1, an infringement of the author’s sole right, one must see whether or not, upon the facts as a whole, the true view is that *there has been a representation of this composition in public*.” Emphasis added.

²⁰⁴ *Harms v Martans Club* [1927] 1 Ch. 526, at 533.

²⁰⁵ *Id* at 528. Emphasis added.

public” used in the Imperial Copyright Act meant that the performance that took place at the club was not public because:

The defendant club is a social club and its premises are private. No member of the public is entitled to enter upon the club premises. The essential element of clubs is privacy; they are private associations, and the buildings they occupy are private premises. How can anything done in a club be said to be done in public?²⁰⁶

These questions were important because they provided a basis for understanding the modern performing right, especially in light of the fact that the central question as to whether a performance (or “presentation”) was in public or not in pre-1912 British legislation was whether or not the performance took place in a place of dramatic entertainment (a point the defendant’s counsel emphasises). The defendant argued that “what was done in this club, although not domestic or private, was not in public”, further arguing that section 2(3) of the 1911 Act made it possible for a person to make profit in private without infringing copyright.²⁰⁷ In conclusion the defendant argued that the word “public” as used in the Imperial Copyright Act meant “the general public”.²⁰⁸

In its judgment the court (per Lord Hanworth M.R.) acknowledged that the words “in public” were “not easy words to define”, adding that “[t]hey are commonly used in connection with a number of activities, which concern the community at large and which are of a far-reaching nature or effect.”²⁰⁹ The court also acknowledged that the protection of musical compositions under the Imperial Copyright Act differed from protection granted in earlier legislation.²¹⁰ The court nevertheless agreed with the decision in *Duck v Bates* that the right given to the author was a valuable right and not mere sentimental protection; and further agreed with the court *a quo* and various other earlier decisions that what constitutes a public performance largely depends upon the facts of each case.²¹¹ The learned judge highlighted the following as being some of the tests applicable in determining the question if a public performance had taken place:

1. *First, it had to be determined whether there had been any injury to or interference with the proprietary rights of the author. In this regard profit was “a very important element.”*²¹²
2. *Secondly, one needed to find out if there was an admission of any portion of the public, namely “the public who would go either with or without payment – the class of persons who would be likely to go to a performance if there was a performance at a public theatre for profit.”*²¹³
3. *Thirdly, one needs to consider if the performance was a domestic one, in the sense of being “private and domestic, a matter of family and household concern only.”*²¹⁴

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Id* at 529.

²⁰⁹ *Id* at 530.

²¹⁰ *Id* at 530 – 531.

²¹¹ *Id* at 531 – 532.

²¹² *Id* at 532.

²¹³ *Id* at 533.

4. Fourthly, one needed to consider where the performance took place, “bearing in mind that the place need not be one which is kept habitually for the exhibition of dramatic entertainments.”²¹⁵

The last requirement in particular signalled a departure from the old era, where performance at a place of dramatic entertainment was a crucial requirement to determine if public *representation* took place. Relying on these tests the court came to the conclusion that the persons present when the performance was made were members of the public, because “[i]f it were possible to get round the Copyright Act by such a performance – if an author had no means of asserting his right in such a case – it appears ... that a very serious inroad would have been made upon his property.”²¹⁶ Rather under section 2(1) of the Imperial Copyright Act the protection granted to the author “is large”.²¹⁷ In a concurring judgment Sargant L.J. found that the right of the author was made clearer in the Imperial Copyright Act by the direct language used in the Act, which expressly granted to the author a sole right which was “not to be lightly defeated or affected by the acts of others in derogation of that grant.”²¹⁸ The learned judge observed that the current case was “infinitely stronger in favour of the plaintiff than in *Duck v. Bates*”, seeing that in return to the annual membership subscription and the entrance fee paid by guests “capable of becoming members of the club”, the members and guests were entitled to the performance of music.²¹⁹ Thus the *Martans Club* case established a strong foundation for the treatment of the performing right in the new regime of the Imperial Copyright Act.

3.2.2.2 Performing Right Society, Limited v Hawthorns Hotel (Bournemouth), Limited²²⁰

A second case that dealt with the question whether the performance in question constituted performance in public in accordance with section 2(1) was the *Hawthorns Hotel* case.²²¹ In this case the court provided a clearer, more succinct articulation of the performing right under the Imperial Copyright Act, with no nostalgic drift to the language of “representation” used in pre-1912 legislation.²²²

In this case the defendant, a “high class unlicensed residential hotel”, had engaged an orchestral trio to play music to its guests in the hotel lounge. On 20 November 1932 the orchestral trio performed two musical works in which the sole right of public performance belonged to the plaintiff. Amongst

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Id* at 534.

²¹⁷ *Ibid.*

²¹⁸ *Id* at 534 – 535.

²¹⁹ *Id* at 537.

²²⁰ (1933) Ch 855 (the *Hawthorns Hotel* case).

²²¹ An earlier case, *Messenger v British Broadcasting Co* [1927] 2 KB 543 was concerned with a more technical question, namely whether the broadcasting by the BBC without authorisation by the author of the author’s musical work amounted to public performance, to which question the court answered in the affirmative. Since 1 June 1957 however, when the Copyright Act 1956 came into force in the United Kingdom, this decision has been of no effect, because the 1956 Act and subsequent UK legislation made a distinction between the right of public performance and the right of broadcasting. South African copyright law has also followed a similar trend.

²²² The court made its ruling solely on the basis of s 2(1) of the Imperial Copyright Act with no reference to any earlier case law (although counsel for the plaintiffs did refer to *Duck v Bates* and the *Martans Club* decision).

the audience was an “emissary”²²³ of the plaintiff and his friend, who had been sent by the defendant to find out if the orchestral trio would play musical works belonging to the plaintiff. It was determined in the case that “any respectable member of the public who was prepared to pay the price charged by the defendants either for consuming meals in their hotel, or for staying there, was at liberty to listen to the music performed by the trio engaged by the defendants.”²²⁴ The only question to be determined was whether the performance of the two musical works was a performance in public or not, within the meaning of the words of the section 2(1) of the Imperial Copyright Act.

The plaintiff argued that profit was a material consideration in this regard, contending that “where there is a commercial element the performance cannot be a private performance.”²²⁵ The plaintiff further contended that people did not cease to be members of the public simply because they were visitors at a hotel, and further that music was included in the price of the dinner because anyone who had dinner at the hotel (or booked a room), could listen to the music.²²⁶ The defendants, relying on *Duck v Bates*, countered and argued that the performance was “of a domestic or quasi-domestic nature”.²²⁷ They further argued that the plaintiff’s emissary and his friend “were not genuine members of the public but were there to watch the interests of the plaintiffs”; and inferred that the plaintiff had not proven that it had suffered enjoy – a necessary requirement in action for breach of copyright.²²⁸ In his succinct judgment Bennett J held in favour of the plaintiff, ruling that, since any respectable member of the public who booked to stay at the hotel or paid for dinner could listen to the music performance, the performance was in public and thus infringed the plaintiff’s statutory rights.

3.2.2.3 Jennings v Stephens²²⁹

The *Jennings* case is a leading and very important case in the modern framing of the performing right in English law. It is also a case that has shaped the understanding of the concept of public performance of musical works in several other common-law jurisdictions, including South Africa, introducing the criterion of the *character of the audience*.²³⁰ It needs to be noted in this regard that the case was not concerned with musical works but rather with a dramatic work. Nevertheless the

²²³ This is what today would be termed a licensing representative, namely a person employed by a collecting society to visit venues where music is used for purposes of determining if the music of the collecting society is being used at such venues.

²²⁴ *Performing Right Society v Hawthorns Hotel* (1933) Ch 855, at 857.

²²⁵ *Id* at 856.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ [1936] 1 All ER 409 (CA) (the *Jennings* case). The *Jennings* case was preceded by *Performing Right Society Ltd v Hammond’s Bradford Brewery Co Ltd* [1934] Ch 121, one of the “loudspeaker performance” cases which dealt with the question whether the broadcast of music from a wireless set using a loudspeaker amounted to a performance in public. Another later case in this regard is *Performing Right Society Ltd v George* (1936) 30 April, 1936, unreported, referred to in another case dealing with a similar matter, namely *Performing Right Society Ltd v Camelo* [1936] 3 All ER 557. These cases did not however, elaborate on the meaning of performance in public in the precedent-setting manner in which the *Jennings* case has done.

²³⁰ In Australia *Jennings* was followed in *Rank Film Production Ltd v Dodds* [1983] 2 NSWLR 553, also *Telstra Corporation Limited v Australasian Performing Right Association Limited* (1997) 191 CLR 140; in Canada it was followed in *Canadian Admiral Corp. Ltd v Rediffusion Inc.*, [1954] 14 Fox Pat. C. 114 and *Canadian Cable Television Association v Canada Copyright Board* (1993), 46 C.P.R. (3d) 359 (Fed.C.A.); and in South Africa it was followed in *Southern African Music Rights Organisation v Svenmill Fabrics (Pty) Ltd* 1983 (1) SA 608 (C).

principles coming forth from the case equally apply to musical works, in particular because the right of public performance in respect of dramatic works under the Imperial Copyright Act is based on the same provision as that applicable in respect of musical works, i.e. section 2(1) of the Act.

In the case the defendant - a president of a dramatic society, was sued for performing the plaintiff's play (dramatic work) at a woman's institute meeting, without authorisation of the plaintiff. The institute, part of a network of similar institutes existing throughout England and Wales, was formed for purposes of holding monthly meetings of a social and educational nature, particularly to encourage music, drama and dancing.. Every female in the village in which an institute existed was expressly or tacitly invited to become a member. The play in question was performed at a regular monthly meeting of the institute in question (the Duston Women's Institute) held on 23 February 1933 at the village hall, where there were sixty-two (62) members (out of 109 members).

No charge was made for admission but an annual subscription for a small amount was applicable. The performance was rendered by members of the institute of a neighbouring village, for no consideration, but "as a return" for services rendered to their institute by the president of the Duston Women's Institute. Only members were admitted to the meetings because a circular of the National Federation of Women's Institutes had advised that inviting visitors changed the character of a performance from being a private one, to being a public one, even if no fee was charged. On this basis the defendant argued that the performance that took place on 23 February 1933 was no a performance "in public".²³¹

The court acknowledged the complication arising from the fact that the Imperial Copyright Act did not define the expression "in public".²³² It is also noteworthy that in the case (obviously because it dealt with the dramatic right) the court affirmed the historical roots of the English concept of "performing right" in the protection of dramatic works.²³³ More relevantly, the court clarified the observation, made by earlier courts that the determination of the question whether a performance is in public or not "is a question of fact". The court observed that such statement was "not in a strict sense correct", as the question must involve both law and fact, 'law in the sense that the true meaning of the words "in public" must be ascertained as matter of law, and fact in the sense that it must be determined whether the facts of the case do or do not fall within that meaning."²³⁴ In this regard Lord Wright M.R. observed:

"The public" is a term of uncertain import; it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of this country. In any specific context it may mean for practical purposes only the inhabitants of a village or such members of the community as particular advertisements would reach, or who would be interested in

²³¹ *Jennings v Stephens* [1936] 1 All ER 409 (CA), 410 – 411.

²³² *Id* at 411 – 412. In this regard Lord Wright M.R. observed: 'Such authorities as there are do not seem precise in defining the meaning of the words "in public"; it is certainly difficult and perhaps impossible to define the precise borders of the territory which they cover.'

²³³ Per Lord Wright M.R., observing: "Performing right, to use a name commonly given to that aspect of the copyright in a dramatic work, was in this country the creation of the statute 3 & 4 Will.IV, c.15". *Id* at 411.

²³⁴ *Id* at 411 – 412.

any particular matter, professional, political, social, artistic, or local. ... Thus it is clear that by “public” is meant ... “a portion of the public.”²³⁵

The departure by Lord Wright M.R. from the earlier position where the emphasis was on the fact that the determination of the question whether a performance was in public or not was a matter of fact – to a position that stated that it is a matter of both fact and law, is noteworthy. This is because, in the writer’s opinion, it illustrates the departure under the Imperial Copyright Act from pre-1912 legislation, with regard to the legal characterisation or articulation of the performing right. Under the pre-1912 legislation (the Bulwer-Lytton’s Act and the Talfourd’s Act) public performance (or rather public representation) was *legally characterised* to involve the use of a *place of dramatic entertainment*, amongst others. Even though, in *Duck v Bates*, which dealt with the pre-1912 legislation, the court developed the important test of distinguishing between what is private and domestic / quasi-domestic vis-à-vis what is public, it still mattered *where* the performance took place – a factual consideration. Thus, in the writer’s opinion, the court’s finding in *Duck v Bates*, namely that the performance was private, did not only depict the fact that the case was a “border line” case – as reiterated in the *Jennings* ruling - but was in many ways inevitable, seeing that “the representation of the play was not made in a place *destined* for public entertainment.”²³⁶

The *Jennings* decision is also crucial in that it considered all the other main authorities dealing with the question of what constitutes “public” or “in public” dealt with above, in order to formulate a clearer articulation of the meaning of the expression. In doing so the court’s ratio depicts an evolution in understanding of the expression, that in turn depicts a shift in meaning made possible by the Imperial Copyright Act. Thus, in commenting on Bowen L.J.’s observation in *Duck v Bates*, that despite a distinction being made between domestic or quasi-domestic performances and public performances, certain “entertainments” of that nature (referring in particular to a private club) could still infringe the author’s right – Lord Wright M.R. referred to that observation as a “rather cryptical and non-committal expression”.²³⁷ Clearly Bowen L.J. could not provide a more emphatic articulation of the principle with the concept of a “place of dramatic entertainment” – namely “[a place] where dramatic entertainments are represented to which the public are admitted”²³⁸ - still looming large. To Brett M.R. in *Duck v Bates* “there [had to be] present a *sufficient part* of the public ... otherwise the place where the drama is represented [would] not be ‘a place of dramatic entertainment’ within the meaning of the statute.”²³⁹ To Lord Wright M.R. however numbers were not a determinant as a portion of the public “can be very small indeed”.²⁴⁰ It cannot be denied however that *Duck v Bates*

²³⁵ *Id* at 412. In our current Copyright Act the phrase “a portion of the public” must of necessity be mean “a section of the public”. See for example paragraph (b) of the definition of “broadcast in the Copyright Act, 1978. Lord Wright M.R. emphasised the fact that the particular portion of the public meant “can be very small indeed”; thus numbers are not a determining factor of what is meant by “public”.

²³⁶ To quote Karapapa *Private Copying* 76. Emphasis added.

²³⁷ *Jennings v Stephens* [1936] 1 All ER 409 (CA) at 413.

²³⁸ See *Lee v Simpson* (1847) 3 C.B. 871.

²³⁹ *Duck v Bates* (1884) 13 Q.B.D. 843. Emphasis added.

²⁴⁰ *Jennings v Stephens* [1936] 1 All ER 409 (CA) at 412.

set the right tone for the development of the concept of “public” or “in public”, and with *Jennings* and the Imperial Copyright Act the time was ripe for a mature expression of the performing right.

Arriving at the important conclusion that the true criterion for determining if a performance was in public or not is *the character of the audience*, Lord Wright M.R. summed up the position as follows:

The presence or absence of visitors is ... not the decisive factor, nor does it matter whether the performance is paid or gratuitous, nor is it conclusive that admission is free or for payment, nor is the number of the audience decisive.²⁴¹

This observation by Lord Wright M.R. is noteworthy in the light of current developments where it appears that government is pursuing a new policy direction where considerations of commerciality shall be uttermost in determining whether particular acts constitute infringing action or not.²⁴² On the basis of this analysis Lord Wright M.R. came to the conclusion that the performance under consideration was a public performance, arguing:

... [I]f the performance ... is held not to be a performance in public, the rights of owners of dramatic copyright in music or copyright in lectures all over the country will be seriously prejudiced; their plays will be liable to lose novelty, and the public demand for performance will be affected; the public appetite will be exhausted. ... If that were not a performance in public, and might be repeated indefinitely all over the country, *the performing right would not be of much value.*²⁴³

Even more emphatically the court observed that “[i]t is the duty of the court to protect the rights of authors, composers and lecturers, according to a fair construction of the statute.”²⁴⁴ This resonates with the words of Sargant L.J. in the *Martans* case, where the learned judge, in giving his concurring judgment, observed succinctly: “... the aim of the Act [referring to the Imperial Copyright Act] is the protection of authors of musical works or composers.”²⁴⁵ The protection of authors was thus, in the eyes of these early justices, a fundamental aspect of copyright legislation. This observation by the learned judges might have become somewhat of a tired or clichéd statement. Nevertheless it is important to reiterate it amidst a growing trend to construe the law of copyright as being concerned with so-called “users’ rights”, or rather to equate authors’ rights with such users’ rights²⁴⁶ – something alien to the edifice of copyright law as constructed through the Berne Convention system. The observations of Lord Wright M.R. were reiterated by Romer L.J. and Greene L.J. in their

²⁴¹ *Id* at 414.

²⁴² This is evident in several parts of the Copyright Amendment Bill 2017, approved by Parliament and awaiting the President’s signature (version B13B-2017), especially in the new provisions dealing with exceptions and limitations and further in light of the proposed fair use defence. For the Bill see <https://pmg.org.za/bill/705/> (date of use: 13 July 2019) and in particular clause 13 (in respect of the proposed section 12A(b)(iii)(bb) and 12B(1)(f)), in relation to the commercial consideration in respect of the fair use defence. See also clauses 11, 19C, 19D etc. of the Bill. The primacy of the commerciality criterion is made event by the fact that the drafters of the Bill saw the need to define the term “commercial” in clause 1(c) of the Bill, where the term is defined as meaning “the obtaining of economic advantage or financial gain in connection with a business or trade”.

²⁴³ *Jennings v Stephens* [1936] 1 All ER 409 (CA) at 415. Emphasis added.

²⁴⁴ *Ibid.*

²⁴⁵ *Harms Incorporated, Limited & Another v Martans Club Limited* [1927] 1 Ch. 526 at 534.

²⁴⁶ See for example Patterson and Lindberg *The Nature of Copyright*, generally.

concurring judgments, but the two justices also highlighted other aspects of what constitutes a performance in public that are worth considering.

Romer L.J. sought to deal with the meaning of the expression “in public” by gleaning the difference between this expression and the expression “in private”. He first observed that the expression “in public” can safely be construed as meaning “not in private”.²⁴⁷ On elaborating on this Romer L.J. made a very important observation on the subject, worth repeating:

... I think the meaning of the two phrases can best be ascertained by considering what is the essential difference between the two performances [i.e. performance “in public” and performance “in private”]. In the latter case the entertainment *forms part of the domestic or home life of the person who provides it*, and none the less because of the presence his guests. They are for the time being members of his home circle. In the former case, however, the entertainment is in no sense part of the domestic or home life of the members of the audience. It forms part of what may be called in contradistinction their non-domestic or outside life. ... The home circle may, of course, in some cases be a large one. The section of the public forming the audience may in some cases be a small one. But this can make no difference ... Nor, with all deference to those who think otherwise, can I agree that it makes any difference ... whether the performers are strangers or members of the domestic circle. The performers at what is unquestionably a private performance are frequently paid. The performers at what is unquestionably a public performance frequently give their services for nothing. Nor can an entertainment that is private when given by members of the home circle cease to be private when given by strangers. ...²⁴⁸

In elaborating further on this matter Romer L.J. further made another very important observation, namely the fact that it does not matter what the nature of the entertainment is, or the place where the entertainment is given.²⁴⁹ In this regard he expressed these timeless words: “A private entertainment may be given in a private house. A public entertainment may be given in a private house”, further reiterating Lord Wright M.R.’s observation that the true criterion is the character of the audience.²⁵⁰ On this basis Romer L.J. agreed with Lord Wright M.R. that the performance in question was in public, since the members of the societies “were in no way bound to one another by any domestic or quasi-domestic tie”, and their monthly meetings “formed part no of the domestic, that is of the private life of a member, but of her outside, that is to say, of her public life.”²⁵¹

Greene L.J. provided clarity on what is meant by the position that the question whether a performance is “in public” is a question of fact. He reasoned that this meant that the facts of the particular case need to be first determined, but once those facts have been determined the question becomes one of law. ‘... [T]he meaning of the phrase “in public” is a question of law, and the question whether the facts when ascertained fall within the words is also a question of law ...’²⁵²

²⁴⁷ *Jennings v Stephens* [1936] 1 All ER 409 (CA) at 415.

²⁴⁸ *Id* at 416. Emphasis added.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Id* at 417 – 418.

²⁵² *Id* at 418.

Greene L.J. brought another important angle to the judgment. – *he introduced the concept of the copyright owner’s public*. In this regard he observed:

The question may ... be usefully approached by inquiring whether or not the act complained of as an infringement would, if done by the owner of the copyright himself, have been an exercise by him of the statutory right conferred upon him. *In other words, the expression “in public” must be considered in relation to the owner of the copyright. If the audience considered in relation to the owner of the copyright may properly be described as the owners’ “public” or part of his “public,” then in performing the work before that audience he would, in my opinion, be exercising the statutory right conferred upon him; and anyone who without his consent performed the work before that audience would be infringing his copyright.* If the performance is such that, if given by or on the authorisation of the owner of the copyright, it would have been a performance before an audience which, in relation to the owner and in respect of that performance, formed part of his “public”, the fact that the performers perform for their own pleasure and improvement and the pleasure of their friends appears to me irrelevant. ... *Once it is appreciated that the wrong of infringement is defined by reference to the statutory right of the owner of the copyright, and that accordingly the question of what the words “in public” means is to be examined primarily in the light of the relationship of the audience to the owner of the copyright, and not in the light of the relationship of the audience to the performers, the difficulties in the present case appear to me to be removed.* ...²⁵³

These words by Green L.J. and the other observations by his brothers have had an abiding impact of the understanding of the concept of “in public” in relation to the performing right. It provided the most clear statement of the proper contours of the performing right under the Imperial Copyright Act, and became the standard for shedding light on the meaning of the expression in the future court decisions of many common-law jurisdictions.²⁵⁴ Our own courts, in the leading South African case dealing with this question, followed and relied heavily on the *Jennings* case in arriving at a decision.²⁵⁵

3.2.3 Reframing the Meaning of “Musical Work”

The significance of the Imperial Copyright Act in clarifying the position regarding the legal meaning of a musical work – thus removing the enigma that existed pre-1912 – is well illustrated by the *Redwood* case.²⁵⁶ This case dealt with three questions relating to the effect of the provisions of the Imperial Copyright Act, the main one (and relevant one for present purposes) being what was termed “the collective work point”.²⁵⁷

²⁵³ *Id* at 418 – 420. Emphasis added.

²⁵⁴ See n 45 for an elaboration of this point.

²⁵⁵ See the case of *Southern African Music Rights Organisation v Svenmill Fabrics (Pty) Ltd* 1983 (1) SA 608 (C).

²⁵⁶ *Chappell & Co Ltd v Redwood Music Ltd; Redwood Music Ltd v Francis, Day and Hunter Ltd* [1981] R.P.C. 337 (HL). This case was part of a series of cases starting with *Redwood Music Ltd v Francis, Day and Hunter Ltd* [1978] RPC 429 (QBD); *Redwood Music Ltd v B. Feldman & Co Ltd* [1979] R.P.C. 1 (QBD); *Redwood Music Ltd v B. Feldman & Co Ltd* [1979] R.P.C. 385 (CA); and ending with *Redwood Music Ltd v Chappell & Co Ltd* [1982] R.P.C. 109 (QBD).

²⁵⁷ The other two questions were termed “the American renewal point” and the so-called “the express agreement point”, irrelevant for present purposes.

The *Redwood* case was, in the same manner as the *Lion Sleeps Tonight* case,²⁵⁸ concerned with the reversionary interest contemplated in the proviso to section 5(2) of the Imperial Copyright Act.²⁵⁹ Section 5(1) of the Act provided that the author of a work was the first owner of copyright in a work.²⁶⁰ The general provisions of section 5(2) then provided that the author could assign his copyright, either in whole or in part, and either generally or subject to territorial limitation, and either for the whole term of copyright or for a part thereof; as well as grant any interest in the copyright by licence. Then came the proviso incorporating the reversionary interest, which stipulated as follows:

Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void ...

The present discussion is not as such, concerned with the reversionary provision but with the second part to the proviso. This second part provided that nothing in the proviso was to be construed “as applying to the assignment of the copyright *in a collective work* or a licence to publish a work or part of a work *as part of a collective work*.” An American woman, Miss Stern, who had become aware of the provision relating to the reversionary interest, obtained from the estates of various deceased authors the right to represent them in relation to the reversionary interest, which she was convinced had reverted to these estates. She made a proposal to the publishers of the works of such deceased authors, numbering between thirty and forty thousand, requiring them to pay to the estates fifty percent of the royalties obtained from the usage of the works for the past six years, and to retain fifty percent for the next ten years, after which they would no longer be entitled to control the usage of the songs. When the publishers refused to accede to this demand, a company, Redwood Music Ltd, was formed and the rights concerned assigned to it, with the objective of starting court proceedings to test the validity of Miss Stern’s contentions.

The crucial question before the court was whether a song of which one person had written the words and another composed the music fell within the definition of “collective work” as contemplated in section 35(1) – seeing that the second part to the proviso to section 5(2) excluded collective works from the operation of the reversionary interest. In answering this question, the court raised a number

²⁵⁸ *Disney Enterprises Inc. v Griesel N.O. & Others* 895 JOC (T).

²⁵⁹ This provision has been termed “the Dickens clause” – see Dean *Handbook of Copyright Law* 3-20A at n 39C; or “the Dickens provision” – see *Anne of Green Gables Licensing Authority, Inc. v. Avonlea Traditions, Inc.*, [2000] O.J. No. 740, 2000 CPR LEXIS 3 (Ont. Super. Ct. Mar. 10, 2000), at para 83, where it is observed: ‘This complex statutory framework of reversionary copyright was originally created in England to relieve against hardship suffered by the impoverished families of deceased authors; it is known colloquially as the “Dickens” provision. ...’ See further in this regard Cavalier 2005 *J. Copyright Soc’y* 231 – 233.

²⁶⁰ This was subject to certain qualifications relating to the commissioning of an artistic work for valuable consideration and the creation of a work in the course of employment under a contract of service (in which case the person commissioning the making of the work, and the employer, respectively, were the first owners of the work).

of points which clarified the position regarding the nature of a musical work under the new dispensation ushered in by the Imperial Copyright Act. It will be recalled that in pre-1912 British copyright law the protection of musical compositions was framed within the mould of dramatic performance. As Scrutton observed at the time, “[m]usical compositions in the English law go hand in hand with the drama”.²⁶¹ Real protection for musical compositions as musical works *per se* was in relation to their status as printed works or sheet music; once the form of exploitation shifted into the performance area, then the musical work would often be subsumed into the rubric of “dramatic piece.” Today what was termed a “dramatic piece” in this context would be best described as a dramatico-musical work, where “copyright in each contribution to [the] dramatico-musical work (e.g., literary work, music, lyrics) may be claimed separately”, in addition to “a copyright in the dramatico-musical work as a whole ... as a single work.”²⁶² Thus in this case, the copyright in the individual musical work (or any of the other constituent works of the dramatico-musical work), would remain intact and would not be affected by or subsumed into the dramatico-musical work.

This was achieved in the Imperial Copyright Act by the introduction of the concept of “collective work”. As Copinger observed, the expression “collective work” was “a useful one to indicate a class of works which differ in principle” from other *ordinary* works.²⁶³ The expression “collective work” was defined in section 35(1) of the Imperial Copyright Act as:

(a) an encyclopaedia, dictionary, year book, or similar work; (b) a newspaper, review, magazine, or similar periodical; and (c) *any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated.*²⁶⁴

The appellants in the *Redwood* case argued that a song – i.e. a creation comprised of words and music – was a collective work as contemplated in section 35(1) of the Imperial Copyright Act and was thus exempted from the application of the reversionary provisions of the proviso to section 5(2) of the Act. The court countered, observing that an “essential ingredient” of a collective work is that it has “copyright of its own”, “in addition to the copyright of each of the parts which constitute or are incorporated in the collective work”.²⁶⁵ This is not the position in relation to a song where the words are written by one person, and the music by another. In such a case copyright subsists separately in the words and in the musical composition, but “[i]t follows that the song itself has no copyright”.²⁶⁶ A collective work is “something which by original collocation or arrangement has a copyright of its own” and thus a song, in which the two copyrights comprising it are separate and distinct, is not a collective work; since “[t]o ‘marry’ the two in the form of a song did not constitute a third copyright in

²⁶¹ Scrutton *Law of Copyright* 96.

²⁶² Kohn and Kohn *Music Licensing* 1307.

²⁶³ Copinger *Law of Copyright* 224.

²⁶⁴ Emphasis added.

²⁶⁵ Per Lord Salmon, *Chappell & Co Ltd v Redwood Music Ltd; Redwood Music Ltd v Francis, Day and Hunter Ltd* [1981] R.P.C. 337 (HL) at 824.

²⁶⁶ *Ibid.* This position is to be distinguished from the case where two or more authors collaborate to make a song, where the contribution of one author is not distinct from that of the other author or authors. In this case the reference is to a work of “joint authorship”. See the observation of Viscount Dilhorne in the case, at 819. Joint authorship does not however, vests copyright in the song itself. In this case the joint authorship would be in respect of the lyrics (literary work) or the musical work, or both, depending on the circumstances of each case.

the song as a ‘work’...²⁶⁷ Furthermore, unlike the position in American law, where copyright in the song “as such” is recognised, “English law does not admit the existence of a single copyright in a song as an entity” subsisting apart from the copyright in the component literary and musical works.²⁶⁸ It is submitted that this position applies equally in South Africa.²⁶⁹

Lord Keith suggested that it was possible to call a song a “hybrid collective work” (i.e. “one which partakes of more than one of the characteristics of ‘literary dramatic musical and artistic’ mentioned in s 1 of the Act”), but that this would be “a collective hybrid work which does not engender a collective work copyright distinct from the copyrights in the individual parts”.²⁷⁰ However, while a “simple song” could not become “a hybrid collective work” which engenders copyright, “a complicated work comprising musical and literary components such as an opera”, could. This, it is submitted, would be true of other dramatico-musical works such as music plays, pantomimes, revues etc.²⁷¹ The *Redwood* case without doubt went a long way in clarifying the difference in the way in which musical compositions were treated in pre-1912 British legislation, and the way they are treated in modern copyright law, commencing with the Imperial Copyright Act. It made it clear that a song was not a single dramatic piece (i.e. a dramatico-musical work) as would have been the case under the old British legislation; and further that there was no independent copyright in the song as an entity but that it was instead, a composite work comprising of two distinct works, namely a musical work and a literary work, in which copyright subsists independently.

It is submitted that this reframing and “freeing” of musical copyright was only made possible by the ingenious and straightforward manner in which musical and other copyright works were dealt with under the Imperial Copyright Act. Further British legislation followed the tradition of categorising musical works as separate, distinct works, and this also found its way in the new common-law system of copyright. Thus section 2(1) and (2) of the British Copyright Act, 1956²⁷² clearly made a distinction between copyright in musical works and copyright in literary works, making it easy for the court, in commenting on the protection of songs under the 1956 Act, to make the now-common and clichéd observation:

²⁶⁷ *Redwood* case *ibid*, per Lord Russell, at 826 and 827.

²⁶⁸ Lord Keith *id* at 829. See also 819 and 824. In American law lyrics and music *comprising a song* are not each seen as a “contribution [that] can stand on its own, independent from the collective work” and thus as “having some value in its own right”. Leifer *Understanding Copyright Law* 77-78 – 78-79.

²⁶⁹ Our courts arrived at this conclusion in the case of *Feldman NO v EMI Music Publishing SA (Pty) Limited, Feldman NO v EMI Music (Pty) Limited* [2007] ZAGPHC 294 Jajbhay J made this observation (at para 26): “In both the particulars of claim and in annexure “A” thereto, the late Brenda Fassie is identified as the joint author *and* the joint composer in respect of the works in question. *On these particulars*, the contribution of the various parties is consequently indistinguishable and inseparable from the contribution of other co-authors and composers.” Emphasis added. Thus in this case Brenda Fassie was a joint author in respect of the words of the song *and* in respect of the musical composition. This ruling was confirmed in *Feldman NO v EMI Music SA (Pty) Ltd / EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA).

²⁷⁰ Lord Keith *Chappell & Co Ltd v Redwood Music Ltd; Redwood Music Ltd v Francis, Day and Hunter Ltd* [1981] R.P.C. 337 (HL), at 831.

²⁷¹ It does appear that Lord Keith made these observations obiter, but in this regard it needs to be mentioned that divergent views exist as to the exact characterisation of a collective work. See in this regard Goldstein and Hugenholtz *International Copyright* 253 – 254; see also Nimmer *Copyright Illuminated* 245 – 254, dealing with the inconsistent understanding of the concept of “collective work” in US law. The focus in the present discussion is however on works in which copyright does not subsist separately from the distinct parts (as in a song) and works where it does (as in a dramatico-musical work).

²⁷² 4 & 5 Eliz. 2 CH 74.

There are two copyrights in the song: one in the music (the “musical work” ...), and one in the lyrics (the “literary work” ...).²⁷³

This may not seem to be a major feat today, but viewed against the backdrop of the state of confusion that existed in pre-twentieth century British copyright law in relation to the protection of musical works, it indeed represents a phenomenal shift. Based on this historical development the British legislature was able, in the Copyright Act of 1988,²⁷⁴ to, for the first time in English copyright law,²⁷⁵ with less effort, proffer a proper definition of the expression “musical work”, which it defined as:

a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.²⁷⁶

Such a definition was indeed ripe for expression. Although it has been observed that the South African Copyright Act of 1978 “departed from [British legislation] in several respects and ... really amounts to our legislature departing on an independent course in the field of copyright law”,²⁷⁷ the influence of British legislation on our law is evident from the definition of “musical works” in the 1978 Act. While previous South African copyright legislation (including the Copyright Act of 1965²⁷⁸) did not, similar to pre-1988 British legislation, provide a definition of the expression “musical works”, the South African Copyright Act defines this expression in *exactly* the same manner as the UK Copyright Act, 1988, does.²⁷⁹ This definition was inserted by section 1(q) of Act 125 of 1992, and was thus clearly borrowed from the British Act enacted some four years earlier. The words of Jacob LJ in *Hyperion Records Ltd v Sawkins*²⁸⁰ in relation to the definition of musical works in the UK Copyright Act, 1988, are apt:

The definition of “music” is not a definition at all – its obvious purpose is just *to separate out lyrics or choreographical directions or the like. They go into a different “box” for copyright purposes, for instance lyrics into literary works and choreographical works into “dramatic works”*. ...²⁸¹

While the words of Jacob LJ clearly reflect a lamenting tenor – apparently because the definition did not satisfy the need that the learned judge wanted to address – the words themselves confirm the

²⁷³ *Hadley v Kemp* [1999] E.M.L.R. 589, at 597.

²⁷⁴ Copyright, Designs and Patents Act 1988, c.48.

²⁷⁵ Although the Musical (Summary Proceedings) Copyright Act 1902 (2 Edw. 7, c.15) provided a definition of musical work as “any combination of melody and harmony, or either”, Garnett, Davies and Harbottle *Copinger and Skone James* 96 have, it is submitted correctly, observed that a definition of this nature is “too restrictive ... as sounds which are neither in melodic nor harmonic combination may equally be recognised to be music.” In the same vein Copeling *Copyright Law* 34 – 35 has observed, commenting on the lack of definition of the expression “musical work” in the South African Copyright Act 63 of 1965, that, while regard could be had to the definition of the expression under the Musical (Summary Proceedings) Copyright Act 1902, the definition was ‘acceptable in so far as it [defined] a musical work as “any combination of melody and harmony, or either of them”, but was ‘unacceptable in so far as it [limited] a musical work to a work which has been “printed, reduced to writing, or otherwise graphically produced or reproduced”, concluding: “A musical work is nonetheless a musical work even though it exists solely in the form of a gramophone record or tape recording. All this required is that there be some tangible evidence of the melody and / or harmony which comprises the piece.”

²⁷⁶ Section 3(1), UK Copyright Act, 1988.

²⁷⁷ Dean *Handbook of Copyright Law* 1-4E.

²⁷⁸ Copyright Act 63 of 1965.

²⁷⁹ See definition of “musical work” in section 1(1), Copyright Act, 1978.

²⁸⁰ [2005] EWCA Civ 565, at para 73.

²⁸¹ Emphasis added.

line of argument advanced in this discussion, namely the fact that musical works were, beginning with the enactment of the Imperial Copyright Act, expressed in their pure, *small rights* form, separate from literary copyright and dramatic copyright.

3.3 Conclusion

In the preceding discussion the writer illustrated how the advent of new technologies and the enactment of the Imperial Copyright Act, together with its elucidation by the courts, became the two single-most important catalysts in the development of the modern protection of music copyright in the English common-law system. This is because these developments shifted music copyright protection from the befuddled state in which it existed in pre-1912 English legislation, providing more clarity and setting the tone for the modern protection of music copyright. In the area of the reproduction right this was done by making it explicit that the right of reproduction was not limited to the printing of works, in an era where the technique of printing was replaced by new technological ways of reproducing copyright works. At the international level, beginning with the Berlin revision of the Berne Convention in 1908, and in national legislations such as the US Copyright Act of 1909 and the UK Imperial Copyright Act of 1911, it was recognised that copyright law had to be adapted in line with technological developments to ensure that it remained relevant as a form of protection for rights-holders. In this way the reproduction right was extended to encompass the new recording technology (mechanical right), the new film, television and video technologies (synchronisation right) and the new radio technology (electrical transcription right).

Of its own right the Imperial Copyright Act sought to provide clarity to the confused manner in which the performing right was framed in pre-1912 English legislation, which had led to many composers not seeing the performing right as a viable source of income for them. This was in contrast with the position in France where the performing right had become a major source of income for rights-holders. In this regard the Imperial Copyright Act disentangled the concept of performing right from the incoherent state in which it existed, where it was connected to fuzzy concepts such as “place of dramatic entertainment”, “dramatic piece” and “representation”. Instead the Act reframed the performing right by providing for a simple, “yet potent” right in section 1(2) of the Act.²⁸² The interpretation of this right by the courts to show that it differed from the limited protection provided for in pre-1912 English legislation, cemented the relevance and efficacy of the modern-day performing right. Thus the leading English decision of *Jennings v Stephens* continues to be relied upon by many common-law jurisdictions in defining the contours of the performing right. The Imperial Copyright Act further shaped the modern music industry by making it easy for the court in the *Redwood* case to find that a song was not a collective work but was instead comprised of two distinct works in which copyright subsists, namely a musical work and a literary work. While this might not seem to be a notable achievement today, at the time it was revolutionary and represented the complete cutting of

²⁸² The right “to perform ... the work or any substantial part thereof in public”. Section 1(2) of the Imperial Copyright Act 1911, incorporated as the Third Schedule to the South African Patents, Designs, Trade Marks and Copyright Act, 1916 (Act No 9 of 1916).

ties with the past era, where it was observed that “[m]usical compositions in the English law go hand in hand with the drama”.²⁸³

²⁸³ Scrutton *Law of Copyright* 96.

Chapter 4: The Historical Development of Music Copyright in South Africa

“IP rights as conceived of in the current IP framework did not exist in precolonial Africa. However, customary law provided, and continues to provide, knowledge governance systems Such systems are relevant and required because there are records of African creativity ... on both a small and grand scale Further, the continent’s rich cultural life manifested in a variety of art, artefacts, song, and dance, which are now commonly categorized as traditional cultural expressions (TCE) or folklore. The then prevailing governing system of customary law would have regulated such expressions, knowledge, skill, and its products.”¹

¹ Dreyfuss and Pila (eds) *Intellectual Property Law* 517.

4.1 Introduction

Just as it was necessary to trace the historical development of music copyright law from a general, international perspective in Chapters 2 and 3, it would also be extremely helpful to do so in relation to South Africa – to the extent that this is possible. In the writer’s estimation, the period from the enactment and coming into force of the first South African intellectual property legislation in 1916² marks the commencement of modern South African copyright law (including music copyright law). Accordingly, the discussion about the impact of the British Imperial Copyright Act on the development of modern music copyright law, dealt with in Chapter 3, has relevance for the development of music copyright law in South Africa, seeing that the 1916 South African enactment relating to copyright was, in fact, to a large extent, an incorporation of the Imperial Copyright Act in the Third Schedule to the 1916 Act. It is also important to note that the current analysis does not include an analysis of the Copyright Act 63 of 1965 – enacted at a time when South African copyright law was already in a modern form.³ The current Copyright Act 98 of 1978 shall be considered in full in Chapter 7 below, as shown in the framework of the study in Chapter 1, although it is also referred to throughout the thesis as necessary.

Of necessity an analysis of the historical development of music copyright law in South Africa would have to be limited to “Western law” – namely the Roman-Dutch common law system and English statutory law applicable in South Africa up to the enactment of the 1916 Act. Due to the general subjugation of indigenous law systems during the colonial rule⁴ – a condition that persists today to a large extent⁵ – the manner in which such systems dealt with indigenous knowledge and / or

² The Patents, Designs, Trademarks and Copyright Act 9 of 1916.

³ The 1965 Act repealed the copyright component of the 1916 (ss 141 – 160, and “so much of the rest of that Act as relates to copyright”). Nevertheless it in essence embodied the essential provisions of the 1916 Act, in particular in its Sixth Schedule, read with section 48 of the Act. See *Dean Application of the Copyright Act* 373. Section 41(1) of the Sixth Schedule to the 1965 Act provided that except in so far as otherwise expressly provided for in the Schedule, “the provisions of [the] Act [applied] in relation to things existing at the commencement of those provisions as they [applied] in relation to things coming into existence thereafter.” In this regard Dean has observed that “it was envisaged under the 1965 Act that no reference, or very little reference, was necessary to the 1916 Act and that the law of copyright was regulated, both in regard to existing and future works, by the provisions of the 1965 Act.” Dean *ibid*. Where the 1965 Act defined works protected under the 1916 Act in a broader manner than was provided for under the 1916 Act, the 1965 Act in essence “retrospectively protected such works but proceeded on the assumption that they had been protected under the 1916 Act.” Dean *id* at 383.

⁴ Curtin *Precolonial African History* 37 – 38 expresses the position that pre-colonial Africa had developed sophisticated legal systems which rendered the coercive power of State unnecessary. However, as Van Niekerk *Interaction of Indigenous Law and Western Law* 57 – 58 has observed: “Although the inhabitants were [in colonial South Africa] allowed to administer their own indigenous laws and practice their customs, all their decisions and acts were subject to the revision of colonial masters.” Obviously the unwritten form of indigenous law systems would have contributed to the justification for their disregard as a system worthy of recognition. Fagan posits that one of the reasons why Khoikhoi law was excluded “from the South African law then commencing its development at the Cape” was the fact that, until the British occupation of the Cape, there was little development of the law in the Cape and “[s]uch changes as there were (not many or very important ones) had been made in the Netherlands, not in South Africa ...” Fagan E “Roman-Dutch Law in its South African Historical Context”, in Zimmerman and Visser *Southern Cross* 2. Nwauche 2010 *PER* 73 makes reference to the recognition of “intellectual capital” in customary law, which he traces to colonial times and identifies as being “group oriented in the sense that it privileges the family and the community over the individual.”

⁵ Van Niekerk *id* at 18 observes: “Indigenous law in Africa is today still typified as primitive law ...” However he argues (*ibid*): “The fact that change in the substance of indigenous law has been slow is mainly due to the isolation of the Bantuspeakers. However, this does not mean that these legal systems should be characterised as static, and neither are they inferior or in any way backward compared to developed Western legal systems.” See also Malowa *Judicial Interpretation of Indigenous Law* generally. Hlophe JP expressed dismay at this situation in *Mabuza v Mbatha* 2003 (4) SA 218 CPD, remarking (at 228 C): “The approach whereby African law is recognized only when it does not conflict with

intellectual property does not form part of the current analysis, as it had no influence in the development of South African intellectual property law.⁶ In light of this, early South African copyright law can be traced to the first Dutch settlement in the Cape from 1652, when the Roman-Dutch law system was introduced as South Africa's common law. In this regard Dean has observed:

... Dutch copyright law as it existed in The Netherlands in 1803 was received into South African law along with the general body of Roman-Dutch law. That there has been very little mention, if any, of Roman-Dutch copyright law in South Africa is hardly surprising because even today ... copyright remains an esoteric branch of the law ... It may well be that 19th Century South African lawyers were in blissful ignorance of the availability of copyright protection under the Roman-Dutch common law. This does not, however, alter the fact that the law was there and the protection available to be called upon if required.⁷

After English occupation, British statutory copyright law had application in South Africa in those territories that were, from time to time, under British control, sometimes alongside local legislation, until the enactment of the 1916 Act and the implementation of the so-called 1917 Gateway (for which see further below).

4.2 An Overview of the Historical Development of Music in South Africa

It has been observed that from at least the beginning of the colonial period, when the Dutch colonised the Cape,⁸ South African music was characterised by “varying degrees of hybridisation”, when Western musical instruments and ideas were adapted to indigenous musical forms.⁹ Music was performed by the Khoi-Khoi, Ethiopians and slaves brought in from other countries (e.g. Malaysia), so that Cape Town “rapidly became a melting pot of cultural influences from all over the world” – so much that by the 1670's a slave orchestra existed in the Cape.¹⁰ By the 1800's Cape Town was a hive of activity in relation to music, with the practice of music parades, influenced by travelling American “minstrels”,¹¹ taking form. An abiding manifestation of these parades is the so-called Tweede Nuwe Jaar (Second New Year) street parade known as the Cape Town Minstrel

principles of public policy or natural justice leads to an absurd situation whereby it is continuously being undermined and not properly developed by the courts, which rely largely on ‘experts’.”

⁶ In this regard Anderson 2010 http://www.law.duke.edu/cspd/pdf/ip_indigenous-traditionalknowledge.pdf 33 (date of use 5 January 2018) has observed that “[i]ndigenous laws, as distinct from international intellectual property law, are localized and contextual.” Thus “[i]ndigenous peoples have argued consistently that if indigenous knowledge is to be respected and protected then attention needs to be given to the manifold indigenous laws and governing structures that *historically* and contemporarily exist for regulating knowledge use. That is, indigenous laws need to be treated as legitimate and given appropriate authority, rather than dismissed and / or supplanted with national or international laws.” Ibid, emphasis added.

⁷ Dean *Application of the Copyright Act* 223 – 224.

⁸ Indicated as being from 1652, when Jan Van Riebeeck arrived in the Cape.

⁹ See Brand South Africa 2002 <https://www.brandsouthafrica.com/south-africa-fast-facts/arts-facts/origins-of-south-african-music>; SAHO www.sahistory.org.za/topic/development-music-south-africa-timeline-1600-2004 (date of use: 20 December 2017). This remained true in respect of a much further era, when it was observed: “... South African has long had very close cultural ties with both Europe and the United States and American popular music found large audience appeal as early as 1900. American ragtime, jazz, swing, and other forms of popular music have been mixed with local styles, but frequently played on Western instruments. Mbaganga [sic], which would eventually be considered the very musical symbol of South Africa, is as indebted to the West as it is to its local roots. ...”

¹⁰ SAHO *ibid.*

¹¹ These were initially travelling white groups that visited South Africa in the mid-1800's and performed in “black-face” (that is, they painted their faces black to look like black performers); later black minstrel groups who sang the spirituals of the American South – famous among them being Orpheus McAdoo, would visit and influenced many South African groups to form similar choirs. SAHO *ibid.* See also in this regard Shoup 1997 *Alif* 74.

Carnival, when the Kaapse Klopse (Cape Minstrels) take to the streets of Cape Town in a colourful, festivity-filled parade in a performance no less glamorous than the famous Rio Carnival in Brazil.¹² In this regard it is worth observing that the choir-style that emerged from the influence of the American minstrels would have conformed squarely to the definition of “musical work” in section 3 of the UK’s Musical (Summary Proceedings) Copyright Act, 1902. This Act defined “musical work” as: “any combination of melody *and harmony*, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced.”¹³

With the influence of missionaries a style of black music composition with western influences but adapted to local harmonic styles emerged. This was led by early composers such as John Knox Bokwe, with other composers such as Enoch Sontonga, composer of *Nkosi Sikelel’i Afrika* (God Bless Africa), emerging. However, by 1925 it was observed that the performing right had hitherto “not been of much practical importance in South Africa owing to the fact that little or no attempt has been made to enforce it”; and in fact that “musical compositions published in [the] country prior to January 1st, 1917, [were] of a practically negligible quantity”.¹⁴ With urbanisation and the rise of a “black urban proletariat” eclectic forms of African music emerged, starting with Marabi and evolving through various styles into Mbaqanga, “the most distinctive form of South African jazz.”¹⁵ From this evolved the first professional black bands that performed in styles such as “isicathamiya” (first popularised by Solomon Linda’s “Mbube” song, which was adapted in several ways, most famously through the Disney version “The Lion Sleeps Tonight”;¹⁶ and now the signature sound of the famous Ladysmith Black Mambazo); “isikwhela Jo” and “kwela” (pennywhistle), which profiled South African music internationally in the 1950s and evolved into Mbaqanga, its grand form.¹⁷ South African popular music itself began in 1912, “with the first commercial recordings.”¹⁸ In this regard South

¹² See <http://www.capetownmagazine.com/tweede-nuwe-jaar>; <http://www.capetownmagazine.com/kaapse-klopse> (date of use: 20 December 2017). It is said that the practice of the Tweede Nuwe Jaar street parade arose from the fact that the slaves in Cape Town in the mid-nineteenth century were only given the second of January as day off, “when their masters were sleeping off the debauchery of New Year’s parties the day before”; and so “[t]o celebrate, groups would dress up as minstrels, waving parasols, strumming banjos and making merry with music, dance and a parade from the District Six area through to the city centre.” Ibid. Eventually the slaves were freed after the British took over control of the Cape, an act that sparked the Great Trek as the Dutch colonists protested the decision. See Dean *Application of the Copyright Act* 176; Zimmerman and Visser *Southern Cross* 54. In spite of the abolition of slavery, the practice of the Tweede Nuwe Jaar has nevertheless continued to this day.

¹³ Emphasis added. Although the Talfourd’s Act (1842 Act), which was applicable in South Africa as shown below, did not define the expression “musical work”, this definition has been described as ‘an apt description of what constituted a “musical work” in the pre-1912 legislation generally.’ Dean *Application of the Copyright Act* 130, quoting Sterling and Carpenter. Of course the music of such choirs would only fall within this definition if the requirements of printing, writing and / or graphic production or reproduction were also met.

¹⁴ Duncan 1925 S. *African L.J.* 292; 296.

¹⁵ See SAHO www.sahistory.org.za/topic/development-music-south-africa-timeline-1600-2004 (date of use: 20 December 2017). See also Shoup 1997 *Alif* 74.

¹⁶ The case of the song “Mbube” and how it was unlawfully adapted into “The Lion Sleeps Tonight” became a famous copyright case, involving the application of the British Copyright Act of 1911 (the Imperial Copyright Act) through its provisions for the reversionary interest, and is outlined in Dean *Awakening the Lion*. See also *Disney Enterprises Inc. v Griesel N.O. & Others* 895 JOC (T), where an order to attach Disney trademarks granted *ad fundam jurisdictionem* in favour of the executor of the deceased estate of Solomon Linda was confirmed.

¹⁷ See in this regard SAHO *ibid*; Broughton, Ellingham and Trillo (eds) *World Music* 638 – 672; Allen *Pennywhistle Kwela* and Meintjies *Sound of Africa!* generally.

¹⁸ SAHO www.sahistory.org.za/topic/development-music-south-africa-timeline-1600-2004 (date of use: 20 December 2017).

Africa's recording music industry developed around the same time that the recording industry developed in other developed parts of the world such as England and the USA.¹⁹

In this regard it would be appropriate to pause and observe that it was the British Copyright Act 1911 (the Imperial Copyright Act), which was applicable in South Africa through its incorporation by the Copyright, Designs and Patents Act of 1916 that facilitated this development of the South African music industry. As indicated, the Imperial Copyright Act consolidated British copyright law and removed the controversies that existed in particular in relation to the performing right, and also facilitated the development of the recording industry (see the discussion under Chapter 3 supra). Other forms of music styles developed in South Africa, including “bubblegum”, “kwaito” which emerged in the transition to democracy and revolutionised the South African music scene. Gospel remains a major music form in South Africa, and rock is prominent among especially the white community. Newer styles which have followed developments internationally include House music, which is linked to the Dj or Djing craze,²⁰ and Hip Hop, the two being arguably the most sensational music forms in South Africa at the moment.²¹ However, because these music forms are heavily dependent on sampling,²² this presents many legal challenges for copyright law that our courts will soon have to grapple with.²³

4.3 The Historical Development of Music Copyright in South Africa up to 1917

4.3.1 Introduction

An effort to trace the historical development of music copyright in South Africa is not an easy one because research relating to this is as scarce as that relating to the historical development of copyright in South Africa in general. The only focused study on the historical development of copyright in South Africa that the writer is aware of is a doctoral research conducted by Dean and submitted for examination in 1988.²⁴ The writer relies much on this study for this current analysis,

¹⁹ With regard to the music publishing industry, the discussion above has shown that this was in existence in Britain and other parts of Europe for hundreds of years prior to 1912.

²⁰ See generally in this regard Ayres *Worldwide Dissemination of House Music*.

²¹ Some of the kingpins of these music forms in South Africa include DJ Black Coffee, who has gained international prominence in the House music genre (see <https://www.timeslive.co.za/tshisa-live/tshisa-live/2017-09-27-dj-black-coffee-has-bagged-another-international-award/> - date of use: 20 December 2017) and Cassper Nyovest, the indisputable leader in Hip Hop, who in 2017 made history by attracting crowds of almost 70 000 at the FNB stadium (after filling up another large venue, The Dome, a 19000 capacity building, in 2015; and Orlando Stadium, a 40 000 capacity stadium, in 2016 – see <https://citizen.co.za/lifestyle/your-life-entertainment-your-life/entertainment-celebrities/1747694/details-how-cassper-nyovest-made-history-and-outsold-rihanna-justin-bieber/> - date of use: 20 December 2017).

²² It has for example been stated that sampling is “[o]ne of the most important techniques used to construct hip-hop songs” and “the basis for hip-hop beats”. See Vanasse *Hip-Hop and Copyright Law* 5, emphasis added.

²³ This concerns questions such as whether such use can be considered to be *de minimis* or as amounting to fair dealing. See for a discussion of some of these issues Schumacher 1995 *Media Culture Society* 253 – 273; Lindenbaum *Music Sampling* and Ewald J and Oliver 2017 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2898820 (date of use: 20 December 2017).

²⁴ Dean OH *The Application of the Copyright Act, 1978, to Works made prior to 1979* (LLD Thesis, University of Stellenbosch: 1988), herein cited as Dean *Application of the Copyright Act*. Copinger *Law of Copyright* 346 provides a very brief, one-page summary of the state of the law of copyright in South Africa prior to 1917. Another study that the writer has come across is that of Pistorius T “The Imperial Copyright Act 1911’s role in shaping South Africa’s copyright law”, in Suthersanen and Gendreau (eds) *A Shifting Empire* 204 – 225. This study however focusses not on the historical

especially with regard to pre-1912 events. However, because Dean dealt with copyright in general and not music copyright specifically, this has to be contextualised for current purposes. Modern South African copyright law can be traced from the Patents, Designs, Trade Marks and Copyright Act, 1916,²⁵ the first intellectual property legislation enacted by the Union of South Africa. This Act incorporated, *holus bolus*, the text of the British Copyright Act of 1911 (the Imperial Copyright Act) in its Third Schedule, subject to certain minor alterations.²⁶

Dean succinctly describes copyright law in South Africa prior to the coming into operation of the 1916 Act as being “in a very confused and disjointed state.”²⁷ This is reminiscent of the manner in which the Copyright Commission 1875/6 described the state of British copyright, calling it “wholly destitute of any sort of arrangement, incomplete, often obscure, and even when ... intelligible upon long study ... in many parts so ill-expressed that no-one who does not give such study to it can expect to understand it.”²⁸ Section 24 of the British Copyright Act, 1911 attempted to resolve this in respect of pre-1912 British rights by providing that any qualifying “existing rights” (whether in the nature of copyright or “performing right”) would be ‘transformed into “new” or substituted rights’ under the Imperial Copyright Act, and in this way “treated in the same way as rights conferred by the British Act, 1911 in works made thereafter.”²⁹ In the same manner, the transitional provisions of the South African Act of 1916 created conditions under which rights protected in South Africa up to 1 January 1917, when the 1916 Act came into operation, would continue to find protection under the 1916 Act. Borrowing an expression used by Laddie, Prescott and Vitoria to describe the process of the substitution by the British Copyright Act, 1911, of pre-1912 rights (“1912 Gateway”), Dean uses the expression “1917 Gateway” to describe the process whereby rights in existence in South Africa on 1 January 1917 were substituted by rights conferred upon the works in question by the 1916 Act.³⁰ This expression is apt and it is going to be used here also.

Apart from the need for historical analysis one important reason why an understanding of the rights protected under the 1916 Act (including those that passed through the 1917 Gateway in order to find protection in this Act), remains relevant, is the impact of the transitional provisions of the current Copyright Act, 1978, as embodied in section 41 and more particularly section 43 of the Act. These provisions deal with the application of the 1978 Act to works made prior to 1 January 1979, when this Act came into operation. As Dean, who deals expertly and competently with this issue in his thesis points out:

development of South African copyright but on the impact of the Imperial Copyright Act on current South African copyright law.

²⁵ Act 9 of 1916.

²⁶ See Dean *Application of the Copyright Act* 8-9.

²⁷ *Id* at 170.

²⁸ See McFarlane *Performing Right* 61.

²⁹ Dean *Application of the Copyright Act* 147.

³⁰ See Dean *id* at 147 and 170, and the full discussion at 332 – 370.

In applying the Copyright Act, 1978, to works made prior to 1 January 1979 ... one must, depending upon the circumstances, have regard to certain of the provisions of the Copyright Act, 1965, and the Patents, Trade Marks, Designs and Copyright Act, 1916.³¹

Thus, while those earlier laws have been repealed, their provisions remain relevant for purposes of the application of the 1978 Act to works made within their auspices.³² To this end one must ask these questions: (i) what works enjoyed copyright under the 1916 and 1965 Acts?; (ii) who owned the copyright in such works “in terms of those Acts”?, and (iii) what is the term of copyright “under those Acts”?³³ In essence therefore it can be said that the 1916 Act on the one hand and the 1978 Act on the other have created a *two-way traffic system* with regard to copyright protection in modern copyright law – with the 1916 Act looking *forward* to (i.e. relying upon) the 1978 Act for the continued recognition of the protection accorded to works protectable under that Act (i.e. the 1916 Act), and the 1978 Act looking *backward* to the 1916 Act³⁴ for the determination of the ownership, duration or validity of copyright in relation to such works. This is not a merely pedantic exercise, as demonstrated in the so-called *Lion Sleeps Tonight* case,³⁵ where the court essentially accepted the fact that the reversionary interest in Solomon Linda’s work, “Mbube”, vested in the Executor of his deceased estate, twenty five years after his death, as provided for in the proviso to s 5(2) of the Imperial Copyright Act (which as indicated, comprised the Third Schedule of the 1916 Act). This is because “Mbube”, which was composed in the 1930’s, was protected under the 1916 Act and since its composer, Solomon Linda, died in 1962, the reversionary interest vested in the executor of his deceased estate in 1987.³⁶ Commenting on the impact of this case Pistorius has observed:

The result was that not only had Linda’s copyright in South Africa reverted to his estate’s executor, but this was also the legal position in all countries which were formerly part of the British Empire.³⁷

The following is an analysis of the protection of music rights in South Africa prior to 1 January 1917, including those that passed through the 1917 Gateway. This is divided into rights protectable under the Roman-Dutch common law and rights protectable under statutory law.³⁸ In this regard it needs to be highlighted that this discussion does not include English common law copyright which protected unpublished works and did not form part of South African copyright law.³⁹ Roman-Dutch common

³¹ Dean *Application of the Copyright Act* 93.

³² This is in turn made possible by the fact that the 1916 Act ‘made provision for the granting of so-called “substituted rights” in the place of any copyright existing in South Africa *no matter what its origin might have been.*” *Id* at 208, emphasis added.

³³ See *id* at 113.

³⁴ And the 1965 Act in respect of works created under that Act.

³⁵ *Disney Enterprises Inc. v Griesel N.O. & Others* 895 JOC (T).

³⁶ See for a further discussion of this Dean *Handbook of Copyright Law* 3-20 – 3-20A; Dean *Awakening the Lion* and Pistorius “The Imperial Copyright Act 1911’s role in shaping South Africa’s copyright law”, in Suthersanen and Gendreau (eds) *A Shifting Empire* 216 – 218.

³⁷ Pistorius *id* at 217.

³⁸ This is in line with Dean’s characterisation of the sources of pre-1917 South African copyright law as being domestic law (i.e. Roman-Dutch law and the statutory law of the provinces); pre-1911 British copyright law and British copyright law subsisting in terms of the British Copyright Act, 1911, and existing in the United Kingdom as on 1 January 1917. See Dean *Application of the Copyright Act* 170 – 171; also at 208 where the learned author observes that early Dutch copyright can be divided into the period of the granting of privileges and the period of copyright legislation.

³⁹ In this regard Dean *id* at 228 – 229 correctly criticises the reference by counsel for the applicant in *Boosey & Co v Simmonds* (1903) 20 SC 632; 13 CTR 1138 to a South African common law protection when the case in question was

law would, however be included, despite the fact that no reference to it is made in the Fourth Schedule to the South African Act of 1916. As Dean has argued, rights protectable under the Roman-Dutch common law would be eligible to pass through the 1917 Gateway because ‘these rights were “copyright” and the purpose and intent of the Act of 1916 was to recognise any existing copyright but to transform it into copyright provided for in the Act of 1916.’⁴⁰ Lastly, the discussion highlights the impact that the Imperial Copyright Act, 1911, incorporated in the Third Schedule to the 1916 Act, has had in shaping modern South African copyright law. Pistorius addresses aspects of this issue at some length in her article titled “The Imperial Copyright Act 1911’s role in shaping South Africa’s Copyright law”.⁴¹ This chapter particularly considers the impact that the Act has had in reframing the legal understanding of what constitutes a musical work – thus clearing the maze that existed in English law in respect of this matter, prior to 1912.⁴²

4.3.2 Music Rights Protected under Roman-Dutch Law

4.3.2.1 The Era of the Republic of the United Netherlands

During the period of the first occupation of the Cape by the Dutch – i.e. from 1652 until 1795 – the Netherlands was a republic comprised of a number of provinces, which were autonomous except in matters of foreign affairs and defence. This was the era of the Republic of the United Netherlands. Roman-Dutch law was received in the Cape at this stage and became the common law of the colony.⁴³ Roman-Dutch law had “a multiplicity of sources” which Dean “conveniently” divides into *legislation* and *the works of the writers of Roman-Dutch law*.⁴⁴ The Dutch East India Company, which had jurisdiction and trade monopoly over the Cape was administered by a Governor working with the Raad van Politie. The company did not have legislative powers and could only issue *placaaten* (local statutes) dealing with matters of an administrative nature, including the granting of monopolies and the issuing of licences.⁴⁵ The fact that the Governor could issue *placaaten* dealing with monopolies is instructive because, like many other European countries as highlighted above,

concerned with published works. Thus, apart from the fact that British common law copyright had not been assimilated into South African copyright law, it would not have been applicable in any case because it was only concerned with unpublished works. Moreover, Roman-Dutch common law would also not apply because it only gave protection “in the country itself” (which would have been the Cape where the case was heard); in this case however, publication had taken place in Britain.

⁴⁰ Dean *id* at 336.

⁴¹ Pistorius T “The Imperial Copyright Act 1911’s role in shaping South Africa’s copyright law”, in Suthersanen and Gendreau (eds) *A Shifting Empire* 204 – 225.

⁴² Although section 3 of the Musical (Summary Proceedings) Copyright Act, 1902, as referred to above, proffered a definition for “musical work”, defining the phrase as “any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced”, this definition was still stuck in the print music era and it did not recognise the technological developments that had taken over the international music industry by storm at the turn of the twentieth century, particularly in the form of recording technology.

⁴³ Dean *Application of the Copyright Act* 183. For a full discussion of the reception of Roman-Dutch law in South Africa see Zimmerman and Visser *Southern Cross* 33 – 64. Dean *id* at 184 has observed that because of the influence that the province of Holland had, “the Roman-Dutch law which took root at the Cape was strongly biased in favour of the law of the Province of Holland.” Zimmerman ... however argues that this view of the law of Holland arises from “confusion”, asserting, with support from a dictum by Van den Heever JA in *Spies v Lombard* 1950 (3) SA 469 (A) 481 sq, that, in terms of the constitution of the Netherlands at the time of the settlement in the Cape the law of Holland had no application in either the other provinces of the Netherlands or the Netherlands’ overseas possessions.

⁴⁴ Dean *id* at 184.

⁴⁵ Dean *id* at 173 – 174. Although these *placaaten* “were subject to veto from higher authorities in Batavia and in the Netherlands” (Dean *id* at 174) it appears that their authority had been recognised by the Batavian *hoofdcomptoir*, the Dutch East India Company and the Estates-General. Zimmerman *id* at 40.

the practice of issuing “proto-copyrights” in the form of royal privileges or letters patent, in relation to the printing of books, was prevalent in the Netherlands also, from circa 1516.⁴⁶ These privileges granted monopoly rights of unlimited duration to a publisher or printer in relation to the printing of books under certain conditions. Dean states that privileges were granted “to written works of all types”, including musical works, but there was no clear distinction between what later became the subject-matter of copyright, designs and patents.⁴⁷

Dean observes that these privileges were generally granted to “those who incurred a financial outlay” in the printing of works, such as publishers, and that “[t]he interests of authors ... were generally speaking not taken into account”, except where the author was also a publisher.⁴⁸ Privileges were only granted in respect of published works or works in which there was a clear intention of publication – and no payment was required except that in Holland there was a requirement that a copy of the work had to be donated to the library of the University of Leiden.⁴⁹ A privilege vested in the publisher *the right of reproducing and publishing the work*, later involving *the right to reproduce or publish the whole or a part of the work; the right to import and distribute copies of the work produced elsewhere*, and in exceptional cases *the right to translate the work*.⁵⁰ It has been observed that a prolific book publishing industry existed in the Netherlands during the 17th and 18th centuries, with many foreign writers choosing to publish their works in Holland to avoid censorship in their countries.⁵¹

Having indicated the above, it needs to be noted however that, in respect of both dramatic and musical works, the granting of a privilege *did not entail the granting of a performing right*.⁵² Dean states that the reason for this was that “[t]o grant such a privilege would have been inconsistent with the ratio of the privilege system as being for the benefit of the publishing industry.”⁵³ Furthermore in respect of dramatic and musical works protection was granted ‘only to the extent that they were in the form of “books” and were capable of being reproduced by means of printing and / or published’⁵⁴ – a position not very different from that prevailing in England in respect of both the privilege and copyright system. Generally protection was not granted in respect of unpublished works; however the Estates-General of Holland issued a placat in 1728 conferring on certain professors and members of the teaching staff of the University of Leiden the right to prevent the unauthorised publication of their works.⁵⁵ The territory of the privilege was the territory where the grantor had

⁴⁶ Dean *id* at 209.

⁴⁷ Dean *id* at 210.

⁴⁸ Dean *id* at 210 – 211. The author mentions exceptional cases where privileges were issued to authors themselves, such as in the case of pictures and gravures, whose making involved a technical process involving the original artist, who thus had control over the mass production of the work concerned.

⁴⁹ Dean *id* at 212 – 213.

⁵⁰ *Id* at 213.

⁵¹ See Hoftijzer 2015 *IEG* <http://www.ieg-ego.eu/hoftijzerp-2015-en>; Hoftijzer <http://publications.nichibun.ac.jp/region/d/NSH/series/symp/2001-03-30/s001/s010/pdf/article.pdf>; Dean *ibid*.

⁵² Dean *id* at 214.

⁵³ *Ibid*.

⁵⁴ *Ibid*. See also Dean *id* at 226 for a succinct recap of the “content” of South African copyright during this period.

⁵⁵ *Id* at 217 – 218.

jurisdiction and generally “there was no question of privileges having international effect.”⁵⁶ The privilege system was abolished in 1796, first in Holland, paving the way for Dutch statutory copyright law.⁵⁷

Seeing that *placaaten* were used to grant protection to authors, as indicated above; and seeing that the Dutch East India Company Governor at the Cape could, in conjunction with the Raad van Politie issue *placaaten* granting monopoly rights, the question has to be asked why no privileges were issued to authors in this way during Dutch rule in the Cape. As indicated above, musical activity was rife in the Cape during this period. We again turn to Dean for the resolution of this enigma. Dean argues that the fact that under the Dutch East India Company “very little ... business or economic activity” took place other than the Cape operating as a refreshment station would have contributed to the apparent lack of interest in the protection of works of authorship.⁵⁸ In particular the non-existence of a publishing trade at the Cape during this period, and the fact that “copyright at the time was really only of any particular interest to publishers” would explain this situation – further confirmed by the fact that the first printing press in the Cape was only established in 1800. As indicated, protection was granted to works only so far as they were capable of being reproduced by means of printing. Without a printing press no protection could thus be granted.

McKenzie provides a convincing reason why there was no publishing industry at the Cape during this period – namely the Cape authorities’ fear of the political implications of having a free press.⁵⁹ It has in this regard been observed that Francis Dundas, the acting governor of the Cape during the first British occupation, expressed an intense opposition to the establishment of a printing press at the Cape, arguing that this was

more likely to produce evil than good effects, since the minds of the inhabitants are by no means prepared to exercise the freedom of discussion on almost any subject, particularly politics, concerning which they had been led to entertain very confused and erroneous opinions.⁶⁰

This, together with the fact that privileges only operated within the jurisdiction of the person issuing them, is, it is submitted, conclusive evidence for the position that the system of printing privileges did not take root at the Cape. There is thus no question about the rights accorded through such privileges passing through the 1917 Gateway and being replaced by substituted rights. In any event, even where common law copyright had taken root in the Cape (as dealt with in paragraph (b) below), it would have been abolished by the Cape Act of 1873. Similarly common law copyright was abolished in Natal by the Acts of 1896 and 1897, and in Transvaal by the Act of 1887.⁶¹ The exception in this regard relates to the Orange Free State, which did not enact any copyright

⁵⁶ *Id* at 215.

⁵⁷ *Id* at 216 and 218.

⁵⁸ *Id* at 225.

⁵⁹ McKenzie 1998/1999 *Kronos* 90. McKenzie refers to the issuing of *placaaten* by the Dutch East India Company on three occasions – in 1702, 1726 and 1744 – forbidding the establishment of independent publications.

⁶⁰ McKenzie *ibid*, n 11, quoting Meiring J *Thomas Pringle: His Life and Times* (Cape Town, 1968) 82.

⁶¹ Dean *Application of the Copyright Act* 339.

legislation and provided for the application of Roman-Dutch law in its Constitution of 1854.⁶² In this regard it has been submitted that any copyright published in the Orange Free State from this period passed through the 1917 Gateway and was converted to a substituted right.⁶³ Dean, in describing the copyright that passed through the 1917 Gateway, indicates that it is copyright ‘derived from the earlier South African legislation, i.e. the so-called “Provincial Copyright Acts”, the British Copyright Act of 1842, or *from the Roman-Dutch common law*.’⁶⁴ It needs however, to be understood what is meant by “Roman-Dutch common law” in this context. The brief note below seeks to clarify this.

First, it needs to be understood that the process of substitution of old rights with new rights under the 1916 South African Act involved the recognition of the “old” right and its ownership’, and the transformation of the said right ‘into a “new” right having the content, ambit and force” of the copyright provided for under the 1916 Act.’⁶⁵ As Sir Wilfrid Greene observed in *Coleridge-Taylor & Another v Novello & Co. Ltd*⁶⁶ in respect of the provisions of the British Imperial Copyright Act (which are mimicked in the 1916 South African Act), what the Act created was a “new copyright,” a different matter with different elements in it to any copyright which existed before the Act, and including, as I have said, certain matters, performing rights and common law rights, which did not fall under old copyright.’ It is in this regard submitted that the “old rights” that passed through the 1917 Gateway could not have been the rights accorded under the privilege system but those provided under Dutch statutory copyright as received in the South African Roman-Dutch common law (as dealt with below in paragraph (b)). Further, apart from the fact that Dutch statutory copyright did away with the privilege system, it is explicit in the Fourth Schedule to the 1916 Act that the “existing rights” being substituted were either “copyright and performing right”, “copyright, but not performing right” or “performing right, but not copyright”. This aligns with the provisions of section 160 of the 1916 Act, which stipulated:

As from the commencement of this Chapter no person shall be entitled to *copyright or any similar right* in any literary, dramatic, musical, or artistic work ... otherwise than under and in accordance with the provisions of the British Copyright Act and this Chapter ...⁶⁷

It is submitted that that the reference to “any similar right” does not permit the inclusion of rights arising from the privilege system (either in English or Roman-Dutch law) but is rather a reference to the performing right, which as dealt with earlier, was, in pre-1912 British copyright law, treated as a right separate from but similar to copyright. Rights arising from Roman-Dutch privileges would not

⁶² Dean *ibid*.

⁶³ Dean *id* at 339 – 340.

⁶⁴ Dean *id* at 9. Emphasis added.

⁶⁵ Dean *id* at 338. Pictorially represented, ‘... the shell of the “old” right was taken, drained of its contents, remodelled and replenished with the content of the copyright provided for in the Act.’ Dean *ibid*.

⁶⁶ [1938] Ch 850, at 866.

⁶⁷ Emphasis added.

qualify as either copyright or performing right (in the latter case for the simple reason that that privilege system did not extend to performing rights).⁶⁸

4.3.2.2 The Era of the Batavian Republic

In 1795 the Cape fell under British annexation after the Battle of Muizenberg, a condition that remained in place until February 1803 when the colony was returned to the Netherlands following the Treaty of Amiens.⁶⁹ This was also the period when the Republic of the United Netherlands was replaced by the Batavian Republic with subordinate status to Napoleon's French Empire – a mere client state.⁷⁰ The control of the Cape by the Batavian Republic was short-lived however, as the British again annexed the Cape in 1806 following the Battle of Blaauwberg, essentially remaining in control until South Africa became a republic in 1961.

Although Dutch control of the Cape under the Batavian Republic was short-lived, it had significance not only in terms of improved administration and the establishment of a proper central government under Commissioner-General JA De Mist, but, as Dean posits, more particularly in relation to the further development of Roman-Dutch law and the introduction of a proper system of statutory copyright in that legal system.⁷¹ During the era of the Republic of the United Netherlands legislative authority in respect of the overseas territories was vested in the Estates-General, the body that dealt with the common interests of the various provincial states.⁷² The Estates-General is however said to have exercised this legislative power only once in relation to “the substantive private law” – in a case involving the law of intestate succession.⁷³ The administration of justice remained virtually unchanged until the end of the first period of Dutch occupation in 1795 and, as observed, the few changes to the law at the time (of a very insignificant nature) happened in the Netherlands, not in South Africa or Batavia.⁷⁴ Dean, commenting on the significance of the era of the Batavian Republic

⁶⁸ This observation was necessary only for the completeness of the discussion. The debate can be curtly terminated by stating that, since Roman-Dutch statutory copyright did away with the privilege system, there would be no question of rights granted under the privilege system being in existence as of January 1917. In a similar vein, logically the Roman-Dutch copyright received in the Orange Free State in 1854 would be the statutory copyright law received at the time when the Cape was a province of the Batavian Republic (see the discussion in paragraph (b) below), and not the privilege system that formed part of Roman-Dutch law prior to this, since the Batavian law did away with the privilege system. In this regard it is noted that article 57 of the 1854 Orange Free State Constitution, as clarified in 1856, provided that Roman-Dutch law would be applicable as the *grondwet* of the Orange Free State “only in so far as it was found in force in the Cape Colony at the time of the appointment of the English judges in the place of the previously Council of Justice.” Zimmerman and Visser (eds) *Southern Cross* 54. Dean *Application of the Copyright Act* 223 and 226 affirms that it is “Dutch copyright law as it existed in The Netherlands in 1803” which “was received into South African law along with the general body of Roman-Dutch law”, and which “continued to operate in undiminished scope in the Orange Free State up until 1917.”

⁶⁹ The annexation of the Cape followed the request of Prince William of Orange, ruler of the Netherlands, who asked Britain to prevent France from taking possession of the French colonies. See generally SAHO <http://www.sahistory.org.za/article/batavian-republic-1803-1806> (date of use: 21 December 2017).

⁷⁰ See Parker *Geopolitics of Domination* 43.

⁷¹ For the improvement of administration in the Cape, including improvements relating to the judicial institution, under Commissioner-General De Mist and Governor JW. Janssens see SAHO *ibid* and Dean *Application of the Copyright Act* 189 – 191.

⁷² Zimmerman and Visser *Southern Cross* at 39; also Dean *id* at 173.

⁷³ The so-called *Octrooi* of 1661. See Zimmerman and Visser *ibid*.

⁷⁴ Zimmerman and Visser *id* at 38 and 40. Batavia (present-day Jakarta in Indonesia) was the first Dutch colony founded under the Dutch East India Company in 1619. As indicated (see n 45 *supra*) the *placaaten* issued by the Dutch Governor in the Cape could be vetoed by higher authorities in Batavia and the Netherlands.

in the further development of Roman-Dutch law and the Roman-Dutch system of statutory copyright in particular, observes:

Virtually all the South African legal historians devote very little attention to the Batavian Republic period of the Cape. Virtually nothing is said about the further development of the law at the Cape during the Batavian Republic period. ... However, the period of the Batavian Republic assumes considerable significance for the law of copyright because what was in effect the first piece of Netherlands copyright legislation dated from July 1803 during which time the Cape was an overseas province of the Batavian Republic.⁷⁵

When Britain took occupation of the Cape in 1795 prior to returning control to the Batavian Republic in 1803, it did not do away with the application of Roman-Dutch law.⁷⁶ Further to this, while during the era of the Republic of the Netherlands no one had direct legislative powers over the Cape except for the Estates-General, which “only had a minor legislative function” and was not actively involved in the development of the law – Dean shows that the Batavian Republic had direct legislative powers over the Cape, albeit for a short interval.⁷⁷ Of greater significance is the fact that it was during this period that the Batavian Republic passed the first copyright legislation, the Copyright Act of 1803.⁷⁸ The logical conclusion, as Dean submits, is that this legislation “had full force and effect at the Cape.”⁷⁹ In view of this it is important to consider what this legislation provided in relation to literary and musical works in order to consider the extent to which the protection accorded to these works found recognition under the 1916 Act.

The Batavian Act of 1803 was, true to form in relation to the privilege system and the Holland Act of 1796 preceding it, also focused on the protection of publishers, granting a right of copying to “compilers of books” or those in whom the right vested in some other lawful way.⁸⁰ Section 1 provided that henceforth no privileges or patents relating to the printing and publishing of books

⁷⁵ Dean *Application of the Copyright Act* 191.

⁷⁶ Dean *id* at 189. Not even after the second permanent annexation of the Cape did the English set out to displace the application of Roman-Dutch law as South Africa's common law. In this regard McKenzie and Visser observe: “Soon after 1806 the first complaints were registered about the inconvenience and disadvantage to British merchants of the use of Roman-Dutch procedures and the Dutch language in, and the incompetence of the members of, the local courts. No doubt as a result of such grievances, the British eventually rejected the formal replacement of Roman-Dutch law by English law, preferring instead to permit and await a gradual infiltration of English law into the local legal system.” McKenzie and Visser (eds) *Southern Cross* 436 – 437.

⁷⁷ Dean *Application of the Copyright Act* 192 – 193. Dean argues that all indications point to the fact that “the application of the law at the Cape was closely integrated with the law of the Batavian Republic”, especially legislation of a general nature. The learned author continues (at 195 - 196): “... [I]t is not only historically sound but also logical that developments in [the law of the Republic of Bavaria] between 1795 and 1806 should also have formed part of the body of the law for purposes of South Africa”, so that “1806 and not 1795 marks the true parting of the ways between the development of the Roman-Dutch law in South Africa and elsewhere.”

⁷⁸ In terms of the system of statutory copyright in the Netherlands, the 1803 Batavian Copyright Act was, in fact, preceded by a law of the Province of Holland of 1796, the first law to abrogate the system of privileges, recognising for the first time an exclusive right of ownership of works originating from an author, although such ownership vested in the publisher and not the author. The law granted perpetual copyright in respect of “books” or any works that were capable of being printed, thus excluding works of sculpture. The law was enacted at the time when the Province of Holland was part of the new Batavian Republic and had thus lost the autonomy it enjoyed under the Republic of the United Netherlands. For this reason the law's application was limited to the Province of Holland and was thus not part of the Roman-Dutch law received in South Africa. This law nevertheless influenced the enactment of the 1803 Batavian Copyright Act (the *Publicatie van het Staatsbewind der Bataafsche Republiek van 3 Juli 1803*), which had application in all the Batavian provinces and, as Dean contends, in its overseas provinces or colonies (thus including the Cape). See Dean *id* at 218 – 220.

⁷⁹ Dean *id* at 192.

⁸⁰ Dean *id* at 220. The Act itself was titled *National Book Act of the Batavian Republic*. See http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_nl_1803 (date of use: 23 December 2017).

would be granted by means of public authority as this violated the basic principle that everyone has a lawful claim to his property without the need for any special law. To assert the new right, the publisher's name and the place and date of publication had to be indicated on the work⁸¹ – a position reflecting in modern practice in relation to published books. Summing the core purpose of the Act, Dean observes that “it remained primarily the promotion of the trade in books and thereafter the dissemination of information and the promotion of science.”⁸² However it should not be assumed that because of the emphasis on “books” this Act was only concerned with book publishing as such. The Act, like the 1796 law of Holland, granted perpetual copyright which was transmissible to the heirs of the publisher, and was concerned with works “which were capable of being reproduced by means of a printing process.”⁸³ The emphasis on “books” in the Act no doubt was a relic of past glory, where a thriving book culture and trade contributed to the “Golden Age” of the Dutch Republic and the so-called “Dutch Miracle”.⁸⁴ It needs to be noted however that the Netherlands' book publishing industry developed alongside a famed music publishing industry. Thus the collegia musica was a group of musical societies spread all over many Dutch towns from the sixteenth century onwards, and was known for its focus on instrumental music.⁸⁵

It is observed that in the eighteenth century the collegia musica operated by means of “obtaining monopolies to license itinerant to play in the town and to regulate admission to their performances.”⁸⁶ Some of the collegia musica became semi-public institutions and licensed and admitted guests to their sessions, and in the nineteenth century they influenced the founding of professional, civic societies.⁸⁷ Related to this the following has been stated:

The first half of the 18th century *was a great age of music publishing* in the United Provinces. Amsterdam, with the publishing houses of Mortier, Witvogel and above all Roger and Le Cène, *was an international centre of music printing*. Good trading links facilitated the rapid distribution of their products. This brought Dutch music into direct contact with the international repertory, especially the Italian. This ‘internationalization’ of musical tastes and activities is reflected in the frequent references to the many foreign musicians who chose to reside there. ...⁸⁸

*The Scheme for Passing through the 1917 Gateway*⁸⁹

⁸¹ Article 7(a) of the Act, recorded in Van Gompel *Formalities in Copyright Law* 78 and n 187.

⁸² Dean *id* at 220A.

⁸³ Dean *id* at 221.

⁸⁴ Hoftijzer 2015 *IEG* <http://www.ieg-ego.eu/hoftijzerp-2015-en> 1 (date of use: 23 December 2017). In this regard Hoftijzer notes regarding the Dutch book publishing industry: “It has been said ... that in the 17th century more books were printed in the Netherlands than in all other European countries put together. ... [B]etween 1601 and 1700 hundreds of printer-publishers were active, producing well over 67,000 titles. ...” Hoftijzer *id* at 6. See also generally in this regard Hoftijzer <http://publications.nichibun.ac.jp/region/d/NSH/series/symp/2001-03-30/s001/s010/pdf/article.pdf> (date of use: 23 December 2017).

⁸⁵ Sadie (ed) *Companion to Baroque Music* 317.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* Emphasis added.

⁸⁹ The phrase “Scheme for passing through the 1917 Gateway” is borrowed from the observation of Sir Wilfrid Greene M.R. in *Coleridge-Taylor & Others v Novello & Co. Ltd* [1938] Ch. 850, at 860, where he observed in respect of section 24(1) of the Imperial Copyright Act, 1911 (the equivalent of section 151 of the 1916 South African Act), that it was “drafting

It is clear from the above therefore that the 1803 Act applied to musical works also, in spite of its emphasis on “books” (similar to the way in which early English copyright was protected). In essence, also already highlighted, what was contemplated was all works capable of being reproduced through printing. Section 2 of the Act referred to a *regt van kopij* (right to copy) and a *regt van uitgawe* (right to publish) which vested in the copyright owner. In relation to the question whether this right, in respect of literary works (in this case, lyrics or the words to music) and musical works published in the Orange Free State from 1854, would pass the 1917 Gateway the answer must be in the affirmative. Thus any literary and musical works printed and published in the Orange Free State (since Roman-Dutch law granted protection only to published works) would be substituted with better rights under the 1916 Act. However, because Roman-Dutch law did not grant protection in respect of performing rights, the right to perform a work in public provided for in terms of the 1916 Act (the scope of which was that provided for under the British Copyright Act, 1911, incorporated in the Third Schedule of the 1916 Act), would not extend to such works. This is the effect of the Fourth Schedule to the 1916 Act, which clearly provided that where an existing right protected copyright, but not performing right, the substituted right was “[c]opyright as defined in the British Copyright Act, [i.e. the 1911 Imperial Copyright Act] *except the sole right to perform the work or any substantial part thereof in public.*”⁹⁰

The rights protected in line with the definition of copyright in section 1(2) of the Third Schedule, were (i) “the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever” – thus extending the scope of the right beyond printing; (ii) the sole right “to produce, reproduce ... or publish any translation of the work; and (iii) the sole right “to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered” – thus drastically extending the scope of the right to include mechanical rights, synchronisation rights and electrical transcription rights (for which see Chapter 3 supra). Thus the 1916 Act had the effect of transforming a right protected under an old system of copyright as the Roman-Dutch common-law copyright system was, into a modern right with an extended scope of protection.

4.3.3 Music rights Protected under Statutory Copyright Law

4.3.3.1 Introduction

When dealing with statutory copyright law for purposes of determining which copyright passed through the 1917 Gateway, it is important to distinguish between Dutch statutory copyright (as dealt with in 2.3.2.2(b) above), which was incorporated into the Roman-Dutch common law; and statutory copyright that had direct application in the Cape and the rest of South Africa prior to 1 January

mechanism for getting *into the scheme* of the Act the existing works and putting them on the same basis *mutatis mutandis* with new works to be made after the coming into force of the Act.” Emphasis added.

⁹⁰ Emphasis added.

1917.⁹¹ Regarding Dutch statutory law during the time in which South Africa was under Dutch rule the position is that “statutes which are *ex facie* of universal application”, such as the Bavarian Copyright Act dealt with above, “are *presumed* to have been promulgated in South Africa” and thus form part of Roman-Dutch law.⁹² Furthermore, statutes which are “*ex facie* of merely local application” would only form part of South African law “if incorporated into Roman Dutch law by the institutional writers”.⁹³ In contrast, certain statutory copyright law enacted in Britain when any of the provinces was a colony of Britain and statutory copyright law enacted in any of the provinces of South Africa prior to 1 January 1917 had direct application in South Africa.⁹⁴ Such copyright passed through the 1917 Gateway in terms of section 151 and the Fourth Schedule to the 1916 Act and was replaced with substituted rights.

In addition to the above, *copyright in relation to musical, dramatic or artistic works which subsisted in the United Kingdom before 1 January 1917*, was, in terms of section 147 of the 1916 Act, “deemed to have subsisted in the Union as from the date of the commencement of the copyright in the work, to the same extent as if copyright therein had subsisted under the law of the United Kingdom.” Copyright subsisting in the United Kingdom before 1 January 1917 was that protected in terms of the Imperial Copyright Act of 1911. This Act, in similar fashion to section 151 and the Fourth Schedule of the 1916 Act, provided for the substitution of previous British copyrights with new or substituted rights under section 24 and the First Schedule thereto – the so-called “1912 Gateway”.⁹⁵ As Dean observes however, in “some instances ... the 1911 Act conferred copyright on works which had not previously enjoyed copyright under the pre-1912 legislation or the common law.”⁹⁶ This is particularly true in respect of musical works, the protection of which prior to 1912 was in a state of confusion and entangled with protection for dramatic works or “dramatic pieces”. As observed previously, it was left to the Copyright Act, 1911, to bring sanity to this situation. The 1911 Act did not have automatic application in self-governing dominions like South Africa, but in terms of section 25(1), had to be incorporated into the law of such dominions through legislation, with or without modification. This was achieved in South Africa through the 1916 Act. The following discussion maps out the statutory protection of music copyright prior to 1 January 1917 as clarified in the preceding comments, indicating in each case, which copyrights passed through the 1917 Gateway.

4.3.3.2 Pre-1912 British Statutory Copyright

⁹¹ It is true that while the Batavian Republic had jurisdiction over the Cape, i.e. in the short interval from 1795 – 1806, prior to British occupation, legislation enacted in that Republic, including the Batavian Copyright Act of 1803, had direct application in the Cape. However, once Batavian rule over the Cape ended, new legislation from the Batavian Republic no longer had application in South Africa and the previously-applicable legislative only continued to apply in so far as it was now part of South Africa’s Roman-Dutch common law. This is even more so because, “[w]ith the adoption of the Napoleonic code in 1809 in The Netherlands, indeed the development of Roman-Dutch law terminated in The Netherlands itself very shortly thereafter.” Dean *Application of the Copyright Act* 196.

⁹² Zimmerman and Visser (eds) *Southern Cross* 472. Emphasis added.

⁹³ *Ibid.*

⁹⁴ See Copinger *Law of Copyright* 346, observing in relation to the state of South African copyright law in 1915 (i.e. prior to the enactment of the Act of 1916), “... the laws of each particular colony remain in force locally, though imperial copyright will be regulated by the old imperial statutes.”

⁹⁵ See Dean *Application of the Copyright Act* 147.

⁹⁶ Dean *id* at 148.

Statutory protection applicable in relation to or affecting musical works under British law was dealt with in some depth in paragraph 2.2 above. As indicated, this protection was in an entangled form and placed an artificial distinction between copyright and performing right. Copyright applied in respect of “books” (i.e. literary works) under the Statute of Anne and subsequent legislation, but in *Bach v Longman* it was held that “books” included printed music.

Protection in respect of performing rights was, with regard to “musical compositions”, introduced through the Talfourd’s Act (Literary Copyright Act, 1842), which extended to such works the protection afforded to dramatic works under the Bulwer-Lytton’s Act (Dramatic Literary Property Act, 1833). Other legislation was enacted dealing with musical works and copyright in general but in South Africa it was only the Copyright Act, 1842 and the International Copyright Act, 1886, that had application.⁹⁷ Protection accorded under the 1842 Act extended to the British dominions, which included “all the colonies of South Africa, from the time when, and for as long as, they were colonies, and the Union of South Africa.”⁹⁸ Under the Talfourd’s Act read with the International Copyright Act, 1886 “books” (an expression encompassing all printed works, whether literary, dramatic or musical) enjoying copyright protection in the United Kingdom (e.g. if they satisfied the requirement of publication) also enjoyed copyright protection in the South African colonies. Similarly, dramatic and musical works enjoying performing rights in the United Kingdom also enjoyed performing rights in South Africa.

The above position applied equally in respect of works made in South Africa and those made in Britain. In each case protection was granted in terms of British legislation.⁹⁹ In this regard a distinction needs however to be made between the provisions of the Talfourd’s Act and those of the International Copyright Act, 1886. The Talfourd’s Act extended protection to works made either in Britain or in the dominions, if such works were first published in the United Kingdom. This position was confirmed in the case of *Routledge v Low*.¹⁰⁰ The first South African case in which the Talfourd’s Act was invoked was *Dickens v “Eastern Province Herald”*,¹⁰¹ which involved a rule nisi motion by Charles Dickens, calling upon the editors and proprietors of the Eastern Province Herald newspaper to show cause why they should not be restrained from printing Dickens’ work, *Great*

⁹⁷ Dean *id* at 233.

⁹⁸ *Ibid*.

⁹⁹ Dean *id* at 234.

¹⁰⁰ (1868) LR 3 HL 100. The case involved an American author, Maria Cummins, who lived in New York, and had assigned the copyright in her novel to Sampson Low in the United Kingdom (after posting the manuscript of the novel to Low). Low had duly registered the novel and the assignment at Stationers House, and published a two-volume edition. During the time of publication of the novel Cummins had visited Canada for a few days. Subsequently Routledge, a rival publisher, published an unauthorised version of the novel at a cheaper price. At the House of Lords on appeal questions were raised about the place where publication had to take place for copyright to subsist in a work, the geographical area of protection and the person entitled to the copyright. The court held that publication had to take place in the United Kingdom for copyright to subsist; that protection extended to throughout the British dominions, and that an alien friend (referring in this case to Cummins) first publishing her work in the United Kingdom was entitled to copyright protection under the Talfourd’s Act, provided that at the time of publication she resided in any part of the British dominions – however temporarily. If the work was however first published in a British colony such as Canada, copyright protection would not, in terms of the Talfourd’s Act, subsist in the United Kingdom in respect of such work. Giving his ruling Lord Cranworth observed: “[The Act’s] provisions appear to me to shew clearly that the privileges of authorship which the Act was intended to confer or regulate in respect to works first published in the *United Kingdom*, were meant to extend to all subjects of Her Majesty in whatever part of her dominions they might be resident ...”

¹⁰¹ (1861) 4 Searle 33.

Expectations, in their newspaper. With reference to the fact that Act 4 of 1854 of the Cape¹⁰² permitted the importation of foreign reprints of English copyright works it was contended that no Act of the Cape parliament could alter the provisions of the “Imperial Law”. The rule nisi was granted and made absolute with costs. Apart from the *Dickens* ruling six other cases dealing with the 1842 Act were heard in the Cape Colony, which were largely concerned with the performing right in respect of British dramatic and / or musical works.¹⁰³

Under the International Copyright Act, 1886 protection was granted in both the United Kingdom and any of the dominions, irrespective of whether publication first took place in the United Kingdom or in the dominions (section 8), subject to conditions relating to the registration of copyright (i.e. if the dominion concerned had a system of copyright registration, the provisions in any of the Copyright Acts relating to registration of copyright would not apply; however if the dominion concerned did not have a system of copyright registration then registration in accordance with the Copyright Acts would be required). It has however, been observed that the provisions of the International Copyright Act, 1886, had no retrospective application and only applied in the dominions after 25 June 1886.¹⁰⁴ This means that the applicable legislation in respect of works made before this date would be the Talfourd’s Act, provided that first publication took place in the United Kingdom.

Scheme for passing through the 1917 Gateway

Regarding the scheme for passing through the 1917 Gateway of pre-1917 British statutory copyright having force in South Africa it needs to be mentioned that, although the British Copyright Act, 1911, repealed all previous British copyright legislation in the Second Schedule to that Act, section 36 provided that such legislation would continue to have effect in the British dominions until the Act was made applicable in such dominions (in terms of s 25(1)). Thus although copyright protected under the 1842 Act and the International Copyright Act, 1886 would have passed through the 1912 Gateway and the rights subsisting therein substituted with the new rights provided for under the 1911 Act, for purpose of the Union of South Africa the old rights provided for under these Acts continued unabated until 1 January 1917, when the 1916 Act came into force.¹⁰⁵

(1) Where protection was granted in respect of both copyright and the performing right

Therefore, pursuant to the Third Schedule to the 1916 Act, read with section 151 thereof, where protection was granted in respect of both copyright (or more specifically, rights in books, including printed music) *and* the performing right under the Talfourd’s Act, this protection would be

¹⁰² Titled *Act for Authorizing the Importation into the Colony of the Cape of Good Hope of Books, being Foreign Reprints of Books First Composed, or Written, or Printed, or Published in the United Kingdom, and in which there shall be Copyright.*

¹⁰³ These cases are: *Searelle & Gilbert & Sullivan v Bonamici & Perkins “Proprietors of the Lyric Opera Company”* (1893) 3 CTR 171; *Marsh v Bevan* (1893) 3 CTR 220; *Edwards v Pollard & Chester* (1899) 9 CTR 31; *Wheeler and Another v De Jong & Walton* (1901) 11 CTR 3; *Boosey & Co v Simmonds* (1903) 20 SC 632; 13 CTR 1138; *Koenig v Landeshut* (1904) 14 CTR 97. See Dean *Handbook of Copyright Law* 2-B1. Of these cases, the ones dealing with musical works were the *Bonamici* case, which dealt with the payment of damages for the unauthorised public performance of a musical work on the basis of loss of royalties which could otherwise have been earned; and the *Boosey* case, which was more concerned with the unauthorised selling of copies of a musical work.

¹⁰⁴ See Dean *Application of the Copyright Act* 143 – 144, referring to Laddie, Prescott and Vitoria.

¹⁰⁵ See further Dean *id* at 236.

transmuted into “[c]opyright as defined in the British Copyright Act”. This was indeed a very powerful transformation of the old rights, in particular relating to musical works, and in fact ushered in the modern era of understanding of these rights. It resolved the longstanding problem so painstakingly highlighted above; where an artificial distinction was made between copyright and the performing right in British copyright law rather than seeing the performing right as being one of the rights subsisting in copyright in musical works alongside the reproduction right (just as the French saw both the reproduction and the performing rights as constituting *droits d’auteur*). Credit must of course in this regard, given to the British Copyright Act, 1911 and not the 1916 South African Act for resolving this situation because the latter Act merely referred to “[c]opyright as defined in the British Copyright Act” for the resolution of the problem. Indeed the Fourth Schedule to the 1916 South African Act was a mere mimicking of the First Schedule to the British Copyright Act.

The definition of copyright under the British Copyright Act was undertaken in section 1(2) of the Act, which for the first time created normality with regard to the meaning of copyright – for the first time conceiving copyright as a bundle of various rights which included the right to “... perform ... the work or any substantial part thereof in public”. Furthermore, the concept of copyright was vastly improved to take into account technological developments, in particular the emerging recording and film industries, by providing in section 1(2)(d) that in the case of a literary, dramatic, or musical work, copyright include “the sole right ... to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered”. Finally the definition made it explicit that, in respect of all the acts clearly associated with copyright ownership (that is, the newly defined “bundle of rights” in respect of copyright), the sole right included not only the copyright owner’s right to do these acts but also the right “to authorise *any* such acts”.¹⁰⁶ This resolved the problem where doubts had for example existed as to whether the copyright owner’s authorisation was required for the performance of a work, once published.¹⁰⁷

(2) Where protection was granted in respect copyright, but not performing right

The position in this regard is straightforward. In respect of works in which protection subsisted only in respect of “copyright” (i.e. in respect of the printing and publishing right in relation to “books”, which as indicated, included printed or sheet music), protection under the 1916 Act would be a better, remodelled protection that extended beyond just print rights but excluded the right to perform the work. In this regards it needs however to be observed that, in relation to musical works,¹⁰⁸ the effect of the provisions of section 147(1) of the 1916 Act is that the 1917 Act recognised two types of musical works, namely those in a better state than pre-1917 musical works and including all the bundle of rights associated with musical works in the 1916 Act, with the exclusion however, of the performing right; and a modern category of musical works including the whole panoply of rights,

¹⁰⁶ Emphasis added.

¹⁰⁷ See Kamina *Film Copyright* 10 – 12 regarding some of the problems arising from this under the Bulwer-Lytton’s and Talfourd’s Acts. See also Scrutton *Law of Copyright* 78 et seq, commenting on this doubtful situation.

¹⁰⁸ This applied, *mutatis mutandis*, in respect of artistic and dramatic works also.

including a proper performing right not burdened with the uncertainties that existed in the pre-1912 English conception of the performing right.¹⁰⁹ In this regard Dean has observed:

It will be recalled that ... British copyright in dramatic, musical and artistic works also passed through the South African 1917 Gateway. The copyrights involved included pre-1912 copyrights which had passed through the British 1912 Gateway and copyrights in post-1912 works which enjoyed copyright in Britain under the British Act of 1911. ... [The copyrights in respect of pre-1912 works] passed through the South African 1917 Gateway via a South African route and a British route.¹¹⁰

The new category of musical works protectable under the British Act, 1911 is dealt with under item (c) below.

(3) *Where protection was granted in respect of performing right, but not copyright*

Where protection in respect of the musical composition subsisted only in respect of the muddled pre-1917 performing right¹¹¹ an inferior form of protection, namely protection only involving “[t]he sole right to perform the work in public, but none of the other rights comprised in copyright as defined in the British Copyright Act”, was substituted. However, this right was clearly in a better form than the pre-1912 British right. This is because the right to perform was now, in the reading of section 1(2) of the British Copyright Act (which the right was defined with reference to in terms of the Third Schedule), clearly expressed as existing separately in respect of all of the works in which copyright subsisted. This removed the confusion that existed prior to 1912, where the interpretation of the right of public performance was biased in favour of dramatic or dramatico-musical works, to the neglect and detriment of *small* rights musical works. It is submitted that this clarification in general paved the way for the full development of the performing right post-1917, in which the right came to be understood more in relation to French *petits droits* (i.e. small musical works).

4.3.3.3 Pre-1917 Provincial Statutory Copyright

The various provinces and / or republics in South Africa (i.e. the Cape, Natal and the Transvaal, with the exception of the Orange Free State) enacted copyright or copyright-related legislation at various periods from the second half of the nineteenth century. In this regard it should be noted that “[t]o the extent that these territories were British dominions this legislation was in part supplementary to the British Copyright Act, 1842, and the International Copyright Act, 1886.”¹¹² Dean points out that the provincial statutes were in many cases as incongruent as pre-1912 British statutes and imperfectly took over and adopted these statutes “apparently without a proper understanding of the subject matter”; giving the example of the Transvaal incompletely taking over the Netherlands Copyright Act

¹⁰⁹ In this regard it needs to be recalled that under English law, this anomaly had already been redressed in the Imperial Copyright Act, 1911, but this had no application in South Africa because s 25(1) of that Act stipulated that the Act would only apply in the self-governing dominions unless the legislation of such dominions specifically made it applicable.

¹¹⁰ Dean *Application of the Copyright Act* 343 – 344.

¹¹¹ Or in respect of British works, pre-1912 performing right.

¹¹² Dean *Application of the Copyright Act* 236.

of 1881 in spite of the fact that the said legislation “differed widely in approach to British legislation”.¹¹³

(a) *Copyright Legislation in the Cape*¹¹⁴

In the Cape the earliest legislation was Act No. 4 of 1854,¹¹⁵ which formed the subject-matter of the case of *Dickens v “Eastern Province Herald”* dealt with above.¹¹⁶ This case dealt with the importation into the Cape colony of foreign-made copies of works in which British copyright subsisted and thus has no bearing on the matter of the 1917 Gateway. The second legislation, the Copyright Act 2 of 1873, protected “books”, which were defined in a manner similar to the definition of “books” in the Talfourd’s Act, and included “sheet of music” within the definition. This definition thus aligns with the manner in which British legislation protected musical works (in the sense of printed music) since the decision in *Bach v Longman*. Copyright was defined, in similar fashion to the British legislation, as “the sole and exclusive liberty of printing or otherwise multiplying copies of any book” (section 9). This means that the performing right was excluded. However, since the 1842 Talfourd’s Act made provision for the performing right, this would be available in respect of Cape works first published in the United Kingdom prior to the coming into force of the International Copyright Act, 1886, and thereafter in respect of a work first published either in the United Kingdom or in any of the dominions, including the Cape. As indicated, the legislation of the provinces / colonies was supplemental to the 1842 and 1886 British Acts.

For copyright to subsist in the work first publication, which had to have taken place in the Cape, was necessary. Although the legislation made no mention of the requirements of nationality or place of residence in respect of the author, Dean suggests that asserts that the author needed to have been a resident of the Cape Colony for copyright to subsist in a work, although in terms of section 2 the author did not need to be alive at the time of first publication.¹¹⁷ Although the 1873 Act made provision for a registry book and the registration of works, it seems that this was not a strict requirement.¹¹⁸ Dean argues that as in the case of the British Act, 1842, registration was a condition precedent for the enforcement, rather than the subsistence, of copyright.¹¹⁹ From the coming into force of the International Copyright Act 1886 publication of the work in the Cape conferred copyright in the work not only in the Cape but also in Britain and all countries to which the 1842 Act extended – as well as all Berne Convention countries and Austria-Hungary – and registration of the work in

¹¹³ Dean *id* at 237.

¹¹⁴ The information relating to the pre-1917 copyright legislation of the provinces of the Cape, Natal and the Transvaal discussed here is largely based on Dean’s treatment of the subject in Dean *Application of the Copyright Act*. The writer’s analysis regarding and emphasis on the impact of such legislation on music copyright is nevertheless, the writer’s own original contribution and is given to advance the objective of this thesis. The writer accessed the old legislative enactments dealt with here from University of Pretoria “Statutes of the Old South African Colonies: 1714 – 1910”, available at <https://repository.up.ac.za/handle/2263/56531> (date of use: 06 January 2018). Old case law was accessed from LexisNexis 1828 – 1946 – “All South African Law Reports”, available at <https://www.mylexisnexis-co-za> (date of use: 06 January 2018 – subscription required).

¹¹⁵ See n 102 *supra*.

¹¹⁶ (1861) 4 Searle 33. See n 101 *supra*.

¹¹⁷ Dean *Application of the Copyright Act* 239.

¹¹⁸ At least this was the case in respect of works of British origin, as held in the case of *Boosey & Co v Simmonds* (1903) 20 SC 632; 13 CTR 1138.

¹¹⁹ Dean *Application of the Copyright Act* 240.

the Cape was equivalent to registering it in the United Kingdom.¹²⁰ Dean asserts that the 1873 Cape Act abolished Roman-Dutch common-law copyright.¹²¹ Unlike in the case of Roman-Dutch copyright law section 1 of the Act provided that the author was the initial owner of the work, except that where first publication happened posthumously, the initial owner was the proprietor of the manuscript.

Other legislation was enacted in the Cape which had no real bearing on the subsistence of copyright and thus falls outside the scope of this discussion. These pieces of legislation are: (1) the *Books Registry Act 4 of 1888*. This Act dealt with the registration of books and the requirement for the deposit of copies of the books. A notable aspect of this Act however is that it supplemented the definition of “book” by providing that this did not include, *inter alia*, “sheet of music ... intended for private circulation, and not for sale, and of which not more than fifty copies shall be printed.”¹²² This was clearly a position that deviated from British legislation; (2) The *Copyright Protection and Books Registration Act 18 of 1895* repealed the 1854 Act and replaced its provisions with amplified provisions; and (3) the *Copyright in Works of Art Act 45 of 1905*. This Act, though containing substantive provisions relating to the subsistence of copyright, was concerned with copyright in artistic works (“works of art”) and thus falls outside the ambit of this thesis.¹²³

Scheme for Passing through the 1917 Gateway

Regarding the scheme for passing through the 1917 Gateway what was substituted in relation to the 1873 Cape legislation was *copyright* in “sheets of music” which was replaced with a better right similar to what was stated above in 2.3.2.3(a)(ii) above. Performing right clearly did not feature because as indicated, the Cape legislation made no provision for the performing right. It is obvious that the Cape copyright in “sheets of music” was transformed into a powerful right under the 1916 South African Act, because the Cape legislation clearly had many constraints with regard to exercise of the right granted; in particular the provision under the 1888 Act that if the copyright owner circulated the “sheets of music” privately and did not print and sell at least fifty copies, copyright would not subsist in such music. There is no reason why such a limitation ought to be imposed and certainly British legislation had no such limitation.

Speaking of British legislation, it needs to be recalled that both the Talfourd’s Act, 1842 and the International Copyright Act, 1886 operated concurrently with the Cape legislation. Thus although the Cape legislation made no provision for the performing right, if, between `1842 when the Talfourd’s

¹²⁰ This position was confirmed in *Boosey & Co v Simmonds* (1903) 20 SC 632; 13 CTR 1138. This case was a motion seeking to restrain the respondent from selling or otherwise dealing in copies of certain musical compositions first published in London, in which the copyright belonged to the applicants; and further directing that the respondent deliver these copies to the applicants or the court, or else destroy them. The respondent had argued that because the copyright in the compositions had not been registered in the Cape as required by the 1873 Act, then the applicants were not entitled to take action in the Cape, “not being ... the holders of registered copyright in this Colony.” The court, after observing that registration under the 1873 Act was “of books which are published and brought out in this Colony, and without any reference to publications in England”, held that “the English Act protects the holders of such copyright through the British dominions”, and thus “they would be entitled to an action under the English law of copyright”. Thus the court granted the interdict restraining the selling of the music compositions (but not the other prayers).

¹²¹ *Id* at 243.

¹²² Section 1 of the Act.

¹²³ For an analysis of this Act see Dean *Application of the Copyright Act* 247 – 255.

Act was enacted, and before the coming into force of the International Copyright Act, 1886, a Cape resident had owned copyright in a musical composition (i.e. if he was the author of the work or if the performing right was assigned to him), he would have the right to exercise such performing right – provided of course that the requirement of first performance in the United Kingdom was satisfied. After 1886 this right could be exercised without the need to first perform the work in the United Kingdom – thus first performance in the Cape Colony, or in Natal, or in either the Transvaal and / or the Orange Free State, or in any other British colony or in the United Kingdom itself would suffice to vest the right in the copyright owner concerned.

In light of the foregoing, regarding the passing of the performing right through the 1917 Gateway the position outlined above under 2.3.2.3(a)(i) and/or (iii), would apply, depending, respectively, on whether the person concerned had “[b]oth copyright and performing right” – as would be the case if the person concerned was the author or assignee of the work; where either the Cape legislation or the Talfourd’s Act or both would have applied in respect of the pre-1917 copyright, and the Talfourd’s Act would have applied in respect of the pre-1917 performing right – or had “[p]erforming right, but no copyright” – as where the pre-1917 performing right was assigned to him, or where the author had assigned the copyright but retained the performing right; where the Talfourd’s Act only would have provided protection.

(b) Copyright Legislation in Natal

The first copyright-related legislation to be enacted in Natal was Ordinance 14 of 1856,¹²⁴ which had no bearing on the subsistence of copyright as it was, similar to the 1854 Cape Act, only concerned with the authorisation of reprints of books first written, printed or published in the United Kingdom. The second Act enacted was the Copyright Act No. 9 of 1896, which was repealed a year later when it was observed that it had shortcomings of a highly technical nature. Dean nevertheless contends that because the repeal of the Act was made subject to the saving of any copyright created by it, its consideration “can ... not be disregarded.”¹²⁵ The writer is nevertheless of the view that since this Act was enacted in 1896, when the International Copyright Act, 1886 was already in force, better protection would have been provided under the 1842 Talfourd’s Act in respect of Natal works. As has been observed, the International Copyright Act, 1886 made the provisions of the Talfourd’s Act operational in spite of publication or performance not having first taken place in the United Kingdom, as long as it took place in any of the British dominions, a Berne Convention country or Austria-Hungary. This means that copyright owners would, in the absence of proper copyright legislation in Natal, be able to rely on the provisions of the Talfourd’s Act for protection.

¹²⁴ Ordinance for authorizing the importation, into the Colony of Natal, of books, being foreign reprints of books, first composed or written, or printed or published, in the United Kingdom, and in which there shall be copyright, No. 14 of 1856

¹²⁵ Dean *Application of the Copyright Act* 256.

The need for this resort to the Talfourd's Act was in fact, recognised in section 5 of Act No. 17 of 1897, which repealed the 1896 Act.¹²⁶ This section provided that nothing in the Act of 1896 or the Act of 1897 could be deemed to have limited any rights arising from copyright conferred in Natal by British legislation, particularly the Talfourd's Act. As Dean has observed, "[a] Natal copyright owner thus enjoyed two parallel copyrights in his book."¹²⁷ Nevertheless, what Dean has termed "the Natal "Error"" does need to be highlighted here, as it had an impact on the passing of works through the 1917 Gateway and is thus "significant for modern South African copyright law."¹²⁸ What Dean termed the Natal Error was the fact that the Act of 1896 provided that copyright in a *literary and artistic work* (the subject-matter of the Act's protection) was created by the act of first publication, without indicating where this first publication had to take place or what the national status of the authors was.

The effect of this was that "publication anywhere in the world of the works of authors of whatever nationality created copyright in Natal."¹²⁹ This, as Dean has noted, included works which were not accorded protection under Talfourd's Act and the International Copyright Act, 1886 – thus including works emanating from countries that were not members of the Berne Convention or Austria-Hungary; the result being that "[m]any of these works ... would have enjoyed copyright in 1917 which passed through the South African 1917 Gateway."¹³⁰ What Dean does not specifically highlight in relation to this is the potential impact that this would have in relation to the reversionary interest provisions of the 1916 Act, incorporated through the application of the British Copyright Act, 1911, by means of the Third Schedule to that Act.¹³¹

It is submitted that the impact of this is that an assignment of copyright by the author of any works first published *in any part of the world* between the coming into force of the Natal Act, 1896 and 1 January 1917, when the 1916 South African Act came into force, would – if such assignment happened after the coming into force of that Act, be subject to the reversionary interest contemplated in the British Copyright Act, 1911. The modern impact of this is not inconceivable. To illustrate, if a twenty-year old composer of a musical work who first published the musical composition anywhere in the world on 31 December 1916¹³² and assigned such copyright to publisher XYZ at any time thereafter, died at the age of eighty (i.e. in 1976), the reversionary interest would have vested in his personal representative or the executor of his deceased estate by the beginning of 2012 (i.e. twenty-five years after his death). The famous case that dealt with this reversionary interest scenario is the so-called 'Lion Sleeps Tonight' case.¹³³

¹²⁶ Dean points to the first anomaly regarding this, namely the fact that the repeal Act 'was somewhat confusingly called "The Copyright Act, 1896, despite being an Act of 1897.' Dean *id* at 255.

¹²⁷ *Id* at 261.

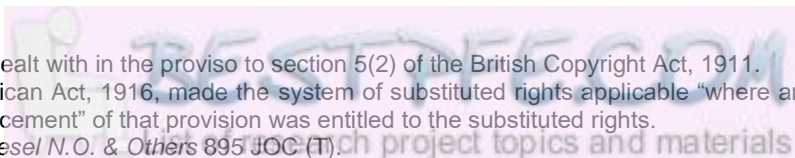
¹²⁸ See Dean *id* at 263 – 264.

¹²⁹ *Id* at 257.

¹³⁰ *Id* at 263.

¹³¹ The reversionary interest is dealt with in the proviso to section 5(2) of the British Copyright Act, 1911.

¹³² Section 151 of the South African Act, 1916, made the system of substituted rights applicable "where any person [was] immediately before the commencement" of that provision was entitled to the substituted rights.

¹³³ *Disney Enterprises Inc. v Griesel N.O. & Others* 895 JOC (T). 

Another important observation not highlighted by Dean in relation to the 1896 law is the significance of the manner in which the law treated the protection of musical works. As indicated above, the subject-matter of protection under the Natal Act of 1896 was literary and artistic works. This was defined to mean “every book ..., musical composition ... and other work of literature or art”. “Book” was however, also defined to include “sheet of music”. It is instructive that the 1896 Act appeared to make a distinction between “sheet of music” (i.e. printed music) and what it termed “musical composition”. It is not clear if an intentional distinction was meant here or if this was a result of the imperfect incorporation of concepts used in other legislation. If the distinction was intentional this would be noteworthy, in that it would imply that Natal was ahead of its time in not limiting copyright protection of musical works to “sheet music” but by extending this to “musical compositions” in general. This would for example imply that the Natal legislation recognised that reproduction of musical works was not limited to reproduction by means of *printing*, but that it would extend to other forms of reproduction. This would be instructive because this was a period internationally in the development of copyright law – coinciding with technological developments at the turn of the twentieth century – that a debate was raging as to whether the protection in relation to musical works was limited to the printing of those works or if it extended to the new forms of reproduction.¹³⁴

In particular questions were raging as to whether the reproduction of musical compositions by means of perforated rolls in player pianos, piano players or reproducing pianos which had become the new trend of music usage at the turn of the twentieth century was a prohibited act under copyright law. When this question came before the English and American courts, they all took the position that such use of musical compositions did not infringe the right to copy a musical composition – rulings that sparked an outcry that led to both the United States and the United Kingdom enacting legislation that marked the beginning of modern copyright law.¹³⁵ Within this context, the effect of the distinction between “sheet of music” and “musical composition” in the Natal law is that – whether intentional or not – the Natal law extended protection to musical works beyond just the printing of sheet music to other forms of reproduction. This conclusion would be supported by the fact that under the 1896 law, copyright was not defined in terms of printing as has been the case with a lot of legislation during this type, since the Statute of Anne defined copyright in this way. Markedly, the Natal law defined copyright as “the sole and exclusive liberty of multiplying copies of any literary or artistic work”. Clearly the method of multiplication of copies was not mentioned here, making the argument advanced here more plausible. Another observation in this regard is the fact that the protection granted by the 1896 law did not extend to performing rights.

The 1897 Act, which repealed the infamous 1896 law, did not however, perpetuate this unusual treatment of musical works and reverted to the old British legal tradition of conferring protection in respect of “books”.¹³⁶ “Book” was defined to include “sheet of music” – remaining true to the long

¹³⁴ See the full discussion in Chapter 3 *supra*.

¹³⁵ The rulings were *Boosey v Whight* (1899) 1 Ch. 836; 80 LTR 561 in the United Kingdom, and *White-Smith Music Publishing Company v Apollo Company* 209 U.S. 1 (1908). For a full discussion of this see Chapter 3 *supra*.

¹³⁶ Protection was also granted in respect of “works of art”. SS 6 – 8.

British tradition emanating from the *Bach v Longman* decision. Unlike the 1896 Act, this Act clearly stipulated that first publication in Natal was required for copyright to subsist in a book, and such first publication could take place in the lifetime of the author or posthumously. The Act also created a registration system for both books and artistic works, and certified copies of entries into the registries was *prima facie* evidence of the ownership of copyright unless expunged or varied by the Supreme Court (section 8). Registration was, however, in terms of section 28 not a requirement for the subsistence of copyright in respect of books but merely a condition precedent for enforcement. Although the Act did not specifically require that a book needed to be original for copyright to subsist, in line with British authority in *Walter v Lane*¹³⁷ a mere copy of a previous book was not entitled to copyright protection.¹³⁸ Dean submits that while the Act was silent on this, it would appear that protection was granted in respect of works created by the national of any country, as long as first publication took place in Natal.¹³⁹ Obviously by virtue of the International Copyright Act 1886 and the Talfourd's Act, 1842, copyright created in Natal would find protection in Britain, any of its dominions, Berne Convention member countries and Austria-Hungary. The 1897 Act made no provision for performing rights but these would be protectable under the Talfourd's Act. Nevertheless the Play Rights Act, 1898, dealt with briefly below, did make provision for a form of performing right.

In light of what was said above regarding the possible extension of copyright protection under the 1896 Natal law beyond printing to encompass other forms of reproduction, it is instructive that the 1897 law defined copyright as “*the sole and exclusive right of multiplying copies of any work, whether by printing, copying, engraving or otherwise.*”¹⁴⁰ The first highlighted part here conforms almost verbatim to the wording used in the 1896 Act.¹⁴¹ The second part however extends the ambit of the right to include not only “printing” but also “copying ... or otherwise.” It appears that the clear intention was that copies would be multiplied not only through the well-recognised (at the time) act of printing, but that other forms of copying of the work were contemplated.¹⁴² The fact that the expression “or otherwise” compels one to conclude that, for all their shortcomings which Dean has so carefully highlighted, the two Natal pieces of legislation displayed much progressiveness in relation to the recognition of the fact that times were changing, and other forms of reproduction of copyright works other than through printing were possible and should be recognised. In this regard not even British legislation displayed this form of progressiveness and as indicated, in *Boosey v*

¹³⁷ (1900) A.C. 539.

¹³⁸ See Dean *Application of the Copyright Act* 270.

¹³⁹ Dean *id* at 97.

¹⁴⁰ Emphasis added.

¹⁴¹ The difference is that while the 1896 law referred to “the sole and exclusive *liberty*” to multiply copies, the 1897 Act referred to “the sole and exclusive *right*”.

¹⁴² It is true that in respect of musical works the 1897 Act made provision only for the protection of “sheets of music”, as opposed to the 1896 Act which distinguished between sheet of music (i.e. printed music) and a general category of musical composition. Nevertheless, it is submitted that the extended ambit of the forms of reproduction contemplated in the 1897 Act achieved the same objective as that of the 1896 Act, and more emphatically provided for an “open-ended” reproduction right (through the use of the expression “or otherwise”).

*Whight*¹⁴³ two years later, the British courts refused to recognise that the use of perforated roles amounted to a copying of musical works.

The final copyright-related legislation passed in Natal prior to it being incorporated into the Union of South Africa was the Play Rights Act No. 44 of 1898. The expression “play right” was defined as:

- (a) The sole and exclusive right to represent, perform, act, play or exhibit any dramatic, operatic or *musical work*, being a tragedy, comedy, play, opera, farce, scene, pantomime (or its class), *song*, dance, or other scenic or *musical* or dramatic production or representation registered under this Act;
- (b) The sole and exclusive right of converting or adapting any work registered under this Act into any form, whether dramatic or otherwise.¹⁴⁴

As Dean has observed, the first part of the definition was concerned with the performing right and “was clearly intended to emulate the British Dramatic Copyright Act of 1833 read together with the Copyright Act of 1842”.¹⁴⁵ The second part clearly dealt with an adaptation right, which is a right in the nature of copyright and thus did not conform to the conception of the performing right at the time (i.e. as a right distinct from copyright). The “copyright” aspect of the Natal play right is further illustrated by the manner in which the infringement of a play right was described. Section 13 provided that the infringement of a play right would occur if any person, without the written consent of the proprietor or his agent, *copied* (i.e. *repeated*, or *colourably imitated*) a play right work by “dialogue, scenic effect, or composition, or in any manner whatsoever, or *if any person shall adapt, multiply, or publish, or expose for hire, sell, or import any imitation of any play right work, or any portion of any play right work.*”¹⁴⁶

Dean decries the fact that the 1898 Act referred to the Natal variant of the performing right as a “play right” and not as a “performing right”, in line with the manner in which it was described in British legislation.¹⁴⁷ However, the present writer does not see this as a major concern – or even for that matter, as a matter of concern at all. The writer has, in this thesis, been critical of the pre-1912 British concept of performing right for being convoluted in that it did not clearly distinguish between this right as it applies to musical works vis-à-vis its application to dramatic and / or dramatico-musical works. The writer has, in this regard, made reference to others who have similarly been critical of the nature of British performing right, and who showed a preference for the right to be termed an “acting right”, a “play right” or a “stage right.”¹⁴⁸ The issue of critical importance in relation to the Natal Act of 1898 is therefore not that it referred to the performing right as a play right (though in this regard it did deviate from the British designation of the right), but that it conflated the right with the adaptation and reproduction rights. In its definition of the performing right aspect of the play right the Natal Play Rights Act followed the convoluted tradition of British legislation, making no distinction

¹⁴³ 1899, 1 Ch. 836; 80 L.T.R. 561.

¹⁴⁴ Emphasis added.

¹⁴⁵ Dean *Application of the Copyright Act* 281.

¹⁴⁶ Emphasis added.

¹⁴⁷ Dean *Application of the Copyright Act* 281.

¹⁴⁸ See Chapter 2 *supra*.

in the operation of the right in respect of dramatic works, dramatico-musical works and non-dramatic musical works.

Scheme for Passing through the 1917 Gateway

The scheme for passing through the 1917 Gateway in relation to the rights protected under the Natal legislation discussed above would be as follows:

- (1) Regarding the rights provided for under the 1896 and 1897 Acts, since these did not include a performing right, the substituted right under the Fourth Schedule to the 1917 Act would be “[c]opyright as defined in the British Copyright Act, except the sole right to perform the work or any substantial part thereof in public”;
- (2) Regarding the “play right” contemplated in paragraph (a) of the definition of “play right” in the Play Rights Act, the substituted right would be a proper performing right under the British Copyright Act, 1911, i.e. “[t]he sole right to perform [the] work in public” – without reference, in relation to musical works, to the inappropriate concepts of “represent, act ... or exhibit”;
- (3) Regarding the “play right” contemplated in paragraph (b) of the definition of “play right” in the Play Rights Act – i.e. the right to control the conversion or adaptation of a musical work – as Dean has pointed out, ‘the holder of these adaptation rights would have been entitled to obtain the full substituted right of “copyright” provided for in the British Act of 1911’, seeing that ‘[t]he effect of the Fourth Schedule was that any right of modern “copyright” which was not a “performing right” was a component of “copyright” and it could be substituted for full copyright, excluding the performing right’;¹⁴⁹
- (4) It will be recalled that, as pointed out earlier, the enactment of copyright legislation by the different colonies did not, while these colonies were under British control, do away with the application of British copyright legislation. Thus the provision of the Talfourd’s Act and the International Copyright Act, 1886, remained applicable in respect of works created by Natal nationals and the rights concerned would have passed through the 1917 Gateway either as copyright (where the right was both a copyright and a performing right); copyright, with the exclusion of “the sole right to perform the work or any substantial part thereof in public” (where the right was a copyright but not a performing right), or the sole right to perform the work in public, “but none of the rights comprised in copyright” in terms of the British Copyright Act, 1911 (where the right was a performing right but not a copyright).

(c) Copyright Legislation in the Transvaal

¹⁴⁹ Dean *Application of the Copyright Act* 345.

Roman-Dutch common law copyright was incorporated into the law of the Transvaal (die Zuid Afrikaansche Republiek) when it was constituted as a separate independent state in 1852.¹⁵⁰ Between 1877 to 1881 (or possibly 1884) the Transvaal was declared to be a Crown colony of the British and thus the British Copyright Act, 1842, would have been applicable in the colony.¹⁵¹

The first substantive copyright legislation enacted by the Transvaal, which effectively abolished the common law, was the Copyright Act of 1887 (Law No. 2 1887, for the Regulation of Copyright); an Act modelled after Dutch legislation, unlike the legislations adopted in the Cape and Natal.¹⁵² Section 1 of the Act provided that copyright was “the right to publish writings, ... *musical works, plays ...* by means of printing, as also *to perform or exhibit dramatic-musical works and plays in public*”.¹⁵³ Such right belonged to the author “and his assigns”. A performance or exhibition in public referred to “[e]very performance or exhibition to which access is once or oftener obtainable upon payment of money or any other valuable consideration ... even in cases where a ballot is required in addition” (section 1). The Act made provision for a general act of infringement (e.g. in respect of the right of public performance), and additionally in relation to specific acts of unlawful trading in the work.¹⁵⁴ The remedies included the right to seize copies of the infringing work, and the right to claim delivery or destruction of such copies (sections 18 – 19). It needs to be noted here that while the Act extended protection to “musical works”, a clear reading of the Act demonstrates the fact that the performing right only applied in respect of the public exhibition or performance of “dramatic-musical works and plays”. The right therefore properly extended only to *grand rights* (grands droits) and dramatic play rights, as discussed above. In this regard the Transvaal legislation at least was clear on this issue.

The Act was mainly concerned with works published through printing, although Dean submits that copyright in unpublished works – which “showed a large measure of similarity to British common law copyright in unpublished works” – was also contemplated.¹⁵⁵ The Act did not make provision for the national status of authors or where the works must have been made for copyright to subsist. Dean highlights the impact of this on the 1917 Gateway in the following manner:

... [A]ll unpublished works which enjoyed copyright in the Transvaal at the time of the 1917 Gateway would have passed through that Gateway and would have been granted substituted rights under the Act of 1916. The works of foreign origin which would have qualified for substituted rights under the 1916 Act in this way would have included works originating from all parts of South Africa as well as abroad.¹⁵⁶

¹⁵⁰ See Dean *Application of the Copyright Act 197 – 198; 288.*

¹⁵¹ Dean *id* at 203- 204; 288.

¹⁵² Dean *id* at 289;292. The Dutch legislation which the Act of 1887 was derived from is the Copyright Act of the Netherlands, 1881.

¹⁵³ Emphasis added.

¹⁵⁴ Section 18 provided: “He who infringes the copyright of another, **or** who sells, imports, distributes, publicly exposes for sale, or has in his possession for the purpose of selling, a work, whereby an infringement is made upon the copyright of another, renders himself liable to a civil action for damages on the part of the author or his assigns.” [Emphasis added]

¹⁵⁵ Dean *Application of the Copyright Act 290; 291.*

¹⁵⁶ *Ibid.*

The right to publish printed translations of the works in other languages was only preserved if the author “expressly reserved to himself the exclusive right in respect of one or more specially mentioned languages” by making an endorsement on the title page or cover of the issue of the original version of the work, and publishing such translations within three years of doing so (section 5). Similarly, the exclusive right to perform or exhibit “dramatic-musical works or plays” was lost as soon as the works were published by printing, unless the author had expressly reserved to himself this right in the original issue of the work on the title page or cover of the work (section 12). The copyright in a work published by printing lapsed if the author or his assigns, or the publisher or printer did not lodge three copies of the work with the Registrar of Deeds, within two months of publication, reflecting a sworn declaration by the printer that the work was printed at his printing house “established in this Republic” (section 10).¹⁵⁷ Nevertheless, Article 298 of a resolution of the Second Volksraad of 1 June 1895¹⁵⁸ (accepted as notice by Article 420 of the First Volksraad Resolution of 20 June 1895), which amended the Act, made provision for the extension of the benefits of the Act to all works eligible for copyright printed or published in any state or colony, “provided all privileges according to the copyright existing there are conferred by such State or Colony to owners of the copyright of books issued and printed within this Republic.”¹⁵⁹ A further enactment, the Copyright in Military Maps Proclamation No. 24 of 1902 has no relevance for present purposes as it was concerned with copyright in maps.

It was observed above that the British Copyright Act, 1842, would have been applicable in the Transvaal from between 1877 to 1881 or possibly 1884 when the Transvaal was a colony of the British. The application of British copyright legislation nevertheless ceased thereafter, when the independence of the Transvaal was again recognised by Britain. From 1900 the Transvaal was however, formally annexed by Britain, becoming a British dominion. As Dean observes, from this point the provisions of the British International Copyright Act, 1886, read with those of the Talfourd’s Act, “became a factor in the Transvaal”, and there was thus a parallel application of both the Transvaal law and the British law.¹⁶⁰ In this regard Dean makes certain notable observations based on the fact that the Transvaal legislation was based on the law of the Netherlands and not British legislation. In the first instance, Dean highlights the fact that an assignment of copyright under the Transvaal law, being as it was based on Dutch law, did not necessarily have to be in writing and “the acquisition of the ownership of the original manuscript of a work may by implication have included the acquisition of the ownership of the copyright in the work in question.”¹⁶¹ However, since British

¹⁵⁷ Dean *id* at 295 has observed that this was indicative of the existence of common law copyright in published works, which was recognised for an initial period but lapsed if there was no compliance with prescribed formalities. Similar requirements were imposed in relation to the *subsistence* of copyright in works published by printing before the coming into operation of the Act (s 20). The system was nevertheless a deposit system and not a true registration system, as registration did not constitute prima facie proof of copyright ownership. Dean *id* at 294.

¹⁵⁸ Erroneously published in the *Staatskoerant* of 3 July 1895 as Article 296.

¹⁵⁹ See also Copinger *Law of Copyright* 346.

¹⁶⁰ Dean *Application of the Copyright Act* 299.

¹⁶¹ *Ibid.*

legislation required a written assignment, such acquisition without such a written assignment would not have been capable of transmitting copyright derived from British legislation.¹⁶²

In the second instance, Dean opines that because British legislation at the time required an express reservation of the performing right made on the title page of each copy of a work released to the public (which, the author observes, went further than the equivalent provisions in the Transvaal law), then

[i]t is ... possible that many *musical works* first published in the Transvaal during the relevant time did not comply with the aforementioned British formality and they would thus have fallen into the public domain as far as their performing rights under British law were concerned, after first publication in the Transvaal.¹⁶³

While the writer agrees with the sentiment that the performing right *provided under the Transvaal Act* might not have been valid under British legislation, where the British formality of reservation of the rights was not strictly adhered to, the writer submits that this is not a situation that affected musical works but “musical-dramatic works” and “plays”. As the writer has observed above, the exhibition or performing right provided for under the Transvaal Act of 1887 did not extend to musical works, but only extended to “musical-dramatic works” (which, as indicated, is a reference to the *grand rights*). Pure (or *small*) musical works were already excluded from the application of the performing right under the Transvaal Act and thus Dean’s observation here cannot apply to them.¹⁶⁴

Scheme for Passing through the 1917 Gateway

In light of the above the scheme for passing through the 1917 Gateway in respect of Transvaal works is as follows:

(1) In respect of dramatic-musical works (and plays) a full copyright as defined in the British Copyright Act would be substituted. This is because the rights subsisting in respect of these works included both the right to publish the works (by means of printing) and the right to exhibit or perform the work.

(2) In respect of musical work the rights accorded under the Transvaal Act would be replaced by copyright as defined in the British Copyright Act, “except the sole right to perform the work or any substantial part thereof in public”. This is because as indicated above, a clear reading of the 1887 Act leads to no other conclusion than that musical works were not accorded a performing right under that Act; and

¹⁶² *Id* at 300.

¹⁶³ *Ibid.* Emphasis added.

¹⁶⁴ Admittedly, Dean’s error here seems to be a *lapsus calami* because elsewhere he correctly observes: “... It must be borne in mind ... that the Transvaal Act of 1887, while protecting musical works per se in respect of reproduction and publication, only protected dramatic-musical works in respect of performing rights. Accordingly only musical works which formed component parts of operas, musical productions, etc. were eligible for substituted performing rights under the Act of 1916.” *Id* at 348.

(3) As indicated, British copyright legislation applied in the Transvaal from September 1900 when the Transvaal was annexed by Britain, in parallel with the Transvaal Copyright Act, 1887. Since the Talfourd's Act included both copyright and performing right in respect of musical works, works first published in the Transvaal would have been substituted with a full copyright under the British Copyright Act, provided that any assignment of rights fulfilled the requirements of British legislation and not merely those of the Transvaal Act (i.e. the assignment must have been in writing); furthermore, the performing right must have been specifically reserved as provided for under British legislation (and not under the Transvaal Act), seeing that British legislation imposed stricter requirements in relation to the reservation of performing rights than the Transvaal Act did. Where these requirements were not made however, these works would have failed to pass through the 1917 Gateway and would have fallen into the public domain.¹⁶⁵

As indicated above, the Orange Free State did not pass any copyright legislation during the time in which it was an independent state. As such, the copyright law applicable would have been Roman-Dutch common law copyright, as discussed above under 2.3.2.2.

4.3.3.4 Post-1912 and pre-1917 British Copyright

Apart from "old" copyrights which passed through the 1917 Gateway, the 1916 South African Act also specifically made provision for the passing through the 1917 Gateway of copyright in certain works protectable under the British Copyright Act, 1911. This specifically referred to copyright in musical, dramatic and artistic works. In this regard section 147(1) of the 1916 is worth repeating here:

147. Saving of copyright in certain works made outside the Union

(1) Where copyright subsisted in the United Kingdom in respect of any musical, dramatic or artistic work before the commencement of this Chapter, the copyright shall, subject to this section, be deemed to have subsisted in the Union as from the date of the commencement of the copyright in the work, to the same extent as if copyright therein had subsisted under the law of the United Kingdom.

It is of course, not in dispute that the "copyright [subsisting] in the United Kingdom" at the time of the commencement of the 1916 Act was that provided for under the Imperial Copyright Act, which consolidated all previous British copyright legislation and introduced a new system of copyright for Britain. The Imperial Copyright Act nevertheless did not extend automatically to the self-governing dominions (like the Union of South Africa) because of the impact of section 25 thereof, which provided that the Act would not extend to a self-governing dominion unless the Legislature of such dominion declared it to be in force, with or without modifications. When considering the question of musical works protected under British copyright, which found protection under the South African Act,

¹⁶⁵ Dean indicates that works that failed to pass through either the 1912 British Gateway (under the Imperial Copyright Act, 1911), or the 1917 South African Gateway would have fallen into the public domain either "through the effluxion of time, the lack of compliance with formalities or for whatever cause"; or generally if they failed to meet 'all the requirements, both substantive and formal, for the enjoyment of an "old" copyright under the relevant legislation.' Dean *id* at 148; 334; 338.

1916, the following picture emerges, considering the effect of section 147(1) of the Act, read together with section 151 (which created the 1917 Gateway):

(1) South African musical compositions protected as literary property or “books” under the old British legislation (i.e. the Talfourd’s Act and the International Copyright Act, 1886) would have passed through the 1917 Gateway in terms of section 151, and received better protection (either full copyright, if the old rights included a performing right, or copyright with the exception of the performing right), as dealt with above. It is conspicuous that literary works are excluded from the types of works in which South African copyright protection would be extended in terms of section 147(1) (referred to above).¹⁶⁶ The writer is of the view that this is because these works would, in any case, have found protection in South Africa through the 1917 Gateway as pointed out in this paragraph.¹⁶⁷ This however, is true only in regard to South African and not British works, as pointed out below.

(2) With regard to British literary works it needs to be acknowledged that “the *British works* which passed through the South African 1917 Gateway were works which already enjoyed substituted rights under the British Act of 1911 and not copyrights in British works which existed prior to 1 July 1912.”¹⁶⁸ In respect of musical compositions protected as literary property under the old British legislation therefore, a distinction needs to be made between South African works and British works. Thus it needs to be observed that, in respect of British works (*but not South African works protected by British legislation*), the 1917 Gateway was redundant.

(3) Having indicated the above, in many cases a reference to “musical works” in section 147(1) of the 1916 Act must be construed as being a reference to works with a broader scope than certain musical compositions protectable as books under the old British legislation (and which would have passed through the 1912 British Gateway). This is because in some cases (perhaps many cases) such pre-1912 musical compositions would only have received protection in respect of copyright only, as then understood – i.e. the right to print and publish copies of the work – to the exclusion of the performing right. In such cases the protection granted to such works under the Imperial Copyright Act (and thus under the 1916 South African Act also) would have been copyright minus “the sole right to perform the work or any substantial part thereof in public”. Full copyright in respect of musical works under the Imperial Copyright Act on the other hand included all the rights applicable to musical works in the definition of copyright in section 1(2) of the Imperial Copyright Act, including the right of public performance (for which see the discussion below).

¹⁶⁶ Especially in view of the fact that section 147(1) applied in respect of “copyright [subsisting] *in the United Kingdom* in respect of *any* musical, dramatic or artistic work before the commencement of” the 1916 Act. Emphasis added. Since 1886, after the enactment of the International Copyright Act, 1886, this would have included South African works protected under British copyright legislations, as the copyright in such works would have subsisted *in the United Kingdom* (as well as in South Africa), in spite of the fact that first publication did not take place in the United Kingdom.

¹⁶⁷ See also Dean *Application of the Copyright Act* 335, observing that the reason for the omission of literary works in the types of works mentioned in section 147(1) “was presumably as a result of the fact that British literary works enjoyed copyright in South Africa prior to 1917 by virtue of the extra territorial operation of the British Copyright Act of 1842.”

¹⁶⁸ *Ibid.* Emphasis added. The relevance for musical works in this regard arises from the fact that, as dealt with in Chapter 2, “[m]usical scores were protected under the early [British] Copyright Acts only as literary works, and thus only from unauthorised reproduction in printed or sheet music form.” Garnett, Davies and Harbottle *Copinger and Skone James* 96.

4.3.3.5 Case Law

Two English cases that were decided in relation to the passing of old rights through the British 1912 Gateway illustrate how this issue has been dealt with in practice and are thus worth considering here. The two cases are the *Novello*¹⁶⁹ case and the *Redwood*¹⁷⁰ case. As indicated above, the British Gateway was provided for in section 24 of the Imperial Copyright Act. This section is in fact, mimicked almost verbatim by section 151 of the South African Act of 1916, so what the courts have said in relation to section 24 of the Imperial Copyright Act would, *mutatis mutandis*, have equal application in relation to works passing through the 1917 South African Gateway. Like section 151(1) of the 1916 Act, section 24(1) of the Imperial Copyright Act provided that a person entitled to an “existing right” or an interest in such right would, from the commencement date of the Act, be entitled to a substituted right, which (i.e. the substituted right) would “subsist for the term for which it would have subsisted if the Act had been in force when the work was made and the work had been one entitled to copyright thereunder”, subject to certain provisos. The relevant proviso for purposes of the two cases was the proviso under paragraph (a) of section 24(1).

The proviso stipulated that if, before the commencement of the Act, the author had assigned the existing right or granted an interest in the right “for the whole term of the right”, at the date when such right would have expired the substituted right would, “in the absence of express agreement”, pass to the author or his legal representative if deceased; and any interest created in relation to the existing right and subsisting before the commencement of the Act would cease to exist (“determine”). Nevertheless, the person who, prior to the expiry of the right was the owner of the right or interest would, upon giving notice, be entitled to an assignment of the right or the grant of a similar interest for the remainder of the term of protection, “for such consideration as, failing agreement, may be determined by arbitration”. In the absence of such an assignment or grant, the person concerned could continue to reproduce or perform the work as before, subject to the payment of such royalties “as, failing agreement, may be determined by arbitration”, if the author demanded payment of such royalties within three years of the expiry of the right. However, the proviso specifically stipulated that where the work was incorporated in a collective work, and the owner of the right or interest was the proprietor of the collective work, no payment of royalties would be required.

The South African cases that were decided in relation to the 1916 Act were not concerned with the direct application of that Act (i.e. they were not heard when that Act had direct application in South Africa, namely pre-1965, before the enactment of the Copyright Act, 1965, which repealed the 1916 Act). Rather, they concerned the extension of copyright protection to works created pre-1965 by virtue of the transitional provisions of the 1978 Act. These cases will also be briefly considered.

¹⁶⁹ *Coleridge-Taylor & Others v Novello & Co. Ltd* [1938] Ch. 850.

¹⁷⁰ *Chappell & Co Ltd v Redwood Music Ltd; Redwood Music Ltd v Francis, Day and Hunter Ltd* [1981] R.P.C. 337 (HL). This case was part of a series of cases starting with *Redwood Music Ltd v Francis, Day and Hunter Ltd* [1978] RPC 429 (QBD); *Redwood Music Ltd v B. Feldman & Co Ltd* [1979] R.P.C. 1 (QBD); *Redwood Music Ltd v B. Feldman & Co Ltd* [1979] R.P.C. 385 (CA); and ending with *Redwood Music Ltd v Chappell & Co Ltd* [1982] R.P.C. 409 (QBD).

(a) *The Novello case*

In this case one Samuel Coleridge-Taylor had concluded an agreement with Novello & Co, in terms of which he assigned to them, in consideration for a royalty, “the copyright and right of publication, representation, and performance, and all other the rights, property and interests intended to be thereby assigned” relating to a musical work titled “A Tale of Old Japan”, of which he was a composer, “so long as the copyright should last”. The musical work was published in England in September 1911 and the assignment was concluded in March 1912 – prior to the coming into force of the Imperial Copyright Act (i.e. 1 July 1912) – and was applicable for the whole of the United Kingdom and its territories and dominions, and “for all foreign countries”. The composer died in September 1912 and his wife was appointed as an executor. In March 1930 she assigned to herself and hers and the deceased’s daughter and son, the copyright and all rights connected thereto, including any future rights arising from statute, in respect of all the deceased’s published and unpublished works and manuscripts; subject to any agreements concluded by the deceased composer or her as the deceased’s legal representative.

The widow and her two children instituted proceedings against Novello in September 1937, twenty five years after the death of the composer, claiming (a) a declaration that they were entitled to the copyright in “A Tale of Old Japan”, “free from any right or interest” of the defendant company; i.e. notwithstanding the agreement concluded between the composer and the defendant – essentially claiming that the copyright had reverted to them; and (b) an injunction against the defendant and its servants and agents restraining them from reproduce or performing the work in public, or authorising others to do so. The court *a quo* had ruled in favour of the plaintiffs, holding that since the agreement was concluded after the coming into force of the Imperial Copyright Act, the proviso to section 5(2) (i.e. the so-called reversionary interest), applied (i.e. the reversionary interest vested in the widow as the deceased personal representative); and further that the provisions of section 24(1) did not apply.

The defendant had argued that its rights in relation to the work remained valid until September 1953 (i.e. forty two years after the publication of the work, being the period for which copyright subsisted under the Talfourd’s Act, 1842, which applied to the assignment between the composer and Novello). The defendant argued that “the effect of the proviso to s. 24 subs-s. 1, was to preserve to assignees such as the company the rights they had acquired (i.e., the copyright until forty-two years from the date of publication) and to confer on the author or his legal personal representatives ... the copyright for the additional period during which it continued under the Act.”¹⁷¹ Essentially the defendant argued that “a person entitled immediately before the commencement of the Act to both copyright and performing right became entitled to copyright as defined by the Act” and that this subsisted for a period of fifty years from the death of the author - which was the effect of the phrase providing that the term of protection would be “for the term for which it would have subsisted if this

¹⁷¹ *Coleridge-Taylor & Others v Novello & Co. Ltd* [1938] Ch. 850, at 853.

Act had been in force at the date when the work was made". The plaintiff's rights to enjoy the copyright was thus, according to the defendant's arguments, curtailed by the defendant's right to enjoy copyright under the Talfourd's Act for a period of forty two years from publication of the work (i.e. until 1953), after which the plaintiffs would then enjoy the copyright for the residue of the fifty-year period of protection under the Imperial Copyright Act (i.e. until 1962).

In furthering its argument the defendant argued that section 24 alone applied in respect of copyright "in any work produced before the commencement of the Act" and that the proviso to section 5(2) had no application to such copyright and "only [applied] to new copyright under the Act in works produced after it came into force."¹⁷² The plaintiffs however, argued that the expression "copyright" in the proviso to section 5 "includes pre-Act copyright" and that "[t]he mischief it was meant to remedy was the danger of an author being persuaded by a publisher to assign the rights in all his works between the passing and the commencement of the Act."¹⁷³ In giving its judgment (per Sir Wilfrid Greene M.R.) the court observed that "the question depends upon the construction of two provisions of the Copyright Act read in relation to one another. One is the provision in s. 5 ... and the other is s. 24".¹⁷⁴ Regarding the "scheme" of the Act the court observed:

Broadly speaking it is, I think, correct to say that the scheme upon which the Act is drawn up is to deal with copyright law as it is to be under the Act when it comes into force, leaving for special treatment a subject which required special treatment – namely, the grafting into the new and comprehensive code of law all works in respect of which copyright, performing rights, and common law rights existed under the old law. ...¹⁷⁵

Commenting on section 24 the court observed that the section dealt with existing works, "and it is that section that one would expect to find the relevant provisions with regard to the duration of copyright *and the nature of the right of copyright which is to be given by the law in respect of such works*."¹⁷⁶ This would be true of section 151 of the 1916 South African Act, since that section mimics section 24, as indicated earlier. The court further observed that the effect of section 24 was that rights that subsisted in a work that existed before the commencement of the Imperial Copyright Act were dealt with as provided in that section so that "if [anyone wished] to find what are the rights of copyright which are to subsist in such a work... they are to look within the four corners of this section and not outside it, save in so far as sub-s. 3 itself tells them that they are to look outside it, by looking, where necessary, to s. 19, sub-s. 7; s. 19, sub-s. 8; and s. 13." This observation would, *mutatis mutandis*, apply in respect of section 151 of the 1916 South African Act.

Continuing, the court observed that the provision of subsection (1) of section 24 was a "drafting mechanism for getting into the scheme of the Act the existing works and putting them on the same

¹⁷² *Id* at 853 – 854.

¹⁷³ *Id* at 854.

¹⁷⁴ *Id* at 856.

¹⁷⁵ *Id* at 857.

¹⁷⁶ *Id* at 859. Emphasis added.

basis mutatis mutandis with new works to be made after the coming into force of the Act.”¹⁷⁷ This is a reference to the scheme of passing through the 1912 Gateway in respect of existing or “old” rights. The observation applies equally with respect to the 1916 Act and the scheme of passing through the 1917 Gateway in relation to old South African rights, the necessary details having been changed. The court observed that in the present case, in relation to the musical work in question, the existing right was “copyright and performing right”, which included “the common law rights”; and the substituted right was “copyright as defined by [the] Act”. The following observation by the court illustrates what was said above in relation to the scheme for passing through either the 1912 Gateway in respect of British works or the 1917 Gateway in respect of South African works, and deserves repetition:

Applying the language of subs-s. 1 to the facts of the present case, it seems to me quite clear, firstly, that Messrs. Novello & Co., the defendants, were immediately before the commencement of this Act, namely, immediately before July 1, 1912, entitled to copyright and performing right, the existing rights as defined in the First Schedule,¹⁷⁸ their title to those rights being, of course, derived from the author, who was the first proprietor of them, under the agreement in question. ... [T]he subsection gives them ... the substituted right specified in the Schedule, namely, copyright under the Act, and it gives that copyright to them for a period which, upon the facts of this case, will expire in September, 1962 ... whereas the right which they had obtained under the agreement, that is to say the assignment of the old copyright, was one which would have expired in September, 1953. Now, the term of the copyright having been extended, the amount of the extension being greater or less according to the circumstances of the individual case, the Legislature, of course, had to make provision for the added term of copyright. Obviously there would have been some ground for complaint ... on the part of authors and their representatives, if this statutory windfall in the shape of an extended term of copyright had fallen into the pockets of purchasers of the old copyright, and the moral claim of the authors to have that windfall themselves was one which Parliament recognized subject to a qualification conferring certain rights on the purchasers ... The substituted right, which, by virtue of that assignment, is obtained by Messrs. Novello & Co. immediately the Act comes into force, is to inure for the benefit of the author to this extent, that during the period from September, 1953, when the old copyright would have expired, until September, 1962, when the new copyright will expire, the copyright is preserved to the author under this proviso. ...¹⁷⁹

In contrast to the provisions of section 24, which were concerned with existing works, the court affirmed that the provisions of section 5 were directed towards the future, dealing with new copyright which was to come into existence upon the commencement of the Act.¹⁸⁰ Much hinged on the meaning of the phrase “after the passing of the Act” in relation to the proviso to subsection 2 of section 5 of the Act in the final ruling of the court. It will be recalled that the proviso stipulated the following:

¹⁷⁷ *Coleridge-Taylor & Others v Novello & Co. Ltd* [1938] Ch. 850, at 860.

¹⁷⁸ This would be the Fourth Schedule under the 1916 Act.

¹⁷⁹ *Coleridge-Taylor & Others v Novello & Co. Ltd* [1938] Ch. 850, at 860 – 862.

¹⁸⁰ *Id* at 863 – 864.

Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) *after the passing of this Act*, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author ...¹⁸¹

The court contrasted this with the fact that the provisions of section 24(1)(a) dealt with assignments “before the commencement of the Act”. In this regard the court noted that “the two provisions cannot stand together consistently, in relation to assignments made between the passing and the commencement of the Act”;¹⁸² observing that what was contemplated by the phrase “after the passing of this Act” in relation to assignments provided for in section 5(2) were assignments made “during the period between the passing and commencement of the Act”; e.g. assignments in relation to future works (i.e. works “to be produced after the commencement of the Act”), and “the proviso to subs-s. 2 of s. 5 does not operate to extend, or to qualify, anything that is found in s.24”.¹⁸³ On this basis the court in fact found in favour of the defendants, ruling that “Messrs. Novello & Co., as from the date of the commencement of the Act, were the owners of the copyright within the meaning of subs-s. 2 of s. 5”, having become such owners “by virtue of the operation of s. 24” (i.e. by virtue of having concluded an assignment with the composer “before the commencement of the Act”). Thus “sub-s. 2 of s. 5 [gave] them what they had not got before’, making the application of the proviso to be non-existent “because at the date when the Act commences the copyright is vested in them and not in the author.”¹⁸⁴

(b) *The Redwood Case*

The question that came for consideration before the courts in this case was the meaning to be given to the phrase “in the absence of express agreement”, where, in terms of the proviso under paragraph (a) of section 24(1) the British Imperial Act provided that the substituted right would, “*in the absence of express agreement*”, pass to the author or his legal representative if deceased. Did this mean that the substituted right had to be expressly referred to in the agreement concerned, or did an agreement which “[used] express terms wide enough to include the new copyright”, suffice? On this point the court unanimously ruled that “[f]or the substituted right not to pass to the author, there must be an agreement which expressly states that this is not to happen and that can be made clear beyond all doubt”, observing further that “[w]ide general words” would not suffice.¹⁸⁵

The effect of this is that a pre-1912 (in the case of British works) or pre-1917 (in the case of South African works) assignment needs, for example, to have specifically mentioned that copyright in a musical composition or a performing right in a musical composition or both, as provided for in the British Imperial Copyright Act or the 1916 South African Act, respectively, would be assigned to the

¹⁸¹ Emphasis added.

¹⁸² *Coleridge-Taylor & Others v Novello & Co. Ltd* [1938] Ch. 850, at 865.

¹⁸³ *Id* at 866.

¹⁸⁴ *Id* at 866 – 867.

¹⁸⁵ *Chappell & Co Ltd v Redwood Music Ltd; Redwood Music Ltd v Francis, Day and Hunter Ltd* [1981] R.P.C. 337 (HL), at 823, per Viscount Dilhorne.

erstwhile assignee, for the remainder of the copyright period contemplated in the new legislation (unless the work was a “collective work”, in which case this requirement would not apply). If this was not done, then copyright would revert to the author as contemplated in section 24(1).

(c) The South African cases

As indicated, the South African cases dealing with the 1916 Act were cases that were concerned with the application of the provisions of the 1978 Act to works made prior 1 January 1979, when the Act came to force. We are, in this regard, concerned with works made when the 1916 Act was still in force, i.e. works made before 1965, but the cases referred to here were not concerned with the direct application of the 1916 Act (i.e. they were not heard when the 1916 Act was still in force, pre-1965). They were instead concerned with the application of the 1978 Act to works made under the 1916 Act. Furthermore, except for one case,¹⁸⁶ the cases were concerned with matters relating to artistic works and not musical works. The principles dealt with in these cases however have equal application in respect of musical works. The extension of protection for pre-1979 works is, in this regard, made possible through the provisions of section 43 of the Copyright Act, 1978. This section has retrospective effect and applies to works made before 1 January 1979 (when the Act came into force) in the same way as it applies to works made thereafter. This notwithstanding, it is specifically provided that the Act does not affect the *ownership, duration or existence*¹⁸⁷ of any copyright subsisting in terms of the 1965 Act, and does not create any copyright which did not subsist before the coming into force of the 1965 Act (namely September 11 1965).¹⁸⁸ As indicated, though the 1965 Act repealed the 1916 Act, in essence it incorporated many of the provisions of that Act, especially in its Sixth Schedule, read with section 48 of the Act.¹⁸⁹

One of the first cases to be heard in this regard was *Tolima (Pty) Ltd v Cugacius Motor Accessories (Pty) Ltd*.¹⁹⁰ This case concerned the indirect copying of an engineering drawing. The court, relying on the earlier judgment of *Scaw Metals Ltd v Apex Foundry (Pty) Ltd & Another*¹⁹¹ and recognising the application of the 1978 Act to works made prior to its commencement in terms of section 43 thereof, concluded that indirect copying – a doctrine derived from English copyright law – was part of South African law, because the latter is modelled on English law.¹⁹² In particular, the court noted: “The doctrine has been built upon the words of the 1911 English statute which were repeated in the South African Copyright Acts both in 1916 and 1965. Similar words were repeated in the 1978 Act ...”¹⁹³ This case was among several cases decided under the problematic provisions of the original version of section 43(a)(ii).¹⁹⁴ Dean has observed that the correct principle with regard to the original

¹⁸⁶ *Disney Enterprises Inc. v Griesel N.O. & Others* 895 JOC (T), the “Lion Sleeps Tonight” case.

¹⁸⁷ The 1984 version of the section referred to *validity* instead of *existence* of copyright.

¹⁸⁸ See s 43(a) of the Copyright Act, 1978.

¹⁸⁹ See n 3 *supra*.

¹⁹⁰ [1983] 3 All SA 164 (W).

¹⁹¹ 1982 (2) SA 377 (D). This case was concerned with works made under the 1965 Act.

¹⁹² At 170.

¹⁹³ *Ibid*.

¹⁹⁴ These provisions were problematic in that they provided that the retrospective application of the 1978 Act did not apply in respect of “copyright which did not subsist prior to 11 September 1965”, rather than “copyright *in any type of work* in

version of section 43(a)(ii) can be “distilled” from the case of *Saunders Valve Co. Ltd v Klep Valves (Pty) Ltd*¹⁹⁵ (the “*Saunders Valve case*”).¹⁹⁶ This case concerned the copyright protection of a series of drawings made in the United Kingdom between 1938 and 1958 and durable in a period covered by the 1916 Act, 1965 Act and 1978 Act.

In assessing the situation, O’Donovan J observed that “[t]he transitional provisions of the Sixth Schedule to the Copyright Act of 1965 ... left unaffected the subsistence of copyright in works made prior to the commencement of that Act” and that, therefore, in the most, “copyright subsisting in works made prior to the commencement of the Copyright Act 63 of 1965 remains unchanged to the present day”.¹⁹⁷ After considering the transitional provisions of the 1978 and 1965 Acts, and observing that Chapter 4 of the 1916 Act “extends the provisions of the British Copyright Act of 1911 to South Africa”, O’Donovan J summed up the applicable position as follows:

The effect of the foregoing provisions, for present purposes, is that the remedies available to the owner of copyright are now governed by the 1978 Act, but that the subsistence of copyright in the drawings upon which the applicant relies as at the date when the 1978 Act came into force is to be determined in accordance with the 1916 Act, and therefore by the 1911 British Copyright Act.¹⁹⁸

which copyright could not subsist prior to 11 September 1961”, as the current version provides. This is illustrated in the case of *Butt v Schultz & Another* [1984] 4 All SA 264 (E), which was concerned with the application of the Copyright Act, 1978, to a boat mould, plug and hull made between 1955 and 1978 (i.e. at the time when the 1916 and 1965 Acts were in force). The court held that the use of such mould, plug and hull without the authorisation of the plaintiff infringed upon his copyright in these artistic works. Nevertheless, on appeal in *Schultz v Butt* [1986] 2 All SA 403 (A) the court held that, in spite of the retroactive nature of the provisions of the Copyright Amendment Act 66 of 1983 (as understood from the provisions of section 43 of the 1978 Act), which amended the 1978 Act by introducing “works of craftsmanship of a technical nature” as a category of artistic works, no copyright infringement took place in respect of moulds and hulls made before October 1983 on the ground that, prior to the said amendment, no copyright subsisted in works of craftsmanship of a technical nature – which the boat mould fell under. More specifically, in light of the provisions of section 43(a)(ii), no copyright subsisted in respect of works of craftsmanship of a technical nature made prior to 11 September 1965. This position of the court is in line with Dean and Karjiker’s contention that the term “copyright” in the original version of section 43(a)(ii) of the Copyright Act (applicable when these earlier cases were heard and amended in 1992 to make the position clearer) had to be understood as referring to what in American law is referred to as “a copyright” – i.e. the complete bundle of rights comprised in a copyright work, as opposed to “rights in copyright” or “a component right of the bundle” – so that the effect was that this provision “precluded creating any bundle of rights where no bundle of rights existed” before. Dean and Karjiker *Handbook of Copyright Law* 3-3 – 3-9. As indicated, the confusion arose from the original version of section 43(a)(ii), which made reference to “copyright which did not subsist prior to 11 September 1965”. The current version has clarified this position by making reference to “copyright in any type of work in which copyright could not subsist prior to 11 September 1965.” Emphasis added. Other cases decided under the original version include *Saunders Valve Co. Ltd v Klep Valves (Pty) Ltd* 1985(1) SA 646 (T); *Barker & Nelson (Pty) Ltd v Procast Holdings (Pty) Ltd & Another* 195 JOC (C), and *Klep Valves (Pty) Ltd v Saunders Valve Co. Ltd* 1987 (2) SA 1 (A).

¹⁹⁵ Ibid.

¹⁹⁶ Dean *Handbook of Copyright Law* 3-2.

¹⁹⁷ *Saunders Valve Co. Ltd v Klep Valves (Pty) Ltd* 1985(1) SA 646 (T) at 648.

¹⁹⁸ Ibid. The same principle was upheld in *Topka t/a Topring Manufacturing & Engineering v Ehrenberg Engineering (Pty) Ltd* 71 JOC (A), which dealt with drawings made in 1972 – where the court made a distinction (at p 73) between “the question of the subsistence of copyright and its ownership [and] the questions of infringement and relief ... up to 31 December 1978”, which were to be dealt with by the 1965 Act; and “the question of infringement and the relief available from 1 January 1979”, which was to be determined by the 1978 Act. Dean *Handbook of Copyright Law* 3-3 sums up the position as follows: “In the case of a work made prior to 11 September 1965 the subsistence of copyright and its ownership and duration must be determined with reference to the provisions of the 1965 Act, in particular the Sixth Schedule thereto (alternatively the 1916 Act, in particular the Third Schedule thereto ...); in the case of a work made between 11 September 1965 and 31 December 1978, the subsistence, ownership and duration of the copyright must be determined with reference to the 1965 Act. The scope of the copyright subsisting in pre-1979 works and the remedies available to the copyright owner in the case of current infringements must, however, be determined with reference to the 1978 Act.”

This position finds support in the *Procast Holdings* case,¹⁹⁹ where Burger J observed, in respect of the original provisions of section 43(a)(i) and (ii) of the Copyright Act, 1978:

I understand these provisos to mean on the one hand that the duration and validity of copyright existing under the 1965 Act is not in any way curtailed, and copyright which did not exist prior to the 1965 Act is not created by the new Act. The clear intention is merely to make available the *additional remedies* of the 1978 Act to the holders of copyright works *without altering, extending or diminishing their copyright existing in any work made prior to 1979*. Counsel for respondent at one time contended that in the last proviso the word 'Copyright' should be read as meaning 'right', and hence he argued that if a person had no right prior to 1965, then because of the second proviso to section 43(1) of Act 98 of 1978 no new rights are created in 1978. But proviso (b) to section 43(1) applies to 'copyright' and not 'right'.²⁰⁰

This observation is enlightening because it affirms the fact that, where copyright in a work existed in terms of the 1916 Act, e.g. copyright in a musical work, such copyright continues to exist under the 1978 Act. However, such copyright is now clothed with the rights – i.e. the bundle of rights – associated with that type of work under the 1978 Act. What is crucial therefore is whether the type of work concerned was protected by copyright under the 1916 Act, who owned it and the duration of such copyright. It is not necessary - or even warranted – to consider the content or scope of such copyright since this is dealt with in terms of the 1978 Act.²⁰¹ In other words, the question to ask is: What protection does the 1978 Act provide in respect of the type of work concerned – seeing that it is the protection provided for under the 1978 Act that matters.²⁰² For this reason Dean correctly criticises the *dictum* of Grosskopf JA on appeal from the *Saunders Valve* case, where the learned judge opined that one had to look at the 1916 Act (incorporating the 1911 British Act) to determine the ambit of the claimant's copyright.²⁰³

The leading case in relation to the interpretation of section 43(a) of the Copyright Act, 1978 is *Appleton & Another v Harnischfeger Corporation & Another*.²⁰⁴ This case was concerned with the application of the international aspects of the British Copyright Act, 1911, as embodied in the 1916

¹⁹⁹ See supra n 194.

²⁰⁰ *Barker & Nelson (Pty) Ltd v Procast Holdings (Pty) Ltd & Another* 195 JOC (C), at 200. Emphasis added.

²⁰¹ This, in essence, is the effect of the amended provisions of s 43(a) of the 1978 Act. As Dean has observed: "It is now clear that in broad terms the section precludes the creation of 'a copyright' retrospectively *and not of additional rights under copyright*. The section is not at all concerned with the scope of the copyright subsisting in the work and its enforcement. It is only concerned with not retrospectively creating copyright in types of works which were not eligible for copyright prior to 1965 No matter when the work was made the copyright in it is regulated by the 1978 Act." Dean *Handbook of Copyright Law* 3-9.

²⁰² This, it is submitted, applies where the 1978 Act provides *better* protection than the 1916 Act and not where, theoretically, it provides *less* protection. In such a case, the *better* protection of the 1916 Act would apply. This is the effect to be given to the phrase that the "clear intention [of the provisions of section 43(a)] is ... to make available the additional remedies of the 1978 Act". See *ibid*.

²⁰³ See Dean *Handbook of Copyright Law* 3-3 – 3-9, commenting on Grosskopf JA's *dictum* in *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) (the "*Klep Valves* case"), on appeal from the *Saunders Valve* case (see n 194 supra), at 33. Similarly, at 18 the judge incorrectly stated: "The effect of s 43 of the 1978 Act accordingly is to render earlier legislation applicable to the question whether copyright subsists in works made prior to the commencement of the 1978 Act, whereas the 1978 Act governs the remedies for infringement of copyright and the procedures relating thereto."

²⁰⁴ 1995 (2) SA 247 (A).

South African Act; as such, the facts of the case are of less relevance for current purposes.²⁰⁵ In the case the court observed that in light of the provisions of section 43(a) of the Copyright Act, 1978, which “make it abundantly clear that [the] provisions apply to works made both before and after the commencement of the Act”, the Act was made applicable to American works made both before and after 1 January 1979 on the basis of Government Notice 125 of 1990,²⁰⁶ the latest government notice dealing with the recognition of protection for works of American origin, *inter alia*. Proc 118 of 1924 therefore, albeit being the “legislation recognising American works current when these drawings were made”, did not apply.²⁰⁷ A contrary position “would seem to rescue from the grave and give present legal effect to a piece of legislation which was totally and unconditionally repealed ...”²⁰⁸

In analysing the statutory provisions necessary to determine the recognition of copyright protection in respect of works made before the 1978 Act the court held that “[t]he starting point in [such] investigation is the current Copyright Act 98 of 1978.”²⁰⁹ In conclusion the court observed (per Corbett CJ):

To sum up, the general, or substantive, provision in the opening words of s 43 means that the 1978 Act applies to all works, whenever made. As far as proviso (i) is concerned, the position is as follows: If copyright subsisted under the 1965 Act, it must mean that it was, at least at the date of the promulgation of the 1978 Act, valid copyright. In this situation *the proviso can only mean that the new Act preserves rights*. The validity or invalidity of copyright under the 1965 Act is thus not an enquiry which one need pursue. As regards ownership of copyright, there was initially a material difference between the two Acts. ... It was accordingly necessary to preserve rights of ownership. ... [A]s a result of an amendment in 1980 this difference no longer exists (see s 9 of Act 56 of 1980). There are some differences between the two Acts relating to term or duration of copyright It follows that the subsistence of copyright in the works in question ... must be determined by reference to the 1978 Act²¹⁰

While acknowledging that “the result achieved ... will be the same in the final outcome” Dean and Karjiker have expressed preference for the position where the starting point of the investigation is the historical analysis, “working forward”.²¹¹ The authors refer to this as “the progressive approach”, while they refer to the approach used by the court in the *Appleton* case - of starting with the current Copyright Act, 1978 and “[working] backwards” – as the “regressive approach”.²¹² In the writer’s view, the process entails both a regressive and a progressive approach. This is in line with the concept of a “two-way traffic system” alluded to above.²¹³ It is submitted that of necessity a

²⁰⁵ In this regard the court aptly noted that “... s 43 is general in its application: it is not directed specifically at local or at foreign works.” *Id* at 260.

²⁰⁶ GN No 125, in GG No 12300 of 23 February 1990.

²⁰⁷ *Appleton & Another v Harnischfeger & Another* supra n 204, at 258.

²⁰⁸ *Ibid*.

²⁰⁹ *Id* at 257.

²¹⁰ *Id* at 261 – 262.

²¹¹ Dean and Karjiker *Handbook of South African Copyright Law* 3-10A.

²¹² *Ibid*.

²¹³ See paragraph 4.3.1 supra.

methodical approach will require one to start with the current Act, because in the first place, the basis upon which copyright protection must be granted to works made before the commencement of the current Act needs to be established. Such basis, as is now common cause, is in terms of the provisions of section 43(a) of the Copyright Act, 1978 and that is the place therefore, where the enquiry must commence.

The second step would then entail identifying the work whose protection is under consideration. Is it the type of work protected under the current Act? This enquiry is crucial because it determines if the provisions of the current Act can be used to buttress the protection granted in respect of such work *by the earlier Act*.²¹⁴ This is also in line with the observation of the court in the *Procast Holdings* case,²¹⁵ where it was noted that the objective of section 43 of the current Act is not to alter, extend, or *diminish* copyright existing in any work made prior to 1979.²¹⁶ Thus in the odd case that the current Act may not make provision for the copyright protection of the work in question, the scope of protection would have to be determined in terms of the old legislation, depending of course, on whether the period of protection in respect of such work has not yet expired.²¹⁷ Having determined that the current Act grants protection in respect of the type of work in question the writer submits that, it is not, at this stage, necessary to be seized with an analysis of the scope of copyright under the current Act in such a work, or to be concerned with matters relating to the duration of copyright and remedies for infringement. Rather, whether the work is of a type protected under the current Act or not, the court must embark on a journey backwards (the regressive approach) to determine the outcome, based on the following circumstances:

(i) If the work is of a type not protected under the current Act

Under such circumstances the enquiry involves traversing back in order to determine if the work is protected under “old law” and the applicable provisions in such a case. Protection is not granted

²¹⁴ If such buttressing is necessary and if the current Act is in fact capable of doing so. Such buttressing would be necessary if the new Act provides for better protection than the earlier Act, and the Act would be capable of doing so if the copyright work concerned is one recognised by the current Act.

²¹⁵ See n 194 supra.

²¹⁶ *Procast Holdings* case id at 200.

²¹⁷ This has some relevance in respect of the protection of musical works. As highlighted above, in the scheme of passing through the 1917 Gateway, and arising from the position regarding the protection of “literary property” in pre-1912 (or in the case of South Africa, pre-1917) British law, a distinction was made between protection in the nature of “copyright and performing right”, “copyright, but not performing right” or “performing right, but not copyright”. Relating this to musical works, three *types* of musical works would have passed through the 1917 Gateway, namely, those in which full copyright (i.e. copyright with its full bundle of rights) subsisted; those in which copyright with its full bundle of rights, except for the performing right, subsisted, and those in which only the sole right to perform the work subsisted. In terms of section 43(a)(ii), nothing in the Act shall, with the exception of copyright in cinematograph films treated as original dramatic works under the 1916 Act, “be construed as creating copyright in any *type* of work in which copyright could not subsist prior to 11 September 1965.”²¹⁷ Thus works in which only the performing right could subsist and works in which full copyright, with the exclusion of the sole right to perform the work in public, subsisted can be construed as a *type* of work in which copyright (as understood in terms of the current Act), could not subsist prior to 11 September 1965.²¹⁷ This position finds support in section 35 of the Sixth Schedule to the Copyright Act, 1965, which maintains the distinction between the three types of musical works provided for under the 1916 Act. This also has some similarity to the Appellate Division case of *Schultz v Butt* [1986] 2 All SA 403 (A), referred to supra n 194, where the court excluded protection to moulds and hulls made before October 1983 on the ground that, prior to the Copyright Amendment Act 66 of 1983 no copyright subsisted in “works of craftsmanship of a technical nature” – which the boat mould fell under; in this way denying protection to a pre-1983 work because it was not of a type protected by the 1978 Act.

under the current Copyright Act. This is not unlike the case of *Schultz v Butt* described above,²¹⁸ where, on appeal, the court excluded protection to moulds and hulls made before 1983 on the ground that prior to 1983 no copyright subsisted in “works of craftsmanship of a technical nature.” The port of arrival for such regressive journey is the 1965 Copyright Act. What will determine whether the 1965 Act will apply *per se*, or if it would be necessary to traverse further back to the 1916 Act, is the period when the work was made. If the work was made before 1 January 1978, but on or after 11 September 1965, then the main provisions of the 1965 Act apply. If however, the work was made before 11 September 1965, but on or after 1 January 1917, the provisions of the Sixth Schedule of the 1965 Act, which in fact are “effectively the 1916 Act”,²¹⁹ apply.

A related consideration in this regard is the duration of the work concerned. Obviously protection would be granted in respect of the work if the period of protection for the work (as determined by the legislation under which the work was made) has not expired. Both where the provisions of the 1965 Act apply *per se*, and where the provisions of the 1916 Act apply specifically, the period of protection is the lifetime of the author and fifty years after his death.²²⁰ It is submitted that all musical compositions that passed through the 1917 Gateway, in which both copyright and performing right subsisted, would be protectable under the current Copyright Act. However, as highlighted,²²¹ at least works in which only the performing right subsisted under the 1916 Act must be treated as peculiar works not comparable to musical works protected under the 1978 Act and would therefore, not find protection under the current Act. This position finds support in section 35 of the Sixth Schedule to the 1916 Act, which effectively preserves the treatment of musical works under the 1916 Act. Firstly, in terms of section 33(2) of the Sixth Schedule protection in respect of pre-1965 rights only extend to substituted rights and not to rights in existence prior to 1917.

Section 35(1) provides that, if the right accorded to a musical work under the 1916 Act did not include the performing right, then this position would prevail under the 1965 Act. Similarly, section 35(2) provides that if the right accorded to a musical work under the 1916 Act only included the performing right, then this position would prevail under the 1965 Act. Nevertheless, section 35(3) extends the ambit of the performing right accorded under the 1916 Act to include not only the right of “performing the work or an adaptation thereof in public”, but also “broadcasting the work or an adaptation thereof”, and “causing the work or an adaptation thereof to be transmitted to subscribers to a diffusion service”.²²² Nevertheless, these types of musical works are alien to the 1978 Act and thus, it is contended, such types of works would conform to the provisions of section 43(a)(ii) and would thus not find protection under the 1978 Act. This, as indicated earlier, should be seen as

²¹⁸ See n 194 *supra*.

²¹⁹ See Dean and Karjiker *Application of the Copyright Act* 383.

²²⁰ See s 3 of the Third Schedule of the 1916 Act (or the Sixth Schedule to the 1965 Act) in respect of works made under the 1916 Act, or s 3(3) of the 1965 Act in respect of works made under the 1965 Act.

²²¹ See the observation in n 217 *supra*.

²²² The difference with the current Act is that, in respect of a transmission in a diffusion service protection is not limited to cases where the transmission is directed at subscribers but applies generally in all cases where a transmission in a diffusion service takes place. See in this regard section 6(e) of the Copyright Act, 1978.

being similar to the situation in the *Schultz* case,²²³ where protection was refused in relation to an artistic work of a technical nature on the ground that no copyright protection existed in respect of such work when the work was first made (albeit such protection was subsequently introduced).

(ii) If the work is of a type protected under the current Act

The type of work protected under the current Act in relation to the present discussion is a “musical work”, which is protected in terms of section 2(1)(b). The scope of protection for this type of work is dealt with in section 6 of the Act, which contains the bundle of rights associated with a musical work. A musical work is in turn defined as “a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.”²²⁴ Where therefore, a work made before 11 September 1965 satisfies these elements (i.e. it is a work meeting the definition of a “musical work” in section 1 and comprising of a bundle of rights), then such a work would most likely find protection under the current Act as a musical work and the provisions of section 43(a)(ii) would not apply to such a work.

It is submitted that, apart from what is stated in (i) herein, musical works made under the 1916 Act would qualify as musical works for purposes of the Copyright Act, 1978. As dealt with in Chapter 3, the modern regime for the protection of musical works in the common law system was ushered in by the Imperial Copyright Act, which was incorporated in the 1916 South African Act. Although the 1916 Act did not proffer a definition of “musical work”, it is submitted that the copyright accorded under the 1916 Act in respect of musical works largely conforms to that which subsists under the current Act. It is submitted that it is partly for this reason that the court in *Disney Enterprises Inc v Griesel N.O.*²²⁵ (the “Lion Sleeps Tonight” case) had no difficulty accepting the position that a musical work made under the 1916 Act was eligible for protection under the 1978 Act.²²⁶ Under such circumstances section 43(1)(i) of the 1978 Act makes it explicit that issues relating to the *ownership, duration or existence* of copyright are determined by the 1965 Act (including the provisions of Schedule 6 to that Act, which preserved essential provisions of the 1916 Act). However, such a work (provided that copyright therein has not yet expired), “enjoy[s] the measure of protection conferred upon that type of work in the 1978 Act.”²²⁷

In essence therefore, the subsistence of copyright in respect of a work made before 1 January 1979 (including its ownership and duration) is regulated by the provisions of the 1965 Act, while “the scope or content of [the] copyright and the manner of its enforcement” is regulated under the 1978

²²³ *Schultz v Butt* [1986] 2 All SA 403 (A). See also the observation in n 217 supra.

²²⁴ Section 1(1), Copyright Act, 1978.

²²⁵ 895 JOC (T).

²²⁶ The facts about the song and its composition are not very evident in the case itself but are recounted by Owen Dean, the attorney representing the executor of the deceased estate of Solomon Linda, the composer of *Mbube*, the song in question. See Dean and Karjiker *Handbook of South African Copyright Law* 3-20 – 3-20A and Dean *Awakening the Lion*. The court confirmed that the executor (respondent) had a *prima facie* cause of action. In fact, the applicant did not dispute that copyright in the song was infringed, but contended that it was the producer and / or distributor that infringed the copyright.

²²⁷ Dean and Karjiker *id* at 3-10B.

Act.²²⁸ In this regard therefore the analogy of a two-way traffic is completed. The regressive journey begins with the enabling provisions of section 43 of the 1978 Act – what Corbett CJ called the “general, or substantive, provision in the opening words of s 43” in *Appleton & Another v Harnischfeger & Another*.²²⁹ It traverses back to the 1965 Act, and where necessary, goes further back to the 1916 Act, to determine issues relating to the subsistence, ownership and duration of copyright. If the work concerned is of a type not protected by the 1978 Act, the journey will end there and protection must be determined under the provisions of the applicable old legislation. If however, the work is of a type protected under the 1978 Act the enquiry must make a U-turn and traverse back on a forward-looking, progressive journey to the 1978 Act. Of necessity a determination of whether copyright has not expired must first be made, after which, if copyright still subsists, the scope of protection and the manner of copyright enforcement must be determined.

The above-outlined framework can be demonstrated in the *Lion Sleeps Tonight* case.²³⁰ The work which was the subject-matter of the infringement action, *Mbube*, was composed in the late 1930's by Solomon Linda. In 1952 he assigned his worldwide copyright in the work to a record company for ten shillings, and died in 1962 of kidney disease, a pauper.²³¹ Several derivative forms of the work were made, including “Wimoweh” and Disney’s “The Lion Sleeps Tonight”, which featured in the Lion King movie and attained worldwide success.

When determining how to deal with the copyright in *Mbube*, the lawyers representing the executor of the deceased estate of Solomon Linda had, of necessity, to rely on the provisions of section 43 of the Copyright Act, 1978, which extend the protection arising from the Act to works made before its commencement.²³² On this basis the lawyers could traverse back to the 1916 Act and the reversionary provision in the proviso to section 5(2) of the Third Schedule to the 1916 Act, to determine that in 1987, twenty-five years after Solomon Linda died, the reversionary interest in *Mbube* vested in the executor of the deceased estate of Solomon Linda. The fact that several assignments were concluded by the heirs of Linda transferring copyright in the song to various parties did not change this situation.

4.4 Conclusion

The foregoing was an attempt to provide a comprehensive analysis of the early development of music copyright in South Africa until the early 1900's. It was submitted that such an analysis is

²²⁸ Dean and Karjiker *id* at 3-7.

²²⁹ 1995 (2) SA 247 (A) at 261.

²³⁰ It is submitted that though Dean and Karjiker *Handbook of South African Copyright Law* 3-10A have expressed a preference for a progressive approach, what they propagate for is in fact a regressive-progressive approach. See Dean and Karjiker *id* at 3-44 – 3-45, where it is clear that the authors have to go back to the 1916 Act in order to come forward to the 1978 Act when making the enquiry. It is interesting that the authors themselves refer to the *Lion Sleeps Tonight* case as an example of where this was done. See Dean and Karjiker *id* at 3-44, n 129D.

²³¹ SAHO <http://www.sahistory.org.za/dated-event/solomon-popoli-linda-singer-and-composer-dies> (date of use: 18 February 2018).

²³² This is evident from the legal opinion prepared by the lawyers, Spoor and Fisher, in the year 2000, for Gallo Music, which became the basis for the legal action taken in by the executor of the Linda estate in 2004. See for the Linda Legal Opinion <http://blogs.sun.ac.za/iplaw/files/2013/01/The-Lion-sleeps-tonight-Mbube.pdf> (date of use: 18 February 2018). See also Dean and Karjiker *Handbook of South African Copyright Law* 3-20 – 3-20A; 3-44 – 3-45.

necessary to understand the nature of music copyright protection in South Africa today, especially in light of the retrospective application of the Copyright Act, 1978, to works made prior to its commencement. While a doctoral thesis written by Owen Dean is undoubtedly the *magnum opus* in relation to the analysis of the historical development of copyright law in South Africa, no such analysis has been done in relation to musical copyright. This chapter therefore, it is submitted, fills a serious gap in relation to this.

The analysis began with a consideration of the privilege system forming part of early Roman-Dutch law, proceeded to the application of pre-1912 British statutory copyright in South Africa, considered the application of pre-1917 provincial copyright legislation, considered the effect of the retrospective application of the British Imperial Copyright Act of 1911 and finally, considered the continuing relevance of the first South African intellectual property legislation, namely, the Patents, Designs, Trade Marks and Copyright Act, 1916. In each instance an emphasis was placed on how this has impacted on the development of music copyright law in South Africa.

It was further highlighted that, through the application of English statutory copyright law in South Africa the confusion that existed in that system in relation to the scope of music copyright and the construction of the performing right in musical works of necessity prevailed in South Africa also. Thus, even though the Imperial Copyright Act and its incorporation in the 1916 South African Act, sought to level the playing field with regard to the copyright protection of musical works and introduced a new regime in this regard, it would take some time before these new changes would be understood. The work of the British courts in clarifying the meaning of the performing right and the proper scope of music copyright is thus equally relevant for the development of South African music copyright law.

PART 2 – THE MODERN PROTECTION OF COPYRIGHT IN MUSICAL WORKS

Chapter 5: General Principles of Copyright Protection with a Focus on Music Copyright Protection

“It seems to me that when he who harbours an idea, by dint of his imagination, skill or labour, or some or all of them, brings it into being in tactile, visible or audible form, capable thereby of being communicated to others as a meaningful conception or apprehension of his mind, a right or property in that idea immediately comes into existence.”¹

¹ Per Slomowitz AJ in *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Video Parktown North (Pty) Ltd Shelburne Associates and Others; Video Parktown North (Pty) Ltd v Century Associates and Others* [1986] 1 All SA 1 (T), at 7.

5.1 Introduction

Seeing that the rights accorded by law in respect of musical works (and sound recordings) derive primarily from the copyright system² – and while recognising that many texts have been written in the area of copyright law, both in respect of South African and international copyright - it is necessary to consider the general principles relating to the protection of copyright. The ensuing discussion is intended to provide a critical analysis in this regard, with an emphasis of its application to the protection of musical works. In this regard it needs to be noted that music copyright “presents a methodological problem for courts ... that most other forms of copyright subject matter do not.”³ For purposes of enriching the discussion and in line with the contextual approach advocated for in this thesis, a comparison of the position applicable in other jurisdictions (in particular those from the Anglo-American tradition⁴) is, where applicable, made. This is aimed at highlighting any differences in practices, authenticating South African practices or recommending the adoption of certain practices where the position in South Africa is not well developed.

As indicated, the South African music industry is still in a state of development and can benefit from practices in related jurisdictions. The discussion in this Chapter shall be of great assistance as no comprehensive analysis of the principles of copyright with particular emphasis on the protection of musical works has been done in South Africa. This will thus add to the body of knowledge in this regard. Prior to delving into this however, it would be worthwhile to remind ourselves of the approach adopted in this thesis regarding the treatment of the subject-matter. As indicated above,⁵ the distinction between the expressions “Music Rights Law” and “Music Law” need to be always kept in mind when dealing with the current study. It has, in this regard, been contended that the expression “Music Rights Law” needs to be understood in the limited sense of those rights that, in law, arise in order to afford legal protection to music. On the other hand the expression “Music Law”, while encompassing “Music Rights Law”, should be understood to include all other branches of law that have an impact on the relationships, transactions and activities that arise in the conduct of the music business. These would include certain forms of intellectual property law⁶; the law of contract;

² We are here dealing with the nature and scope of the rights – what Slomowitz AJ *ibid* at 7 – 10 terms “positive rights” – and not with the regime for the *enforcement* of copyright, termed “rights of action”, which, although provided for in terms of copyright legislation, are essentially based on the rules of civil (and at certain instances, criminal) procedure. Thus except where the context requires, this work is not concerned with matters relating to the infringement of copyright and remedies thereto.

³ Goldstein *Goldstein on Copyright* 10:52. The author attributes this situation to the need to compare the contested works “by ear rather than eye”, necessitating the need for expert testimony (e.g. by musicologists) and courtroom demonstrations which “can, through emphasis and other nuance make similarities appear – or disappear – with disturbing ease.” *Id* at 10:52 – 10:53.

⁴ That is, those jurisdictions based on the English system of copyright law, also termed “common law jurisdictions”. In this regard the Anglo-American system has been termed the “copyright system”, as distinguished from the “author’s rights system” of mainly Continental Europe. See generally in this regard Sterling *World Copyright Law* 17 – 18, and Von Lewinski *International Copyright Law* at Chapter 3.

⁵ See Chapter 1.

⁶ This would include not only the law of copyright and related rights but at least also the law of trademarks (in relation to branding aspects, including the use of stage names); and the law relating to the protection of traditional forms of expressions. However, it needs to be noted that other areas of intellectual property rights have also had an impact on the music industry. Notable in this regard are so-called “celebrity patents”, where certain celebrities made certain inventions relating to their performance careers. In the music industry Eddie Van Halen’s two-handed guitar playing (tapping) technique, which gave him his signature sound, comes to mind. Van Halen made this by “[inventing] a support (top) that

regulatory aspects of the music industry (e.g. the law of competition and the law of mergers and acquisitions); the law of agency (regulating relationships with agents, managers etc); privacy and media law (in respect of the persona of the artist), etc.

The expression “Music Rights” refers to those rights that arise in respect of certain intellectual property relating to music in general. This is specifically limited to rights that arise from copyright and related rights. In the area of copyright the rights concerned are those subsisting in relation to *musical works* and *sound recordings*. In the area of related (or neighbouring) rights the rights afforded to performers in respect of their performance of musical works, whether through live or recorded means. The current chapter is limited to a discussion of the general provisions relating to the *copyright protection* of musical works and where warranted to provide more context, sound recordings.⁷

5.2 The nature and meaning of modern copyright

5.2.1 The Nature of Copyright

The foregoing chapters dealt with the historical development of copyright, but a definition of copyright as it applies today was not as such ventured. In common-law jurisdictions the rights of authors in respect of their creative works is protected through certain copyright principles generally encapsulated in legislative enactments.⁸ In this regard it has often been said that modern copyright law is “a creature of statute”⁹. In many cases however copyright enactments do not define the meaning and nature of copyright, so that clarification in this regard has to be sought in case law, legal writings etc.¹⁰ Often legislative enactments simply refer to “copyright”, “author’s right”, “exclusive right” etc, without defining these – and in this regard it has been cautioned that it is important to examine these terms in the context in which they are used.¹¹ Since copyright law provides protection in respect of a number of works it would be important to examine the relevant provisions of the copyright legislation dealing with these categories of works in order to determine the nature and meaning of copyright in each case.¹²

could flip out of the back of his axe’s body to raise and stabilize the fretboard”, and filed a patent in this regard in 1985. Similarly, the musician Prince invented and patented the so-called “keytar” – a “portable keyboard instrument”, in 1992. Not to be outdone, the musician Paula Abdul patented her own microphone stand in 2009, a “dynamic microphone support apparatus” with a weighted base which the singer can stand on and move around “without fear of falling over”. In 2002 Marlon Brando received a patent for a “drumhead tensioning device and method”, used in musical drums. However, perhaps the most spectacular and famous celebrity patent of all times is the invention that gave rise to Michael Jackson’s legendary “moonwalk” dance, which he showcased in the “Smooth Criminal” video and gave the illusion of gravity defiance. Michael Jackson was able to do this through the use of a pair of specially-designed shoes “that could hitch into a device hidden beneath the stage”, which he and two co-inventors patented in 1993. See in relation to the foregoing Trex and McCarthy 2013 <http://mentalfloss.com/article/52444/27-celebrity-patent-holders> (date of use: 24 December 2018).

⁷ The consideration of sound recordings is necessitated by the fact that in modern times, musical works are invariably embodied in sound recordings (whether by means of physical records, e.g. CDs and vinyl records, or through digital records). The exception is in relation to orchestral music, where music scores continue to be used as an embodiment of musical works.

⁸ See Sterling *World Copyright Law* at 17.

⁹ See Dean *Handbook of Copyright Law* (2012) at 1-4.

¹⁰ Sterling *World Copyright Law* at 46.

¹¹ *Ibid.*

¹² See Copeling *Copyright and the Act of 1978* at 3.

In light of the foregoing it would be useful to review some of the definitions proposed regarding the expression “copyright”. Within the perspective of British copyright law, Garnett, Davies and Harbottle simply define copyright as “a property right which subsists in a number of different kinds of works, such as original literary, dramatic, musical or artistic works, sound recordings, films or broadcasts and the typographical arrangement of published editions.”¹³ The British Act of course specifically provides that intellectual property is a property right.¹⁴ It has to be further noted that this definition makes a distinction between works that are *original* and those that are not. This is because the British Act makes a distinction between works that are original and those that are not required to be original.¹⁵ In South African law however all works are required to be original in order to warrant copyright protection.¹⁶

When defining the meaning of copyright a debate has often raged as to whether copyright is to be construed as a positive right or rather as a negative right (i.e. whether it is a right “authorising” the doing of certain acts, or whether it is a right “preventing” the doing of these acts).¹⁷ Thus Dean and Karjiker define copyright as “[the] right to control the use of a work in all the manners in which it can be exploited for personal gain or profit”¹⁸, implying a positive right. On the other hand, Copeling embraced a negative right position and defined copyright as “that right which vests in the author of every original literary or artistic work and enables him *to prevent* the unsolicited copying of his work ...”¹⁹ In a similar manner, Garnett, Davies and Harbottle assert that the essence of copyright relates to the owner’s right to prevent others from engaging in the restricted acts relating to the particular copyright work, without the owner’s prior authorisation.²⁰

¹³ Garnett, Davies and Harbottle *Copinger and Skone James on Copyright* at 27.

¹⁴ Section 1(1) of the UK Copyright, Patents and Designs Act 1988 c. 48 (hereinafter the UK Copyright Act). The South African Copyright Act (Act 98 of 1978 as amended, hereinafter the Copyright Act or the South African Copyright Act) makes no specific reference to copyright being a property right, but the courts have recognised this reality. See in this regard *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation*; *Video Parktown North (Pty) Ltd Shelburne Associates and Others*; *Video Parktown North (Pty) Ltd v Century Associates and Others* [1986] 1 All SA 1 (T), at 7.

¹⁵ See s 1(1) of the UK Copyright Act. See also Garnett, Davies and Harbottle *Copinger and Skone James* at 159 – 160.

¹⁶ See section 2(1) of the South African Copyright Act.

¹⁷ For a brief discussion of this debate see Copeling *Copyright Law* at 7. Klopper *et al Law of Intellectual Property* at 145 – 146 also deal with this matter and refer to others who do so (at footnote 25, page 145).

¹⁸ Dean and Karjiker *Handbook of Copyright Law* at 1-1.

¹⁹ Copeling *Copyright Law* at 5 – 6.

²⁰ Garnett, Davies and Harbottle *Copinger and Skone James* 29. In an earlier edition the authors of *Copinger and Skone James* were even more emphatic, observing that “[c]opyright is, in fact, only a negative right to prevent the appropriation of the labours of the author by another.” *James Copinger and Skone James* 2. Copeling *ibid* has in this regard observed that “many leading authorities on the subject are inclined to regard copyright as an essentially negative right.” In this regard no less an eminent tribunal as the WTO Panel has observed (albeit in relation to the freedom that Member States have with regard to pursuing “legitimate public policy objectives” which “lie outside the scope of intellectual property rights”): “... [T]he TRIPs Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts.” *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (EC — Trademarks and Geographical Indications)*. WTO Panel Report (WT/DS174/R, 15 March 2005), at 7.210. This position is supported by Van den Bossche *Law of the World Trade Organization* 743, where he observes: “IP rights, it should be noted, confer only *negative* rights, i.e. the right to exclude others from the use of the protected subject matter for a particular period of time. They do not confer positive rights, such as the right to produce or market the product embodying the IP right.” Similarly national courts have lent their credence to this view, as evidenced in the famous Australian decision of *Pacific Film Laboratories Pty Ltd v. Federal Commissioner of Taxation* (1970) 121 CLR 154, at 169, where Windeyer J observed that copyright “is not a right in an existing thing. It is a negative right, as it has been called, a power to prevent the making of a physical thing by copying.” In the famous tobacco plain packaging case, *JT International SA v Commonwealth of Australia* [2012] HCA 43 French CJ relied, amongst others, on the *Pacific Film Laboratories* case to assert that intellectual property rights are negative rights, observing (at para 36): “It is a common feature of the statutory rights asserted in these proceedings that they are negative

In the writer's view however, it is better to see copyright as *both* a positive and a negative right.²¹ It is contended that the language employed in the South African Copyright Act clearly leans more towards the "positive right" view.²² However it is suggested that the exclusive right to exploit the work or to authorise others to do so inherently also involves the right to *prevent* others (who have not been so authorised), from exploiting the work. This prevention would however, often arise or become necessary or effective in the event of the work being infringed or being under threat of infringement. It could thus be said that the positive nature of copyright as an enforceable right relates to the copyright owner's ability to authorise the exploitation of the copyright work (whether for economic or non-economic purposes), while its negative nature relates to the ability to prevent others from infringing the work (i.e. from using the work without authorisation).²³

in character." Our own courts have adopted a similar approach. See *Feldman NO v EMI Music Publishing SA (Pty) Limited, Feldman NO v EMI Music (Pty) Limited* [2007] ZAGPHC 294 at para 7 where Jajbhay J asserts: "Copyright is in fact a negative right, in that it is a right of prohibition enforceable against others from performing infringing acts in relation to the work. Therefore, the ability to enforce a copyright through the Court is the foundation of such copyright."

²¹ Rahmatian *Assignment and Licences* 286 – 287, expresses a similar position when he remarks that the reference to copyright and other intellectual property as a negative right "is an overstatement". He then argues that copyright shares the conceptual features of any property right, whose extent and content is expressed by both (i) the relationship of the property right holder to third parties (the "external" aspect), which involves the right to *exclude* others from the property in the form of trespass or infringement action, and (ii) the content or substance of the property right (the "internal aspect"), which involves the right to *use* and is in the nature of the concept of "incidents of ownership" applicable in the area of tangible property rights (e.g. right to possession and use; right to management; right to alienate and burden etc). Rahmatian then concludes that in the area of copyright as an intangible right the internal aspect would involve the right to assign or license. See also in support of this position Guan 2012 *RCCL* 11.

²² With the usage of the phrase "to do" or "to authorise others to do" certain acts (rather than "restrict others from doing" the acts). See also in this regard Slomowitz AJ in the *Video Parktown North* case (see supra n 14), who scoffs at the idea of copyright being a negative right, remarking: "... [C]opyright has sometimes been called intellectual property, as indeed it is. Thus seen, it is no more "negative" in notion or effect than is property in a *res*. Ownership in a thing is not the right to prevent others from using it. That is merely an incident of ownership. It is the right, at common law at least, ... to do what one pleases with the thing to which it relates, to use it, consume it or exploit it. So too is it with copyright. ... [T]he connotation of sections 6 to 11 of the Act is obvious. Those provisions attempt to define, possibly to circumscribe, that bundle of rights which constitute copyright. Those rights in no way, at least to my way of thinking, "smack of a negative approach".

²³ Some have seen the author's right of authorisation as rather underpinning the economic nature of the rights provided for in copyright. For example Klopper *et al Law of Intellectual Property* at 146 write that "[t]he 'negative right' viewpoint echoes the economic and social arguments for copyright protection." Dean and Karjiker, who, as observed above, seem to lean more on the "positive right" perspective, also arrive at a similar conclusion, asserting that the various acts over which copyright law vests exclusive rights to the copyright owner are acts which "represent in the case of each type of work the manners in which that work *can be exploited for personal gain or profit*." Dean and Karjiker *Handbook of Copyright Law* 1-1 (emphasis added). The authors then proceed to argue that this right (to exploit the work for personal gain or profit) "is an essential right under the law of copyright and that law does not achieve its objective unless such essential right is granted to the full." *Ibid*. However, while this position is correct in certain cases, it is submitted that it is not correct in all cases. *First*, this view suggests that *at all times*, the copyright owner's only interest is in authorising others (either through the granting of a licence or the assignment of rights) to exploit his work (which of course has to be for economic purposes). However this is not entirely true. There are times (such as when the author may have already given an exclusive licence to another to use the work, or when the copyright owner may wish to use the work himself) that the copyright owner would not be interested in authorising others to use the work, even for economic benefit. In such instances the copyright owner would clearly be interested in *preventing others* from using the work. At the same time the copyright owner may, at any given time, not wish to derive any economic benefit from the exploitation of the work. The work does not have to be used only for purposes of personally benefitting or profiting the copyright owner as the copyright owner may elect to allow the usage of the work for no economic consideration (as when a copyright owner allows a children's home to use his work without the need to pay any licence fees). In this case the copyright owner is clearly not interested in positively pursuing the maximisation of profit opportunities from the exploitation of the work. For example, in recent times some musicians have resorted to giving away all or part of their music for free – sometimes as a marketing ploy - without any immediate gain or profit. This has been seen as a way of attracting more fans and hopefully inducing them to buy the music later. Artists and bands like U2, the late Prince, Radiohead and several others have given away their music with varying results. When rights-holders do this they are merely exercising their exclusive right to authorise the usage of their musical works without the expectation of payment. It is in fact on this premise that the Creative Commons system was formed. Creative Commons (CC), which is "[built] on existing copyright law" is used by many, including musicians, to "[reframe] their "property right" by issuing CC licences to enable free use of their music. See in this regard Goss 2007 *Chi.-Kent.L.Rev.* 964. For a list of websites that offer CC-licensed music see <https://creativecommons.org/legalmusicforvideos/> (date of use: 08 June 2016). *Secondly*, it needs to be noted that the philosophical view underpinning the notion that copyright's main

Some have suggested that the use of the phrase “exclusive right” in defining copyright²⁴ lends credence to the view that copyright is a negative right.²⁵ It is nevertheless contended that the relegation of copyright into a mere negative right should not be taken lightly. It can in fact, yield *negative* results (with no pun intended), regarding the manner in which copyright is viewed, and can be restrictive on the ongoing development of copyright in light of changing technologies.²⁶ Thus the view of copyright as a negative right that grants the power “to prevent *the making of a physical thing* by copying”²⁷ could be interpreted to mean that where physical objects are not involved, copyright should give way to other rights such as freedom of expression or some expression of the public interest.²⁸ A definition of the term “exclusive” from an authoritative dictionary, which we should resort

purpose is to give economic benefits to the author (rather than simply saying that it is to give the author exclusive rights to control the usage of his work), is premised on the so-called *incentive theory* of copyright, which Dean and Karjiker have shown support for. See Dean and Karjiker *ibid*. Incentive theorists argue that copyright (and other intellectual property) law seeks to reward the creator for the effort, creativity and talent expended in creating the work, and copyright is conferred on the creator as an incentive for him to create further and better works. This conception of the rationale for copyright protection is however not without criticism. Thus in *Biotech Laboratories (Pty) Ltd v Beecham Group PLC* 786 JOC (A) Harms JA, in recounting the history of the development of copyright law has noted (albeit *obiter*) that the booksellers who lobbied for the enactment of the Statute of Anne of 1709 “had no thought of bringing prosperity to the trade of author” and that the Statute was “a monopoly-breaking move for the benefit of the bookselling trade and authors were merely the excuse for it” (at 792). Furthermore, while commending the current South African Copyright Act for initially entrenching a concern to uphold the interests of the author, where the intention was “to move in the direction of Continental law where the emphasis is on the rights (moral and other) of the author and not on the economic rights of employers and entrepreneurs”, he laments the fact that this good intention was short-lived, as barely a year later the legislature amended Section 21 of the Copyright Act “to the Anglo-American model where commercial rights tend to reign supreme.” Concluding, the honourable judge quipped: “One consequently does not have to be a cynic in order to be sceptical about the philosophical premise” – referring to the incentive theory. *Ibid*. Dean and Karjiker’s argument (*ibid* at 1-2) that “[t]he fact that others ... may reap benefits in lieu of the author does not detract from the situation because such persons generally derive benefits *in loco* the author and not in their own right” is not convincing. In a recent, highly-representative analysis of the incentive theory in respect of the music industry in the United States, it was concluded that copyright law tends not to benefit the majority of musicians and does not appear to provide marginal incentives to create for all musicians at all times, but rather directly affects mostly the income of the highest-earning musicians. This is credited to the prevalence of the winner-take-all markets in the entertainment industry. See Dicola 2013 *ALR* 55:0 at 43.

²⁴ As for example in section 6 of the Copyright Act where it is provided that copyright in a literary or musical work “vests the exclusive right to do or to authorize the doing” of certain acts.

²⁵ In this regard Garnett, Davies and Harbottle *Copinger and Skone James* 28 – 29 note: ‘Copyright ... essentially gives the right owner the right to restrict others from doing [certain] acts ... and, when copyright is referred to as “an exclusive right”, the emphasis is on the word “exclusive”.’

²⁶ In a special report commissioned by the US National Bureau of Standards to investigate the impact of technological developments on copyright law a thorough legal analysis was made in this regard, and the conclusion was that “copyright law has been shaped and reshaped to fit new conditions flowing from technological innovations”. See Saltman *Copyright in Computer-Readable Works* A18. As to the philosophical basis for this the following has been observed: ‘We deduce from the [US] Constitution that the end purpose of copyright is to “promote the progress of science and useful arts,” that is, to stimulate the growth and spread of learning and culture for the benefit of society at large; and that, as a means toward achieving this end, authors are to be given exclusive rights in their works; thus, the creation and public dissemination of works of authorship are to be fostered by giving to authors the legal means to realize the economic value of their contributions to society.’ *Ibid* A-19. It can on this basis be concluded that the adaptation of copyright law in the light of technological developments is thus to be expected and encouraged (seeing that in the first place it is the granting of copyright protection that leads to technological developments). See also in this regard Carrol 2005 *Florida Law Review* 907 generally, and at 956 – 961 in particular, and Chapter 3 above.

²⁷ As held in the *Pacific Film Laboratories v Federal Commissioner of Taxation* case dealt with *supra* at n 20. Emphasis added.

²⁸ See for example Mason 1998 *J.L. & Inf. Sci.* generally and specifically at 11, where he argues that “[b]ecause copyright protects expression and confers rights on the copyright owner with respect to his copyright expression, there is the potential for conflict between copyright and freedom of expression, *if copyright protection is taken too far*.” Emphasis added. A similar position was advocated for by the Freedom of Expression Institute in its comments on the highly-criticised Copyright Amendment Bill 2017, where the Institute argued that “there is an inherent tension between copyright law and the right to free expression” and that “when viewed expansively, copyright law can be repurposed as a tool to curb and even suppress speech, dissent and other forms of expression” – thus aligning with the growing chorus of voices that suggest that the protection of copyright works in the digital environment poses a threat to other interests. See the Freedom of Expression Institute’s submission at <https://www.fxj.org.za/docs-resources/FXI-Copyright-Amendment-Bill-Submission-07July2017.pdf> (date of use: 24 December 2018). From a perusal of the version of the Copyright Amendment Bill approved by the National Assembly on 5 December 2018 and submitted to the National Council of Provinces for its concurrence (version B13B-2017), it is obvious that the “freedom of expression lobby” has lamentably succeeded in

to when there is uncertainty,²⁹ should assist in this regard. In this regard Black's Law Dictionary defines the term "exclusive" as "[a]ppertaining to the subject alone, not including, admitting, or pertaining to any others. ... vested in one person alone."³⁰ This understanding of the term should thus be seen to denote the sense of a right that is *unique* to the rights-holder (rather than a right that merely excludes others from doing certain acts). This is the sense in which the exclusive right vesting in the copyright owner under Section 6 should be understood: it is a right that is unique to the copyright owner – a right that *pertains to the copyright owner alone to the exclusion of all others*.³¹

A simple analysis of the phrase "[c]opyright in a literary or musical work vests the exclusive right to do or to authorise the doing of any of the following acts" should therefore bring us to the conclusion that the exclusive right referred to relates to the positive act of doing or authorising the doing of the acts mentioned, and not, as a primary concern, the exclusion of others from doing these acts. It is a right *empowering* or *enabling* the copyright owner "to do or to authorise the doing" of the acts mentioned in Section 6 (a) – (g); i.e. a right to use, as Rahmatian has asserted,³² and not just a right to exclude. In this regard Ficsor, linking this to the role that collective management of copyright plays, has observed:

It is ... essential to note that exclusive rights – irrespective of the possibility of prohibiting some acts – basically are not of a negative nature. Their genuine purpose is not just that, on the basis of them, owners of rights may exclude others from the exploitation of works [T]he real value of such a right is that it ensures that works are exploited in a way that corresponds to the intentions and interests of the owner of the right.³³

While the copyright owner is not obliged to exploit the work, he is nevertheless *empowered* to do so (or to authorise others to do so). This in many ways accords with the *economic nature* of copyright and the fact that the bundle of rights associated with a copyright work are often termed "economic rights".³⁴ Thus it has been observed that "intellectual property rights are rights of exploitation".³⁵ In

swaying the minds of parliamentarians. The National Council of Provinces approved the Bill without changes on 28 March 2019. For the Bill passed by the National Assembly and the National Council of Provinces (version B13B-2017) and the process followed see <https://pmg.org.za/bill/705/> (date of use: 24 December 2018). Eminent scholars like Owen Dean have criticised the Bill for undermining copyright while politicians are claiming to protect it, arguing: "While purporting to grant various new rights to copyright owners, ... it introduces such extremely wide-ranging exceptions to the exclusive rights of the copyright owner that those rights are seriously undermined." Dean O Sunday Times, November 25 2018.

²⁹ See in this regard *Geyser and Another v Msunduzi Municipality and Others* 2003 (5) SA 18 (N) at 20.

³⁰ See Black *Black's Law Dictionary* 673.

³¹ In this sense the term "exclusive" is used in relation to the positive nature of copyright rather than its negative nature. This is the manner in which Kur and Levin *Intellectual Property Rights* 198 use the term, when they make reference to "a positive (exclusive) right to exploit".

³² See n 21 *supra*.

³³ Ficsor *Collective Management* 15 – 16.

³⁴ This is to distinguish them from the non-economical, "moral rights" of authors, which relate to the protection of the author's personality (and the right of the author of a work to be attributed as such), and the integrity of his work. See Sterling *World Copyright Law* 392 and 429. This distinction is generally recognised, although the South African Copyright Act does not specifically use the phrase "economic rights" (as contrasted for example with the UK Copyright Act, which uses the heading "Economic Rights" when dealing with the rights of performers in Chapter 2 of Part II of the Act – although the term is not specifically used in the section dealing with copyright). For an economic analysis of copyright see Landes and Posner 1989 *J. Legal Stud.* 325 – 363. The concept of "entrepreneurial copyright" also assists in understanding the economic nature of copyright. In this regard it has been noted: "There is always entrepreneurial effort behind the cultural creation – the book, the painting, the music, the film. The entrepreneurs are the sound recording company, the film

this regard Drahos further argues that a historical review “shows that intellectual property rights *have always been used by states to secure market place objectives*, both domestic and international”, resulting in “*the engineering of economies using intellectual property norms*”.³⁶ In a nutshell Drahos affirms the view that “the western intellectual property tradition is rooted in the idea that intellectual property rights *are positive rights* created by the state for the benefit of the commonwealth.”³⁷

In view of the foregoing, the brazen, albeit widely-held view that intellectual property rights do not confer “the right to produce or market the product embodying the IP right”³⁸ - a natural outcome of viewing intellectual property rights as merely negative rights - stands to be challenged. It manifestly leaves open the question as to the basis for the author’s active exploitation of his work.³⁹ Furthermore, it lends credence to the practice of some in the music industry of soliciting the assignment of rights from unwary authors, with no undertaking to actively exploit the rights and only looking for an opportunity to benefit from the exploitation of the rights through the efforts of others (including the author).⁴⁰ Rights-holders of copyright works must be seen as having the right to positively exploit their works. This is at the core of copyright being seen as an instrument for active economic activity. It is also in line with daily practice in the music industry, where musicians actively seek opportunities to exploit their works rather than seeking to benefit from the proceeds of infringement proceedings.⁴¹

The best approach thus, as highlighted above, is to view intellectual property rights, and copyright in particular, as constituting both a positive and negative right. The copyright owner positively exercises his exclusive rights through the issuing of usage licences (whether exclusive or non-exclusive), or by assigning the particular exclusive right to another, thus completely disposing of the

producer, the broadcasters, the publishing houses, the art auction houses and the ISPs who are content owners. It is interesting to note that the ‘creator’ is often captured and made part of the corporate or legal rent-seeking stakeholder in order for the latter to source his creations. ...” Macmillan *New Directions* 130. This accords with the prescript of the right as an exclusive right to do or *to authorise the doing* of the acts, thus more than merely the *preventing* of the doing of the acts.

³⁵ Drahos 1999 *I.P.Q.* 350. The author further notes (at 364): “National intellectual property systems around the world link the origination of rights to individual persons and *maximise the capacity of individual owners to trade in these rights*.”

³⁶ *Ibid* 350 – 351. Emphasis added.

³⁷ *Ibid* 350.

³⁸ See Van den Bossche *Law of the World Trade Organization* 743, referred to supra at n 20. The conception of copyright as the right to exclude others from interfering with the work is admittedly a persistent one. See in this regard Zemer 2006 *Buff. Intell. Prop. L.J.* at 71, who adds that “[t]he right to authorise certain uses *supplements this right to exclude*.” *Ibid*. Emphasis added. To reinforce this idea Zemer writes: “In copyright terms a musician has a *right* to exclude others from accessing or making adaptations of his composition, a *privilege* to make and use the adaptations, a *power* to authorise others to make adaptations and an *immunity* against others exercising their powers and affecting the legal status of the original works and adaptations.” *Ibid*. Emphasis added. This accords with the Lockean view of rights as negative, natural rights. See in this regard Hick 2009 *Tex. Intell. L.J.* 365. The writer cannot agree to this Hohfeldian analysis of rights, especially in relation to copyright. It is submitted that in its quest to construe copyright as a negative right this position militates against the plain understanding of the nature of copyright in a work.

³⁹ Some have attempted to bridge this anomaly by stating that it is the right to exclude (as the phrase “exclusive right” is understood) that forms the basis of the right to license (i.e. the right to give permission). See Kohn and Kohn *Music Licensing* 367. This, it is submitted, is a rather convoluted manner of dealing with this issue. How the right to exclude would form the basis for the right to permit is a baffling conclusion indeed, conveying as it does, the incompatible idea of “excluding and permitting” as a singular concept. *Excluding*, of necessity rules out *permitting*, and the two are not compatible with each other.

⁴⁰ See in this regard an article by the writer entitled “To Publish or not to Publish: A Critical Consideration of the Role of the Music Publisher Today” which seeks to highlight the practices of unscrupulous music publishers. Baloyi 2012 *SA Merc LJ* 218 – 232.

⁴¹ Furthermore, because of the high cost of instituting infringement proceedings, practice shows that these are not as rife as the negative rights theory of copyright would require.

right.⁴² From a negative perspective, the copyright owner exercises his right by having recourse to the courts to obtain interdicts against infringers, to seek for damages and / or to seek for the payment of a reasonable royalty.⁴³

5.2.2 Defining “Copyright”

In conclusion it needs to be mentioned that, as a general definition Dean’s definition of copyright as “work embodying intellectual content” is rather general as it presupposes that one would know what such “work” is. Furthermore, since the term “work” is a technical term the use of the phrase “intellectual content” also presents problems in that it suggests that in addition to a work being recognised as such in copyright law, it also needs to embody intellectual content. However a work (such as a literary work, musical work, artistic work etc.) is considered to be such with reference to certain *defined* intellectual content relating to it. Copeling’s definition would seem to resolve this situation by defining copyright as “that right which vests in the author of every *original literary or artistic work*”. What however becomes immediately obvious with this definition is the fact that it limits works to “original literary or artistic works”.⁴⁴ Copyright law however provides protection to other *original* works in addition to literary and artistic works, such as musical works, dramatic works,⁴⁵ sound recordings, cinematograph films, broadcasts and published editions.⁴⁶

Copeling’s definition can be faulted for other reasons: (i) the fact that he indicates that copyright vests in the “author”. As is common cause copyright can be assigned by the author to another, in which case it would vest in the assignee.⁴⁷ On this basis it would be better to speak of copyright as “originally vesting in the author” or simply stating that copyright vests in “the copyright owner”; (ii) the fact that he limits the right of the author to preventing “the unsolicited copying” of his work. As is common cause, copyright is a “bundle of rights” and thus involves other restricted acts in addition to copying;⁴⁸ and (iii) the inclusion of the requirement that the work needs to be “not of a kind which is contrary to public morality”. Although the requirement of impropriety was considered to be important

⁴² See in this regard *Feldman NO v EMI Music Publishing SA (Pty) Limited, Feldman NO v EMI Music (Pty) Limited* [2007] ZAGPHC 294 at para 6, where it is further observed: “From the viewpoint of exploitation of the [music] rights, assignment and licensing are the most commonly used methods.”

⁴³ Section 24(1) and (1A) of the Copyright Act.

⁴⁴ It is true that that the expression “literary and artistic works” is used in art. 2(1) of the Berne Convention to refer to “all productions in the literary, scientific and artistic domain, and permits of no limitation by reason of the mode or form of their expression”. WIPO *Guide to the Berne Convention* 12. However, defining copyright in this manner within the context of South African legislation, where, even under the Copyright Act 63 of 1965, the subject-matter of Copeling’s text, literary works and artistic works were treated as distinct works of copyright *among other works*, is problematic, as it suggests that only these two works are protectable by copyright.

⁴⁵ Dramatic works may also be protected as a genre of literary works, as is the case in South Africa. See the definition of ‘literary works’ in Section 1(1) of the Copyright Act.

⁴⁶ Copeling recognises this limitation and argues that the other works “either fall within or are related to the fields of literature and art”. Copeling *Copyright Law* at 6. It is suggested that it would have been more useful if Copeling had defined copyright as “that right which vests in the author of every work in the field of literature and art”, where “art” or “the arts” is defined as “[t]he various branches of creative activity, such as painting, music, literature, and dance” – see <https://en.oxforddictionaries.com/definition/art> (date of use: 24 December 2018) - as this would have been more encompassing.

⁴⁷ For assignment of copyright see section 22(1) of the Copyright Act.

⁴⁸ For the concept of copyright as constituting a bundle of rights see Dean *Handbook of Copyright Law* 1-81. This has sometimes been referred to in a number of ways, e.g. “an abstract bundle of legal relations”; “a cluster-right”; “a complex aggregate of rights”; “a range of ownership rights along the ownership spectrum”; “a bundle of distinct and specific monopolies” etc. See in this regard Zemer *The Idea of Authorship* 49 – 51.

at some stage,⁴⁹ Dean has made a compelling argument to the effect that the requirement of propriety is one that would apply in respect of the enforcement rather than the subsistence of copyright.⁵⁰ On this basis Dean argues that while copyright would subsist in a work despite its being improper, the courts may refuse protection if the work is improper or *contra bonos mores*.⁵¹

The fact that the rights conferred by copyright in respect of a work are exclusive rights means that in the duration of copyright, *only* the copyright owner or his authorised licensee or assignee has rights to exploit the work. Because of this it has often been said that copyright confers a monopoly right upon the copyright owner.⁵² However, Garnett, Davies and Harbottle⁵³ counters this notion, arguing that copyright is not a monopoly because it does not prevent competition from similar works, if such works were created independently. Furthermore, because the exclusive rights could be exercised oppressively in such a way as to exclude access to the works or to make access too expensive, the legislature has, in the public interest, imposed certain limitations on and exceptions to copyright (and related rights) and provided for regulation of licensing.⁵⁴ Based on a review of the foregoing definitions and discussion one would venture to define copyright as

legal protection subsisting in certain original works of literature and the arts (such as literary, musical and artistic works), and other original works related to these (such as sound recordings, films and published editions), which vests in the authors of such works the exclusive right to do certain restricted acts in relation to the works; or to authorise others (whether as assignees or licensees), to do so.

While the above definition is admittedly rather long, it does capture all the essential aspects of the meaning of copyright within the South African context without creating ambiguity.

5.3 The subject-matter of copyright

Within the South African context copyright subsists only in respect of *works*. In this regard it needs to be noted *first*, that there are a number of creative expressions that would not warrant copyright

⁴⁹ See the case of *Goeie Hoop Uitgewers (Eiendoms) Bpk v Central News Agency and Another* 1953 (2) SA 843 (W) where it was held that the courts will not protect works that are considered to be “improper, indecent and or lacking in propriety”.

⁵⁰ Dean *id* at 1-27.

⁵¹ Dean *ibid*. Klopper *et al Law of Intellectual Property*, while recognising propriety as “the only remaining common-law requirement” for the subsistence of copyright (at 168), do note however that it would be improper to use copyright law as a tool of censure as doing so would, *inter alia*, be contrary to South Africa’s democratic values (at 170). On the other hand our courts have, as recently as 2008, displayed an inclination to reject the subsistence of copyright where doing otherwise would be against public policy. (See *Peter-Ross v Ramesar* 2008 JDR 0660 (C) where Desai J fell short of entertaining the argument that the applicant’s claim to sole copyright ownership of an academic article should be rejected on the ground of breach of an agreement of co-authorship with the first respondent, in a case where the applicant had proceeded to publish the article without recognising the respondent as co-author. The court did not entertain this matter merely because it was not necessary for it to do so, having found that the article was in fact one of joint authorship). It seems inevitable however that the redefinition of the *boni mores* of society through constitutional interpretation will eventually lead to a diminishing recognition of propriety as a requirement for the subsistence of copyright. See in this regard Michaelman “The Rule of Law, Legality and the Supremacy of the Constitution” at 11-17, who refers to the “intervening factual shift in the social ethos ... from the established doctrine ... [of] *contra bonos mores*”.

⁵² This monopoly right is often called a “qualified monopoly” based on the fact that it is limited in duration to the term of copyright. See in this regard Dean *id* at 1-1 - 1.2.

⁵³ Garnett, Davies and Harbottle *Copinger and Skone James* at 17.

⁵⁴ *Ibid*. Licensing is for example regulated through the use of the Copyright Tribunal, which controls the licensing of works by both rights owners and collecting societies.

protection because they are not considered to be works.⁵⁵ *Secondly*, even where an expression may be considered to ordinarily meet the requirements of a work it may still be denied copyright protection if it can be seen as too commonplace that endowing it with copyright would place undue restrictions on others.⁵⁶ In *Accesso CC v Allforms and Another*⁵⁷ it was held that a court had to exercise a value judgment to determine if the material on which copyright is claimed constitutes a work or is too trivial to merit copyright protection. After this an objective test must be used to determine whether the work is of such a commonplace nature that it should not attract copyright; further considering the consequences of awarding copyright to such a work.⁵⁸

In *Waylite Diary CC v First National Bank Ltd* the court held that two enquiries are involved in determining whether subject-matter constitutes a work eligible for copyright in terms of Section 2(1) of the Copyright Act, namely (i) whether the work concerned falls within one of the recognised categories and (ii) whether the work is original. However, though the two enquiries are different they are often intertwined as it would be difficult to discuss what amounts to a work without discussing the work's originality, since a work needs to have a sufficient degree of originality to exist.⁵⁹ The court further held that in assessing whether a work is entitled to copyright protection it would be permissible to consider the consequences of affording copyright to "a work of doubtful substance".⁶⁰

⁵⁵ In copyright law a work needs to comply with certain requirements, such as originality and embodiment in a material form (see in this regard the discussion under paragraph 6.4 below). Performances are for example not protectable as copyright works though they clearly constitute creative expression (instead they are protected as related or neighbouring rights). In the same vein expressions of folklore and other traditional cultural expressions (TCEs) normally do not fit the description of a "work". One notes however that the Intellectual Property Amendment Act 28 of 2013, which has been signed by the President but is not yet in force, purports to protect such expressions as works within copyright law.

⁵⁶ See *Accesso CC v Allforms (Pty) Ltd and Another* (Case No II) 677 JOC (T) (at 690). See also *Francis Day and Hunter Ltd v Twentieth Century Fox Corporation Ltd & Others* [1940] AC 112, a British decision of the Judicial Committee of the Privy Council relevant for music copyright as it was concerned with the question whether there is copyright protection in a song title. The case involved, *inter alia*, a claim of copyright infringement in respect of the words, "The man who broke the bank at Monte Carlo", which were the title of a song released by the appellant in 1892 and subsequently used as the title of a film released by the respondent in 1935. Apart from the title there was no other connection with the song and neither the song nor the music was used in the film. On appeal to the Privy Council (from the Ontario Appellate Division) Lord Wright held that the claim for literary infringement failed because only the title of the song was copied, and, in the facts of the case, this was too insubstantial to constitute infringement. For copyright to subsist in the song title it had to be sufficiently original and distinctive, which the current title failed to be because the phrase "To break the bank" was a hackneyed expression and the name "Monte Carlo" was "the most obvious place at which that achievement or accident might take place" (at 123). This decision was followed by our courts in the case of *Waylite Diary CC v First National Bank Ltd* 1995 (1) SA 645 (A). See also *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119 (in particular at 143 – 145), where the English Court of Appeal held that the word "Exxon" could not be protected under copyright as an original literary work. Similarly it was held in the Australian case of *Sullivan v FNH Investment (Pty) Ltd* [2003] FCA 323; (2003) 57 IPR 63 that no copyright subsisted in the slogans "Somewhere in the Whitsundays" and "The Resort that offers precious little" because their authorship did not require "the requisite degree of judgment, effort and skill to make it an original literary work in which copyright may subsist" (at 75 – 76). This conforms to the so-called *Scènes à Fair* doctrine applicable in the United States, in terms of which "courts will not protect a copyrighted work from infringement if the expression embodied in the work necessarily flows from a commonplace idea ..." *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068 (9th Cir. 2000), at para 45. See also generally *Reyher v. Children's Television Workshop* 533 F.2d 87, *cert denied* 429 U.S. 980, 97 S. Ct. 492. For an application of this doctrine in respect of musical *scènes à fair* see *Smith v. Jackson*, 84 F.3d 1213 (9th Cir. 1996), where the court affirmed the ruling that taking musical motives (a motive being a "short musical phrase, usually comprised of only a few notes"), where neither the lyrics nor a substantial part of the music was taken, did not amount to copyright infringement.

⁵⁷ *Ibid.* See also *Waylite Diary CC* *ibid* pp 9 – 10 para 15.

⁵⁸ Dean and Karjiker however note that subjective considerations, such as the amount of effort and ingenuity involved in the making of the subject-matter, may be taken into account. Dean and Karjiker *Handbook of Copyright Law* at 1-6.

⁵⁹ *Waylite Diary CC v First National Bank Ltd* 1995 (1) SA 645 (A) at 6 – 10.

⁶⁰ *Id* at 9 – 10. See also Castanaro 2008 *Fordham Intell. Prop. Media & Ent. L.J.* 1271 – 1272, who, after remarking about how, when one flips through the radio stations it feels like one is "hearing the same song over and over again", observes: "We live in a musical era marked by covers, music sampling, and dubiously similar songs that are the product of both accidental and conscious borrowing."

It is submitted that in the music industry there are many songs that use hackneyed, commonplace phrases and thus would be works of doubtful substance. Recently there was a public outcry elicited by certain emotive allegations in the media regarding how the Southern African Music Rights Organisation (SAMRO), a performing rights society, is allegedly “ripping off” arrangers of public domain songs by not allocating to them a hundred percent of royalties relating to the use of such arrangements.⁶¹ It is however submitted that often many recordings of public domain songs (especially those relating to church hymns) lack the element of originality required for true arrangements (or adaptations) of existing works. Often these are blind imitations or slavish copies of the original work, and if subjected to the rigorous processes of the courts, might not meet the requirements of works deserving of copyright protection. One of the arguments made by SAMRO in defence of the allegation against it was that, in terms of its default rules, where arrangements are made of works in which copyright subsists (presumably with the authorisation of the copyright owner), the arranger receives a share of 16.7% in the work, and the original composer receives a share of 83.3%.⁶² SAMRO then argues that this position is deemed to apply equally in respect of arrangements of public domain works, with the arranger been allocated a share of 16.7% and the rest of the 83.3% being distributed to all SAMRO members eligible for royalties in the period concerned.⁶³

This appears to be a reasonable approach to dealing with the matter and is generally consistent with practices elsewhere, as shown in Chapter 6. Another consideration here is the fact that if, without considering the originality elements of an arrangement, a hundred percent copyright credit is given to the arranger, this might place undue restrictions on others, who may want to use or perform the public domain song, as held in the *Accessio* case.⁶⁴ Such parties may find that they are not able to use the public domain song because this would be similar to and would thus infringe the arranger’s version, which itself is a slavish copy of the public domain song. This is an untenable situation that cannot be permitted by the law and would defeat the objective of placing copyright works in the public domain after a certain period for free use by everyone. As highlighted above, following the *Accessio* decision,⁶⁵ even where an expression may ordinarily meet the requirements of a work it may still be denied copyright protection if it can be seen as being too commonplace that endowing it with copyright would place undue restrictions on others. In this regard it was held in the *Klep Valves* case⁶⁶ that a person who relies on an earlier work to create a work over which he claims copyright must demonstrate that in creating the new work, he exercised sufficient independent skill and labour and that there are *substantial differences* between his work and the earlier work.

⁶¹ See for example <https://www.musicinafrica.net/magazine/sa-arts-department-probe-samro-amid-royalties-allegations> (date of use: 24 December 2018). See also Chapter 6 below, at paragraph 6.6.1, for a further elaboration of this matter.

⁶² *Ibid.* Of course if the original composer and the arranger arrive at a different arrangement contractually (e.g. a 50/50 share), SAMRO would be compelled to implement such an arrangement.

⁶³ *Ibid.*

⁶⁴ See n 56 supra.

⁶⁵ *Ibid.*

⁶⁶ *Klep Valves (Pty) Ltd v Saunders Valves Co Ltd* 1987 (2) SA 1 (A), at para 79.

As observed, a clear distinction thus has to be made between “works that are truly original creations” and those that are not, being based on similar, pre-existing works.⁶⁷ In this regard it has been observed:

In the latter instance, it would not be enough for an author simply to content himself with the bald statement that the work in respect of which copyright protection is claimed is of his own making and is therefore original; he must go further and distinguish the work from the pre-existing works and demonstrate his own contribution.⁶⁸

This is also consonant with the definition of “adaptation” in section 1(1) of the Copyright Act, namely as “any arrangement or transcription of the work, if such arrangement or transcription *has an original creative character*.”⁶⁹ This clearly shows that indeed, something more than trivial is required for copyright to subsist in any arrangement. It is in fact notable that the Act refers to the fact that an arrangement or transcription has to have “an original *creative character*” for copyright to subsist in the arrangement / transcription. This might suggest that a higher standard of originality than that which is applicable in respect of works created for the first time, which conforms more to the US standard of a “creative spark”, applies in respect of adaptations. Whatever the conclusion, it is clear that for copyright to subsist in an arrangement, a real difference has to be exhibited from the original work.

It would be important to point out that, in terms of section 1(1) of the Copyright Act a work is defined as “a work contemplated in section 2”.⁷⁰ This means that any subject matter that cannot fit within the description or definition of the works mentioned in section 2 falls short of being considered a work. Conversely, this means that it is important that a work is capable of being categorised either as a literary work, musical work, artistic work, cinematograph film, sound recording, broadcast, programme-carrying signal, published edition or computer programme. Another reason why the correct categorisation of a work is crucial is that, as has been noted, the category which a work belongs to determines, to a large extent, the scope of the work and thus the *bundle of rights* relating to the work.⁷¹ It needs to be mentioned in this regard that the categorisation of what constitute works under the South African copyright legislation does not necessarily reflect the categorisation of works in other jurisdictions. South Africa has generally followed the English tradition in this system but

⁶⁷ Dean and Dyer *Introduction to Intellectual Property* 17.

⁶⁸ *Ibid.* Thus it was held in the US decision of *Alfred Bell & Co. v. Canada Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) that copyright will subsist in a copy of a work in the public domain if the copy is a “distinguishable variation” of the public domain work. The use of an assessment panel by the CMO, comprised of two or more musicologists, such as that used by the PRS in dealing with public domain works, can be of assistance in determining a cautionary preliminary position as to whether the work based on a public domain work is indeed an original work. See for the PRS position Rothenberg *Public Performance of Music* 109 at n 12; Gammons *Art of Music Publishing* 135.

⁶⁹ Emphasis added.

⁷⁰ The works concerned are literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programs.

⁷¹ See Dean and Karjiker *Handbook of Copyright Law* 1-20A. According to Dean *Handbook of Copyright Law* 1-81, the concept of a bundle of rights means that the copyright owner has a monopolistic right to a number of different acts the sum of which constitute a whole copyright.

other jurisdictions, including those that were historically associated with the English tradition, have been at liberty to use other forms of categorisation.⁷²

Under section 1(1) of the UK Copyright Act the following works are protected: original literary, dramatic, musical or artistic works; sound recordings, films or broadcasts; and the typographical arrangement of published editions.⁷³ Section 1(2) then goes on to define the expression “copyright work” as referring to a work of any of those descriptions in which copyright subsists. An important UK decision where the position that only works categorised as such in the legislation are eligible for copyright protection, was cemented, is *Creation Records Ltd and Others v News Group Newspapers Ltd*.⁷⁴ In this case the court refused to grant copyright protection for a scene specially designed and arranged for an *album shoot*, i.e. a photoshoot for use as artwork for the sleeve of the album for a well-known music group, Oasis. The scene was a hotel pool that had been drained of water, with a Rolls Royce lowered to the pool by crane and arranged in such a way as to give the appearance of it coming out of the pool (which had subsequently been partially refilled with water). The scene also entailed the arrangement and positioning / composition of members of the group around the pool and the use of various objects. The defendant had deployed a photographer to the scene, who took photographs that were published in the defendant’s newspaper (“The Sun”) with a promise to give readers, at a price, “a glossy poster of The Sun’s world exclusive of the new Oasis album shoot”.

The court refused to grant copyright protection in respect of the scene, ruling that the scene was *not*, as alleged, (i) a dramatic work, being inherently static with no movement, story or action; (ii) a sculpture or work of artistic craftsmanship, as no element in the composition was “carved, modelled or made in any of the other ways in which sculpture is made”, nor was it “the subject or result of the exercise of any craftsmanship”; or (iii) a collage, since the composition was ephemeral, existing only for a few hours with its continued existence to be in the form of a photographic image, and was thus to be distinguished from a collage, which “involve[s] as an essential element the sticking [i.e. gluing] of two or more things together.”⁷⁵

Having highlighted the above, it appears that the rigid categorisation of works may no longer be sustained under UK law, following a recent ruling of the Court of Justice of the European Union

⁷² As an example, under the Canadian Copyright Act (R.S.C., 1985 c. C-42) copyright is accorded to performer’s performances (s 15 of the Canadian Copyright Act). The UK Copyright Act does protect the rights of performers (s 180 of the Act) but copyright does not vest in these rights (see in particular s 180(4) of the Act).

⁷³ There are nevertheless certain notable differences: For example, under UK law only literary, dramatic, musical or artistic works are required to be original, whereas in the South African legislation all works are required to be original; secondly, dramatic works are protected as a separate category of work whereas in the South African legislation they are a genre of literary works; thirdly, under UK law computer programs are protected as a genre of literary works (s 3(1)(d)) of the UK Copyright Act, as they used to be in South Africa but not any longer. Lastly, UK copyright law makes no provision for the separate protection of program-carrying signals.

⁷⁴ [1997] EWHC Ch 370.

⁷⁵ See *Creation Records Ltd and Others v News Group Newspapers Ltd id* at paras 7 – 13. See also *Nova Productions v Mazooma Games & Ors* [2006] EWHC 24 (Ch), at paras 116 and 118, where the court relied on the categorisation of a dramatic work to refuse copyright protection to a video game, arguing that it was not a work of action intended for or capable of being performed before an audience, since its sequence of images were depended on the manner in which it was played and thus “[t]here is simply no sufficient unity within the game for it to be capable of performance”; furthermore, the developmental notes for the video game did not amount to a dramatic work because “[t]hey do not constitute a single work which is capable of being performed before an audience.”

(CJEU).⁷⁶ This case (the *Levola* case) involved a claim by Levola, a Dutch company, that Smilde Foods' cheese product, the "Witte Wievenkaas", tasted the same as its product, the "Heksenkaas" and thus infringed the copyright in the "taste" of the Heksenkaas product. Levola instituted proceedings at the Gelderland District Court in the Netherlands, arguing that the taste of the Heksenkaas was its manufacturer's intellectual creation in which copyright subsisted (i.e. the taste was a copyright *work*), and that the taste of Smilde Foods' product thus amounted to an unauthorised reproduction of that copyright work. The Gelderland District Court rejected the claim, stating that Levola "had not indicated which elements, or combination of elements, of the taste of Heksenkaas gave it its unique, original character and personal stamp".⁷⁷

Levola appealed to the Regional Court of Appeal, Arnhem-Leeuwarden, Netherlands, which considered that the key issue in the case was whether the taste of a food product may be eligible for copyright protection. Levola argued that the taste of a food product could be classified as a work of literature, science or art protectable under the Dutch Copyright Act, and referred to an earlier decision of the Supreme Court of the Netherlands where that court "accepted in principle the possibility of recognising copyright in the scent of a perfume."⁷⁸ Smilde countered, arguing *inter alia* that the protection of tastes is not consistent with the copyright system, which is intended purely for "visual and auditory creations"; and further that "the instability of a food product and the subjective nature of the taste experience preclude the taste of a food product qualifying for copyright protection as a work".⁷⁹ The Court of Appeal, noting that the Court of Cassation in France had previously refused the granting of copyright protection to a scent, observed that there was a divergence of opinions among the supreme courts of the European Union (EU) regarding this matter. The court thus stayed the proceedings and referred two main questions relating to this matter to the EU Court of Justice for a preliminary ruling.

The Court of Justice dealt only with the first question, ruling that in the light of the answer to the first question there was no need to answer the second question. The Court of Justice interpreted the first question as in essence asking "whether Directive 2001/29 must be interpreted as precluding (i) the taste of a food product from being protected by copyright under that directive and (ii) *national legislation from being interpreted in such a way that it grants copyright protection to such a taste*."⁸⁰ In this regard the Court of Justice made several observations that have a bearing on the understanding of the concept of "work" in EU law. In particular the court observed:

... The directive makes no express reference to the laws of the Member States for the purpose of determining the meaning and scope of the concept of a 'work'. Accordingly, in view of the need for a

⁷⁶ *Levola Hengelo BV v Smilde Foods BV* [2018] EUECJ C-310/17 (13 Nov. 2018).

⁷⁷ *Id* at para 19.

⁷⁸ *Id* at para 22.

⁷⁹ *Id* at para 23.

⁸⁰ *Id* at para 32. Emphasis added.

uniform application of EU law and the principle of equality, *that concept must normally be given an autonomous and uniform interpretation throughout the European Union ...*⁸¹

The Court then ruled that two cumulative conditions need to be satisfied for subject matter to be classified as a “work” within the meaning of Directive 2001/29, namely: (i) the subject matter must be original, in the sense of being the author’s own intellectual creation; and (ii) the subject matter must be an expression of the author’s own intellectual creation.⁸² After analysing the provisions of the Berne Convention⁸³ the court mentioned an additional condition, namely the fact that the subject matter “must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form.”⁸⁴ As a rationale for this ruling the Court made the following observation:

... [F]irst, the authorities responsible for ensuring that the exclusive rights inherent in copyright are protected must be able to identify, clearly and precisely, the subject matter so protected. The same is true for individuals, in particular economic operators, who must be able to identify, clearly and precisely, what is the subject matter of protection which third parties, especially competitors, enjoy. Secondly, the need to ensure that there is no element of subjectivity — given that it is detrimental to legal certainty — in the process of identifying the protected subject matter means that the latter must be capable of being expressed in a precise and objective manner.⁸⁵

Based on the foregoing the Court ruled that the taste of a food product cannot be classified as a work within the meaning of Directive 2001/29 as it “cannot be pinned down with precision and objectivity”; further noting that it was not possible in the current state of scientific development to achieve such precision and objectivity to be able to distinguish the taste “from the taste of other products of the same kind.”⁸⁶ The significance of this case is that the EU Court of Justice has effectively done away with the strict categorisation of what constitutes a work, which applied in the UK and applies in South Africa, having ruled that for subject matter to qualify as a work within the European Union it needs only satisfy the three requirements that it has outlined.⁸⁷ This new position now applies in the UK, as the Court of Justice has ruled that the new concept of “work” “must normally be given an autonomous and uniform interpretation throughout the European Union”. It is acknowledged that the UK is currently implementing processes to exit the EU single market through the “Brexit” decision. However, it appears that EU intellectual property law that applied in the UK before the finalisation of Brexit shall remain applicable in the UK.⁸⁸

⁸¹ *Id* at para 33. Emphasis added.

⁸² *Id* at paras 36 and 37.

⁸³ In this regard it was noted that though the EU is not a signatory to the Berne Convention, it is bound to comply with the provisions of articles 1 to 21 of the Berne Convention, in terms of art 1(4) of the WIPO Copyright Treaty, to which the EU is a party and which Directive 2001/29 intended to implement.

⁸⁴ *Levola Hengelo BV v Smilde Foods BV* [2018] EUECJ C-310/17 at para 40.

⁸⁵ *Id* at para 41.

⁸⁶ *Id* at paras 42 – 44.

⁸⁷ That is, it must (i) be original; (ii) be an expression of the author’s intellectual creation and (iii) be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though it may not be in a permanent form. Based on this, the scene in the *Creation Records* case (see supra n 74) would clearly have qualified as a copyright work.

⁸⁸ See for a further elaboration of this, Chapter 8 *infra*.

Seeing that our courts have traditionally referred to English copyright law in clarifying or confirming certain provisions of our copyright law, is it possible that this ruling might in future, influence the way in which works eligible for copyright are construed in South African law? Could this then result in the recognition of more artistic expressions as falling within works eligible for copyright protection (and thus entitling their authors to the economic rights subsisting in copyright works)? This, alongside a Constitutional interpretation that seeks to ensure greater equality, where subject matter that was previously excluded on the basis of copyright law's strict categorisation is recognised, is conceivable. An example in this regard is drum performances. It is common knowledge that drums play a pivotal role in African culture and that "[r]hythm is the most distinguishing characteristic of [the] African music tradition."⁸⁹ However, unlike in Canada, drum performances would not be protected under copyright in South Africa, even in instances where "only their contributions, and not elements the law recognizes as going towards authorship of the work",⁹⁰ have given the work its distinct character.

The reason for the above is that music is generally conceived in terms of the Western *tonal system*, which, on the one hand, 'denotes a "material scale," the set of tones at the disposal of a musical praxis', and on the other, "designates a form of musical perception that turns tonal material into a complex of tonal relationships."⁹¹ In this conception of music it is understood that a musical composition is in its technical analysis, comprised of rhythm, harmony and melody, but that "[i]t is in the melody of the composition or the arrangement of notes or tones that originality must be found."⁹² In this regard it has been observed:

Rhythm is simply the tempo in which the composition is written. It is the background for the melody. There is only a limited amount of tempos; these appear to have been long since exhausted; originality of rhythm is a rarity, if not an impossibility. Harmony is the blending of tones; this is achieved according to rules that have been known for many years. Being in the public domain for so long neither rhythm nor harmony can itself be the subject of copyright.⁹³

It is submitted that this is a grossly simplistic view of rhythm, which explains its relegation to a state of insignificance as an element for determining the originality of a musical work. In this conception of rhythm traditional African music, by which is meant "the characteristics of African music prior to the colonization of the continent by European countries",⁹⁴ does not stand a chance for broader recognition within the copyright system. This is because in this musical tradition "[t]he emphasis is

⁸⁹ New World Encyclopaedia 2018

http://www.newworldencyclopedia.org/p/index.php?title=Music_of_Africa&oldid=1015632 (date of use: 02 January 2019).

⁹⁰ Bowrey and Handler (eds) *Law and Creativity* 100.

⁹¹ Dahlhaus and Gjerdingen *Origin of Harmonic Tonality* 162 and generally.

⁹² *Northern Music Corp. v King Record Distribution Co.*, 105 F. Supp. 393 (S.D.N.Y. 1952), a decision of the US District Court for the Southern District of New York, at 400. In *Tisi v Patrick* 97 F.Supp 2d 539 (S.D.N.Y. 2000) at paras 28 - 29 a fourth element of a musical composition, namely *structure*, is identified, comprised of such components as introduction, verse, chorus, bridge sections, closing and length.

⁹³ *Ibid.* See however Kaku *Music Copyright Cases* 10 who differentiates between tempo and rhythm. Referring to the Grove Music Online dictionary, Kaku asserts that both rhythm and tempo are components of "time", which (and not rhythm) is the third element of music. It is tempo that refers to the speed of the music, while rhythm refers to "a precise pattern or arrangement of pitches in terms of duration."

⁹⁴ See New World Encyclopaedia 2018

http://www.newworldencyclopedia.org/p/index.php?title=Music_of_Africa&oldid=1015632 (date of use: 02 January 2019).

placed more strongly on rhythms than on melody and harmony.”⁹⁵ This rhythmic structure is characterised by the following elements: (i) an equal pulse base; (ii) a metric time arrangement; (iii) a “specific organizing principle unifying a diversity of simultaneous rhythmic patterns together”, and (iv) an exact starting point for rhythmic groupings.⁹⁶

The centrality of rhythm in African musical expression is demonstrated by the fact that the performance of drums and other traditional instruments, rather than *harmonic tonality*,⁹⁷ is itself seen as the essence and embodiment of music.⁹⁸ This can be illustrated by the use of the term “ngoma” or its plural form, “ingoma”, a “verbal cognate” that is “nearly pervasive” among the so-called Bantu peoples of Africa.⁹⁹ The term “ngoma” primarily means “drum”, but it also means “song” and “dance”.¹⁰⁰ In essence however, the term is concerned with “[a]n African conceptual framework for music”; “an active process of experiencing drumming, playing drums, or dancing to drums, as well as the name of the artifact”, and “a method of making music [as well as] the experience of music itself”.¹⁰¹ This is diametrically opposed to the dominant Western conception of music as a system of *harmonic tonality*, where notes and tones (i.e. the melody) play a central role.¹⁰² It has been observed that the centrality of melody in the Western system arises from the fact that melody is “most valuable” because “it is melody that listeners find memorable”; but also because “*originality is easier to achieve in melody* than in rhythm, harmony or tone colour”.¹⁰³

One could equally observe that in the African context originality is easier to achieve in rhythm than in melody, even though the beat of a drum could itself possess “a very simply melodic character of its own”.¹⁰⁴ In this case therefore, where in African culture, the playing of drums and other accompanying instruments constitute “the making of music” and “the experience of music itself”, it should be possible to accord copyright protection to this artistic expression, despite the prevalence of rhythmical elements.¹⁰⁵ Thus even though the concept of copyright is a Western construct, an

⁹⁵ Ibid. See further Bloch 1997 *U. Miami Ent. & Sports. L. Rev.* 187 generally, for an elaboration on the problem of drum beats not being accorded copyright protection, albeit with reference to modern popular music.

⁹⁶ New World Encyclopaedia *ibid.*

⁹⁷ For which see Dahlhaus and Gjerdingen *Origin of Harmonic Tonality* generally.

⁹⁸ For an anthropological study of the richness and creativity of rhythm, with a focus on drama, dance and ceremony see Goodridge *Rhythm and Timing* generally.

⁹⁹ See Janzen *Ngoma* 69.

¹⁰⁰ For the Shona understanding of the term (as “hymn”; “drum”) see Hawn *Gather into One* 164, and for the Zulu understanding of the term (as “song”; “dance”) see <https://zu.oxforddictionaries.com/translate/isizulu-english/ingoma> (date of use: 04 January 2019). “Ngoma” also refers to a ritual healing ceremony among many African Bantu groups, where the drum is the dominant instrument used while at times accompanied by other traditional instruments. In this regard Janzen has distinguished between the “ngoma of entertainment and of healing”. See Janzen *ibid* generally and at 21 specifically.

¹⁰¹ Hawn *ibid*. This is also evident from the use of the Tsonga (or Xitsonga) words, “vunanga”, and its root word, “nanga”. “Vunanga” is the Tsonga word used for “music”. See <https://www.xitsonga.org/search?sk=vunanga> (date of use: 04 January 2019), while “nanga” is the word used to refer to a traditional wind instrument or whistle made from calabash. See Manganye *Children’s Game-Songs* 10. When loosely translated the word “vunanga” would mean, “in the order of the nanga”, thus showing a connection between the instrument (“nanga”) and the music (“vunanga”) that it produces.

¹⁰² For this system and its history see Dahlhaus and Gjerdingen *Origin of Harmonic Tonality* generally.

¹⁰³ Goldstein *Goldstein on Copyright* (2017) 10:53 – 10:54. Emphasis added.

¹⁰⁴ See the observations of Judge Learned Hand in *Fred Fisher v Dillingham* 298 F. 145 (S.D.N.Y. 1924) at 146, where the court ruled that copyright subsisted in an “ostinato”, a constantly repeated figure or accompaniment to the melody of the song with rhythmical elements (“something like the beat of a drum or tom-tom”).

¹⁰⁵ This is not an outlandish assumption, for which compare the decision of the English Court of Appeal in *Sawkins v Hyperion Records Ltd* [2005] WLR 3281; [2005] EWCA Civ. 565 where it was held that “the resulting combination of sounds” emanating from “performing editions” of an earlier, public domain work, was an original musical work, because this affected “which instrument to play, whether it is to be played soft or loud, or fast or slow, and ornaments, such as trills

African epistemology of copyright could be developed on this basis.¹⁰⁶ However, the ability to do so is curtailed by copyright law's limited categorisation of "work" and its insistence on non-transitory fixation as a pre-requisite for according copyright protection. The fixation requirement becomes an impediment even though the English courts have observed that a musical work can exist even before it has been fixed in a material form.¹⁰⁷

In view of the foregoing, African traditional musicians are denied the opportunity to participate economically in the copyright system if their performances are of a purely rhythmical nature. To be able to benefit from the system they are compelled to incorporate within their entertainment performances those elements of Western music that are recognised as meeting the originality requirements of copyright law. This at times means that they have to dilute the traditional character of these performances to conform them to the Western tonal system. Simply stated, to participate in the copyright system African music has to lose its character as a largely rhythmical performance in order to incorporate a more tonal and harmonic approach, in light of the poor treatment of rhythm as

and slurs; creating a "combination of sounds available for hearing and appreciation through the ears of the listeners" (at paras 17 and 18). This, in the writer's opinion, is the recognition of the place occupied by rhythmical elements in the originality of a musical work, and not merely as an accompaniment to melody, as held in the *Northern Music Corp.* decision (see supra nn 92 and 93).

¹⁰⁶ In recent times there have been concerted calls for an African epistemology of knowledge, alongside the call for the "decolonisation" of the curriculum. African epistemology of knowledge is understood as "a way the African conceptualises, interprets and apprehends reality within the context of African cultural or collective experience", based on "the acceptance that such concepts as knowledge, truth, rationality etc. can be interpreted using African categories and concepts as provided by the African cultural experience without a recourse to Western or alien conceptual framework." Udefi 2014 *Canadian Social Science* 108. See also in this regard Ndubisi 2014 *IOSR-JHSS* 32 – 36; Teffo 2013 *Indilinga African Journal of Indigenous Knowledge Systems* 188 – 202; Ogungbure 2014 *Thought and Practice* 40 – 54.. For the concept of the decolonisation of the curriculum see Le Grange 2016 *South African Journal of Higher Education* 1 – 12.

¹⁰⁷ See generally *Hadley v Kemp* [1999] E.M.L.R. 589; also *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565, where the court observed (at para 53) that "fixation in the written score or on a record is not itself the music in which copyright subsists", and that music has to be "distinguished from the fact and the form of its fixation as a record of a musical composition". Music thus exists apart from fixation and the form of its fixation. Thus the sounds that come from whistling or humming or improvisation is music before it is recorded or reduced into some material form, and such recording or reduction into material form only clothes it with legal protection, in terms of the current requirement of fixation. This then raises the question: must such fixation then be permanent or can it be temporary or transient, to attract copyright protection? These are questions that the courts seem to be currently confronted with now, and it is a matter that the *Levola* case referred to above sought to unravel. Also what the *Sawkins* court appeared to be saying is that musical expression is not limited to a particular fixation and could extend beyond that. The recent US case of *Williams v Gaye* No. 15-56880 (9th Cir. 2018) (Order and amended Opinion, popularly dubbed the "Blurred Lines" case) provides an example in this regard. In this case, the question was whether popular musicians, Pharrell Williams, Robin Thicke and Clifford Harris, Jr.'s bestselling single, "Blurred Lines", infringed the copyright in Marvin Gaye's 1977 hit song, "Got to Give it Up" – where it was alleged that the making of the song did not involve a direct copying of the sequence of notes, riff, lyrics or other musical phrases contained in the music score deposited with the US Copyright Office. The court of appeals for the Ninth Circuit upheld the District Court's ruling that "Blurred Lines" infringed the copyright in "Got to give it Up", on the ground that Gaye's song was entitled to broad copyright protection [i.e. beyond what was expressed in the music score filed with the US Copyright Office, which constituted the fixation or material embodiment of the song] because musical compositions *are not confined to a narrow range of expression.*" as music is comprised of a large array of elements. The court held that where a work is capable of a wide range of expression, as is the case with a musical work, *broad*, rather than *thin* copyright protection is warranted. In this regard substantial similarity is sufficient to prove copyright infringement, rather than the works being "virtually identical" (at 17 - 20). In the case it was submitted that Marvin Gaye could not write "or fluently read" sheet music, and the copy of the sheet music deposited with the US Copyright Office was noted by an undescribed transcriber after Marvin Gaye had already recorded the song. Nguyen Circuit Judge gave a dissenting judgment, arguing that the plaintiffs were merely emulating Marvin Gaye's musical style; that the two songs were not objectively similar as they differed in melody, harmony and rhythm, and concluding that the majority's decision allowed the Gayes to copyright a musical style – something no one had accomplished before (at 58). In countering the majority observed: '... While the dissent is adamant that the scope of the Gaye's copyright is limited to the four corners of the deposit copy, it provides no statutory interpretation or legal analysis supporting its assertion. ... Our decision does not grant license to copyright a musical style or "groove". ... Far from heralding the end of musical creativity as we know it, our decision, even construed broadly, reads more accurately as a cautionary tale for future trial counsel wishing to maximize their odds of success" (at 56 – 57).

a source of originality.¹⁰⁸ Autry proffers a better conception of rhythm as a compositional element of musical works, which, if embraced, would, it is submitted, be more accommodating of traditional African music:¹⁰⁹

... Rhythm naturally encompasses "meter," the number of musical pulses contained in each bar (or subdivision) of a composition, but is more likely to be characterized in scholarly circles as the "symmetry" linking the other artistic choices made by the composer. Rhythm also covers the fluctuations in tempo (the speed at which the notes of a composition are played) within a piece. However, again, educated musicians regard tempo as merely a small portion of the overall symmetry of the composition, making judicial focus on whether one composition is played faster or slower than another highly suspect and even irrelevant to the similarity inquiry. Courts may be likely in this context to focus on the specific correlation between the durations of notes in each composition.' Common meter, while not a copyrightable element by itself, may be cited by the court if used in a "unique" manner that establishes more than an intent to use something common to many compositions. Another more insightful avenue of proving similarity involves analysis of the symmetrical relationships between pitches and the placement of certain musical events within the scope of the piece. Thus, the symmetry is dissected on two levels: the interrelation of pitches within the smaller units (measures, bars, or phrases), and the interrelation within the piece when viewed as a whole.¹¹⁰

Narratives of this nature, understood within the context of developments such as those in the EU Court of Justice decision in the *Levola* case discussed above, shed some hope that in future copyright law can be developed to incorporate all forms of intellectual creation *in their own merit*, i.e. without the current limiting categorisation of what constitutes a work and without the current obsession with the fixation requirement. It needs to be noted that the system of categorisation of works and fixation is *not required* under the Berne Convention, the bedrock of the copyright and authors' rights systems.¹¹¹ Furthermore, within the context of South Africa, a Constitutional imperative that seeks to redress the ills of the past and to grant freedom of expression, including

¹⁰⁸ In this regard Manganye *Children's Game-Songs* 11, quoting Allgayer-Kaufmann and Webber, observes that African music was "at its purest during the pre-colonial period when there was minimal foreign influence", and highlights the following in respect of Tsonga music: "... [A]ll modern Tsonga music is 'contaminated' by 'foreign' music. The prevailing music ... employ the I-IV-V chord progression which is an apparent evidence of Western influence. The artists do not play indigenous musical instruments; they play modern electrical Western musical instruments. ... The Tsonga music has changed since it was recorded first in the 1920's."

¹⁰⁹ In the sense of music that is highly characterised of rhythmical elements from which the originality requirement of copyright must be satisfied.

¹¹⁰ Autry 2002 *J. Intell. Prop. L.* 123. Nevertheless Autry's conception of rhythm is still used within the context of the note or tone (i.e. the melody) being a necessary intertwining or pervasive component of the composition, where he refers to rhythm as being "loosely related to the spatial relationship between the pitch choices ... generally accepted to include duration of both *individual notes* and larger musical units such as phrases, themes or even entire compositions." *Ibid.* Emphasis added. See also Autry's use of phrases like "the speed at which the notes of a composition are played" and "specific correlations between the durations of notes in each composition". What the present writer is calling for however is the recognition of rhythmical performances, such as drum performances, as stand-alone compositional works in which copyright subsists.

¹¹¹ Article 2(1) of the Convention, in defining what constitutes "literary and artistic works" merely gives examples of such works but makes it clear that the definition extends to "every production in the literary, scientific and artistic domain". Similarly article 2(2) leaves it to member states to determine if they wish to impose the requirement of fixation in respect of all or any works.

freedom of artistic creativity, would, if it is submitted, lead to the recognition of African drumming as a copyright work, if it is original.¹¹²

Indeed it is not for the lack of creativity or more properly, originality that African performances (or performances in general) are denied copyright protection. The value of African forms of performance is demonstrated by the fact that Africa's esoteric sounds have often been used to "spice up" or increase the appeal of huge commercial projects. A recent example in this regard is the use of the Senegalese "talking drum" in the Hollywood blockbuster, *Black Panther*.¹¹³ In a regime where the strict categorisation of what constitutes a work is eliminated and where the only considerations are those relating to the originality of the artistic expression it is conceivable that drum performances, could, even without singing or other "melodic accompaniment", be recognised as copyright works based on their original qualities.¹¹⁴ Indeed more forms of artistic expressions not currently recognised can, under such circumstances, find protection under copyright law.¹¹⁵

Regarding the fixation requirement (which, as hinted to above, is another impediment to the recognition of drum beats and other performances under the current copyright regime),¹¹⁶ it is common cause that the normal form of material embodiment for performances is by means of sound recordings or films. The realities of the entertainment industry however are that where this takes place at a commercial level, it is not the performer but other parties (i.e. the record label and film producer, respectively), who would own the copyright in the sound recording and film. The answer thus lies in according copyright protection to the performance itself and thus the performer, provided that the performance satisfies the requirement of originality. This may be done by following the

¹¹² It has been observed that the freedom of artistic creativity provided for in s 16(1)(c) of the Constitution of the Republic of South Africa, 1996 includes both "art" as a product, and the process of creating art", and "should also be broadly defined to include, for example, the making of films and music." Currie and De Waal *Bill of Rights Handbook* 370. It is submitted that if citizens, including those from traditional communities, have the freedom of artistic creativity (including drum performances), then they should also have the right to enforce the Constitutional rights of property (including intellectual property) relating to such artistic creativity.

¹¹³ It is reported that the composer charged with writing the music score for this movie had to travel to Africa for a month to get the "unusual sounds" in the movie's score. See Burlingame 2018 <https://variety.com/2018/artisans/production/black-panther-score-1202697385/> (date of use: 26 December 2018). The talking drum was also used in the *Lion King* movie, alongside the djembe drum and the djun djun drum. See <https://www.x8drums.com/blog/drums-in-lion-king/> (date of use: 26 December 2018). To further illustrate the appeal of African sounds a disc titled "Heart of Africa Vol. 1", promises "[a]n unprecedented sonic expedition into the rich musical heritage of Africa" and a discovery of "a fascinating compilation of strange [and] wonderful instruments, voices and performances that evoke deep images [and] primitive emotions ... for your next film score, remix or album project". See <https://www.spectrasonics.net/products/legacy/heartofafrica1.php> (date of use: 26 December 2018).

¹¹⁴ Currently performances can only be protected as neighbouring rights under the Performers Protection Act 11 of 1967 (the Performers' Protection Act). However, protection under the Performers' Protection Act entails a number of limitations, including the fact that contracts entered into with third parties in relation to the exploitation of the rights but such contracts are only enforceable in South Africa (s 13 of the Performers' Protection Act). Furthermore, the performer cannot assign any of his rights to say, a third party who could commercially exploit the right in exchange for payment of a royalty to the performer - see Dean and Dyer *Introduction to Intellectual Property* 67 - (although he could, in terms of s 5(6), assign his right to a royalty). This means that contracts between South African performers and record companies concluded in South Africa cannot be in the form of an assignment of rights (although they could be in the form of a licence, whether exclusive or non-exclusive); and are only enforceable in South Africa.

¹¹⁵ Although the Intellectual Property Amendment Act 28 of 2013 (signed by the President but yet to come into force) is presented as seeking "[t]o provide for the recognition and protection of certain manifestations of indigenous knowledge [e.g. traditional works and indigenous works] as a species of intellectual property" (Preamble to the Act), it in fact seeks to do so in line with the provisions of the current Copyright Act (s 4 of the Act, introducing section s 28A(1) to the Copyright Act). The proposed s 28B(2) in fact makes it explicit that traditional works shall not be protected until they have satisfied the fixation requirement, except in the murky instance where the work "is capable of substantiation from the collective memory of the relevant indigenous community".

¹¹⁶ For which see the discussion below under paragraph 6.4.

example of Canada and giving legislative recognition of performances as subject-matter in which copyright subsists.¹¹⁷ Alternatively it can be done by simply removing the categorisation requirement and either removing or relaxing the fixation requirement, as done in the *Levola* case.

There have indeed been growing agitations for the removal of these requirements in recent times.¹¹⁸ A controversial attempt in this regard was made in a recent three-judge panel ruling of the US Court of Appeals for the Ninth Circuit, in *Garcia v. Google Inc.*,¹¹⁹ where the court, in a much criticised judgment, held that there was originality in an actor's performance, relying on the *Feist*¹²⁰ ruling. In this regard the court observed:

... [A]n actor does far more than speak words on a page; he must "live his part inwardly, and then give to his experience an external embodiment." ... That embodiment includes body language, facial expression and reactions to other actors and elements of a scene. ... An actor's performance, when fixed, is copyrightable if it evinces "some minimal degree of creativity ... 'no matter how crude, humble or obvious' it might be." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (quoting 1 Nimmer on Copyright § 1.08[C][1]). That is true whether the actor speaks, is dubbed over or, like Buster Keaton, performs without any words at all. ...¹²¹

In arriving at this ruling the court also placed reliance on the fact that US copyright law protects pantomimes and choreographic works.¹²² The court's ruling was however, evidently too revolutionary for its time, and following widespread criticism, an *en banc* court overturned the panel decision's ruling and held that the injunction granted in favour of Garcia against Google "was unwarranted and incorrect as a matter of law and was a prior restraint that infringed the First Amendment values at stake."¹²³ In its rebuttal of the panel decision the *en banc* court reiterated the need to decide the case *on the law*,¹²⁴ and to "[put] aside the rhetoric of Hollywood hijinks and the

¹¹⁷ Section 15 of the Canadian Copyright Act.

¹¹⁸ See for example in this regard Carpenter and Hetcher 2014 *Fordham L. Rev.* and Porter 2015 *Law School Student Scholarship* generally, who argue, *inter alia*, for the relaxation or elimination of the fixation requirement in respect of "transitory works" (i.e. works whose fixation is not of a permanent nature), including live performances, where it is further argued that the requirement is no longer relevant in the digital environment.

¹¹⁹ 743 F.3d 1258 (9th Circ. 2014). In this case the producer of a controversial film on Islam, titled *Innocence of Muslims*, had, without the appellant's knowledge, incorporated anti-Islamic content in the film by partially dubbing over and manipulating footage from an earlier film (which was never released commercially). The appellant had participated in a minor role as an actor in this film. The producer manipulated the actor's lines in this earlier film for purposes of *Innocence of Muslims*, to make her ask, "Is your Mohammed a child molester?" The appellant subsequently asked Google to take down the film from YouTube, based on the Digital Millennium Copyright Act, to no avail. She then instituted proceedings at the federal district court in California, claiming that the use of the film on YouTube "infringed her copyright in her performance" and asking for a restraining order for the removal of the film from YouTube. When the district court refused to grant the restraining order based on certain technical reasons, she appealed to the Court of Appeals.

¹²⁰ *Feist Publications, Inc. v. Rural Telephone Service Co.* 499 U.S. 340 (1991), an important US decision hailed as having "sounded the death knell for the "sweat of the brow doctrine," also known as the "industrious collection doctrine", under which "the courts moved the concept of originality, with its focus on individuality and the creative process to the background and placed renewed emphasis on labour and effort" as a basis for the subsistence of copyright. See Bitton 2011 *Fordham Intell. Prop. Media & Ent. L.J.* 615.

¹²¹ *Garcia v Google Inc.* 743 F.3d 1258 (9th Circ. 2014) at 1263.

¹²² Section 102(a)(4) of the US Copyright Act. Indeed the Berne Convention itself makes provision for the copyright protection of "choreographic works and entertainment in dumb show". Art. 2(1) of the Berne Convention, 1886 (Paris Text).

¹²³ *Garcia v Google Inc.* 771 F.3d 647 (9th Circ. 2014) (*en banc*), at para 22. The *en banc* court further curtly observed (at para 44) that "a weak copyright claim cannot justify censorship in the guise of authorship."

¹²⁴ "The central question is whether the law and facts clearly favor Garcia's claim to a copyright in her five-second acting performance as it appears in *Innocence of Muslims*." *Id* at para 78.

dissent's dramatics".¹²⁵ The law of course, as rehearsed by the court, relates to the fact that only subject-matter that constitutes a "work" is protected by copyright;¹²⁶ and further that such work has to meet the fixation requirement.¹²⁷

It is submitted that the *Levola* court would have arrived at a different decision on this matter, and that the Garcia's acting performance would, within that context, have been found to be a work eligible for copyright protection. The example of choreographic works and pantomimes, which are essentially performances, is apt here. It is for example acknowledged, within the context of the Berne Convention, that such works are protectable by copyright even where they are "diffused live by television" without having been fixed in writing.¹²⁸ A further reason why it is acknowledged that such works can be protected even if they have not been fixed in writing relates to the fact that difficulties could arise in insisting on this requirement because the acting form "is difficult to describe precisely by words".¹²⁹ In this regard it needs to be further observed that the Berne Convention does not, as such, impose the fixation requirement, leaving it to national states to determine this matter.¹³⁰ In this regard the US Supreme Court observed in *US v. Martignon*¹³¹ that "duration and fixation requirements are not identifying characteristics of copyright laws."

The notion of granting copyright protection to live performances is in fact, not an unusual one. Under US State copyright law copyright protection is, for example, granted in respect of live or improvisational performers (e.g. Jazz performers).¹³² This position has not been pre-empted by US federal copyright law, which has, since 1996, also granted protection against the unauthorised fixation of live musical performances and provides that the infringer shall be held liable "to the same extent as the infringer of copyright".¹³³ In his dissenting judgment in the *Garcia v Google (en banc)*¹³⁴ decision Kozinski, circuit judge, makes some important observations. Questioning what he perceived as inconsistencies in the majority's judgement, he observes:

Garcia's dramatic performance met all of the requirements for copyright protection: It was copyrightable subject matter, it was original and it was fixed at the moment it was recorded. ... At times, the majority says that Garcia's performance was not copyrightable at all. And at other times, it

¹²⁵ *Id* at para 47.

¹²⁶ See generally *id* at paras 79 – 91.

¹²⁷ *Id* at paras 92 – 93.

¹²⁸ WIPO *Guide to the Berne Convention* 14.

¹²⁹ *Ibid*.

¹³⁰ See art. 2(2) of the Berne Convention.

¹³¹ 492 F. 3d 140 (2d Cir. 2007), at 151.

¹³² Thus California's statute provides that "the author of any original work of authorship that is not fixed in any tangible medium of expression shall receive exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or similar work." California Civil Code 980 (a) (1) (West. Supp. 1997). This section further provides: "A work shall be considered not fixed when it is not embodied in a tangible medium of expression or when its embodiment in a tangible medium of expression is not sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration, either directly or with the aid of a machine or device."

¹³³ See s 1101 of the US Copyright Act. These are the so-called anti-bootlegging provisions. In the case of *US v. Martignon* 492 F. 3d 140 (2d Cir. 2007) however, the US Supreme Court, while affirming these provisions, held that the provisions, though provided for under the Copyright Act, did not amount to copyright law provisions. The court held that the provisions were not enacted pursuant to the Copyright Clause in the US Constitution and merely gave the performer a "limited right", vis-à-vis the bundle of rights accorded to a copyright owner. *Id* at 152.

¹³⁴ *Garcia v Google Inc.* 771 F.3d 647 (9th Circ. 2014) (en banc).

seems to say that Garcia just didn't do enough to gain a copyright in the scene. Either way, the majority is wrong In its haste to take internet service providers off the hook for infringement, the court today robs performers and other creative talent of rights Congress gave them. ...¹³⁵

Kozinski also challenges the majority's contention that Garcia's performance did not amount to a work, even though it met the minimal requirements for copyright protection, arguing that if this was the case, then Garcia's performance, which was incorporated in an earlier, unsuccessful film, could not be subjected to a copyright claim by anyone, including the film producer.¹³⁶ Kozinski, noting that Garcia did not sign any contract in which she divested herself of her rights in the performance observes: "Without a contract the parties are left with whatever rights the copyright law gives them. It's not our job to take away from performers rights Congress gave them...."¹³⁷ Kozinski also refers to the inconsistency arising from the fact that the US was a signatory to the Beijing Treaty on Audiovisual Performances¹³⁸ and that both the US Copyright and Patent Offices had affirmed that US copyright law was consistent with the treaty, observing that "[t]he Treaty would recognise Garcia's rights in her performance".¹³⁹ One of the arguments made by Google against Garcia's copyright claim in her performance was that allowing the claim would "make Swiss cheese of copyrights", i.e. it would result in the 'splintering [of a work] into many different "works," even in the absence of an independent fixation.'¹⁴⁰ In response Kozinski quips:

The answer to the "Swiss cheese" bugbear isn't for courts to limit who can acquire copyrights in order to make life simpler for producers and internet service providers. It's for the parties to allocate their rights by contract. ...¹⁴¹

It is interesting, in light of the *Levola* decision, that in the *Garcia* case Google made a light argument about making Swiss cheese of copyright "in the absence of an independent fixation", seeing that the *Levola* case was literally concerned with the taste of cheese (albeit Dutch cheese) as well as the question as to what constitutes independent fixation. As observed earlier, while the EU Court of

¹³⁵ *Id* at para 131.

¹³⁶ *Id* at para 134. The film producer had incorporated the performance in his subsequent film, *Innocence of Muslims*. What Kozinski seems to imply is that if this performance was not a work, then no copyright would subsist in it even when incorporated in the subsequent film. In contrast Kozinski argues that the performance became a work when it was fixed in the original, unsuccessful film, and that because Garcia had not signed any co-authorship agreement in respect of the film, nor had she concluded any work-for-hire agreement, she automatically became the author and copyright owner of the performance when it was thus fixed, because "nothing in the legislative history ... suggests that a non-employee doesn't retain any copyright interest in a video clip of his acting performance because it's recorded by the film's producer." *Id* at para 144. Kozinski's argument is clearly an attack on the rigid categorisation of what constitutes a work. Rather than seeing the current incident as constituting an infringement of rights in the actor's performance, Kozinski argues that because the performance itself satisfied the originality requirements and was further fixed in a film without the performer having relinquished any of her rights by contract, then the performance should have been regarded as a work of authorship belonging to the actor (Garcia). Even though the majority acknowledged that the US legislator had left the expression "works of authorship" undefined to provide for some flexibility, it insisted in the categorisation of the work as "motion picture", while Kozinski, citing authority, argued that Garcia's performance was protectable as a standalone work whose inclusion in the motion picture did not divest Garcia of her copyright claim in the work. See paras 80; 134 – 137. Following this line of argument it could thus be argued that copyright would subsist in favour of the performer where a traditional rhythmical performance is incorporated in a sound recording, distinct from the copyright in the sound recording, entitling the performer earn royalties arising from copyright (including publishing royalties) – unless the performer had contractually divested himself of such rights.

¹³⁷ *Id* at para 141.

¹³⁸ Beijing Treaty on Audiovisual Performances (2012).

¹³⁹ *Garcia v Google Inc.* 771 F.3d 647 (9th Circ. 2014) (en banc), at paras 142 – 144.

¹⁴⁰ See *id* at para 88.

¹⁴¹ *Id* at para 148.

Justice ruled that the taste of a food product cannot be classified as a work within the meaning of Directive 2001/29, this was only because it “cannot be pinned down with precision and objectivity”, seeing that it is not possible in the current state of scientific development to achieve such precision and objectivity to be able to distinguish the taste from the taste of other similar products.¹⁴² The importance of the *Levola* ruling however (which it is submitted, signals the new direction in the copyright protection of eligible subject-matter), is that (i) it did away with the strict categorisation of works in copyright law (which implies that Garcia’s performance could have been recognised as a copyright work, if it satisfied the requirements of originality); and (ii) it did away with the requirement of permanent fixation as a prerequisite for the subsistence of copyright in a work, requiring only that the work “must be expressed in a manner which makes it identifiable with sufficient precision and objectivity”¹⁴³

In concluding the matter of the subject-matter of copyright and the position of rhythmical performances it would be helpful to refer to the English Court of Appeal decision in *Sawkins v Hyperion Records Ltd.*¹⁴⁴ This case was concerned with the resurrection (restoration) of the music of the French court composer Lalande (1657 – 1726) which was long in the public domain, through the making of “performing editions” of the work, rather than through the arrangement or rearrangement of the music by, for example, adding significantly to the melody of the music.¹⁴⁵ Dr Sawkins, a musicological scholar, had instead spent some 3000 hours preparing the performing editions, which involved gathering surviving manuscripts and prints; choosing the most appropriate version to use; inserting missing material; adding figuring to a bass; adding a new figured bass; recording missing bars etc. The question was whether Dr Sawkins’ performing editions amounted to a musical work as contemplated in UK copyright legislation. That is, the question was

whether a musical work includes items such as the figuring of the bass, ornamentations and performance directions or is really limited for copyright purposes to the notes on the score, so that in the case of an existing work nothing less than significant rearrangement of, or significant additions to the melody will create copyright in the edition of a musical work.¹⁴⁶

Traditionally a copyright work based on an existing work (including a public domain work) would take the form of an adaptation or arrangement.¹⁴⁷ Copyright subsists in the adapted work, distinctly from the copyright in the main work, if the adapted work complies with the requirements for the subsistence of copyright (i.e. originality and, currently, fixation). In the *Sawkins* case Hyperion argued that Dr Sawkins had merely exacted scholarly exertions on the notation of the scores, as well as including performing indications and directions, but *failed to compose or recompose new*

¹⁴² *Levola Hengelo BV v Smilde Foods BV* [2018] EUECJ C-310/17 (13 Nov. 2018) at paras 42 – 44.

¹⁴³ *Id* at para 40.

¹⁴⁴ [2005] EWCA Civ 565.

¹⁴⁵ See *id* at para 51.

¹⁴⁶ Mummery LJ, *id* at para 51, quoting Patten J in the court *a quo*.

¹⁴⁷ Under the Copyright Act 1978 the copyright owner’s exclusive right to make or authorise the making of an adaptation of a literary or musical work in which copyright subsists is provided for in s 6(f) of the Act.

notes of music, as in a musical adaptation or arrangement.¹⁴⁸ In essence Hyperion contended that “unless the edition includes the composition of new music in the form of the notes on the score (and not merely the correction of wrong or unsatisfactory notes in the scores used) then no copyright would exist in the edition as a musical work.”¹⁴⁹

The court of appeal deemed Hyperion’s contention as giving rise to a *restrictive approach* to the definition of a “musical work” and as resting on an unduly narrow view of what constitutes music for purposes of copyright.¹⁵⁰ The court then set out to elaborate on how the expressions “music” and “creation” of music’ should be understood, and observed:

... [T]he fallacies in Hyperion’s arguments are that (a) *they only treat the actual notes in the score as music* and (b) they approach the issue of subsistence from the wrong direction by dividing the whole of the performing edition into separate segments and by then discarding particular segments on the basis that they are not music and not therefore covered by copyright.¹⁵¹

The court then emphasised that the question whether copyright subsists in a work involves an assessment of the whole work.¹⁵² It is submitted that in uttering these words the *Sawkins* court introduced a revolutionary approach to the question of what constitutes a musical work – one that is diametrically opposed to the earlier US decision of *Northern Music Corp.*, where it was succinctly asserted that “[i]t is in the melody of the composition or the arrangement of notes or tones that originality must be found.”¹⁵³ The *Sawkins* court then elaborated further on the matter by finding that *the essence of music* is the combination of sounds for listening to – intended to produce effects of some kind on the listener’s emotions and intellect, and that “in musical copyright the sounds are more important than the notes”.¹⁵⁴ The essence of music is thus the combining of sounds to produce a pleasing effect to the ear, and “not ... mere noise”.¹⁵⁵ In this regard the observations of Arnold are also important:

As is notorious, what is music to some is mere noise to others, particularly if there is a generational difference. The question is essentially a functional one: if sounds are presented *and consumed as music*, that is to say, for aural enjoyment, then they are music.¹⁵⁶

What is important is therefore for subject-matter to qualify as music is that sounds have been combined with the intention that they should be listened to and enjoyed, and if so listened to and enjoyed, then they are music, despite the fact that others may deem them mere noise. This, it is submitted, would apply equally to traditional African rhythmical performances. Although others may

¹⁴⁸ *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565 at para 44.

¹⁴⁹ Mummery LJ *id* at para 48, quoting Patten J in the court *a quo*.

¹⁵⁰ *Id* at para 50.

¹⁵¹ *Id* at paras 49; 52. Emphasis added.

¹⁵² *Id* at para 49.

¹⁵³ *Northern Music Corp. v King Record Distribution Co.*, 105 F. Supp. 393 (S.D.N.Y. 1952) at 400.

¹⁵⁴ *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565 at paras 53 and 54. The court elaborated on this latter assertion by observing that in infringement cases, “[t]he test of substantial reproduction is not a note-by-note textual comparison of the scores. It involves listening to and comparing the sounds of the copyright work and of the infringing work. So it is possible to infringe the copyright in a musical work without taking the actual notes.” *Id* at para 54.

¹⁵⁵ *Id* at para 53. See also Arnold 2009 *Oxford Seminar 2*.

¹⁵⁶ Arnold *ibid*. Emphasis added.

deem them to be mere noise because of their non-conformity to the Western system of harmonic tonality, they are, in fact, combined together and intended for aural enjoyment by their listeners – and are thus received by the listeners. In this regard as observed above when considering the centrality of the “ngoma” in traditional African entertainment, rhythmical performance represents “[a]n African conceptual framework for music”; which entails “an active process of experiencing drumming, playing drums, or dancing to drums ...” and constitutes “a method of making music [as well as] the experience of music itself”.¹⁵⁷

From the *Sawkins* ruling, it is clear that notes, or melody, are but only a component of the sound that constitutes music, with the court observing:

... The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it. Music must be distinguished from the fact and form of its fixation as a record of a musical composition. The score is the traditional and convenient form of fixation of the music and conforms to the requirement that a copyright work must be recorded in some material form. *But the fixation in the written score or on a record is not in itself the music in which copyright subsists.* There is no reason why, for example, a recording of a person's spontaneous singing, whistling or humming or of *improvisations of sounds* by a group of people with or without musical instruments should not be regarded as "music" for copyright purposes. ...

It is wrong in principle to single out the notes as uniquely significant for copyright purposes and to proceed to deny copyright to the other elements *that make some contribution to the sound of the music when performed*, such as performing indications, tempo and performance practice indicators, if they are the product of a person's effort, skill and time, bearing in mind, of course, the "relatively modest" level ... of the threshold for a work to qualify for protection. ...¹⁵⁸

From the above observation of the court one has therefore to conclude that it is possible to have “music” even if the sounds thereof are comprised only of rhythmical performances and devoid of or featuring less notes and melody, provided that such performances satisfy the requirement of originality.¹⁵⁹ The court’s recognition of rhythmical elements as being eligible for consideration when determining if subject-matter amounts to music is consistent with Waadeland’s study of rhythmical performance (or rhythmic performance).¹⁶⁰ Waadeland shows that rhythm contains important [creative] properties in the ultimate expression of music (e.g. making a musical performance *swing*). This happens when “the performing musician [gives] “life” to the rhythm through a process by which (more or less) conceptualized structural properties of rhythm are *transformed* into live performances of rhythm.”¹⁶¹ One of the ways in which rhythm achieves this is that it gives rise to “musical *styles* of

¹⁵⁷ See supra n 101.

¹⁵⁸ *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565 at paras 53 and 56.

¹⁵⁹ This is not to suggest that African music is devoid of melodic elements. African *singing* does indeed depict deep tonality, e.g. in the pentatonic scale. See <https://www.britannica.com/art/pentatonic-scale> (date of use: 08 January 2019). The writer is here concerned with African rhythmical performances.

¹⁶⁰ Waadeland 2000 *ICMPC* <https://www.escom.org/proceedings/ICMPC2000/Sun/Waadelan.htm> (date of use: 08 January 2018).

¹⁶¹ *Ibid.*

performance, and contribute[s] in fundamental ways to a communication of motional and emotional musical qualities from the performer to the listener and within the group of performing musicians.”¹⁶²

Consequently, as the *Sawkins* court has held, rhythmical or performance elements should not be excluded in the consideration of what constitutes music. This is particularly significant in the South African scenario, where the Constitutional Court has ruled that matters of intellectual property (and copyright in particular) must “be understood through the prism of the Constitution”.¹⁶³ It is submitted that the exclusion of rhythmical performances, including those of a live nature, from copyright protection as a result of the rigid categorisation of what constitutes works eligible for copyright protection and the fixation requirement, would be at odds with certain constitutional protections. It needs to be acknowledged that the artistic creativity protected by the freedom of artistic creativity in s 16(1)(c) of the Constitution would generally be categorised as intellectual *property*. This it is submitted, includes traditional forms of artistic creativity. As is common cause, intellectual property is protected as a property right under s 25 of the Constitution.¹⁶⁴ In order not to “[deprive] the right of any usefulness”,¹⁶⁵ intellectual property in the form of traditional, rhythm-based music should not be excluded from copyright protection based on the strict categorisation of works and the fixation requirement.

Further to the above, depriving traditional forms of entertainment from copyright protection because they do not fall within the recognised categorisation of works, and because of the fixation requirement would, it is submitted, also infringe the right of equality of the originators of such entertainment. Section 9(1) of the Constitution provides that “*everyone* is equal before the law [including the law of copyright] and has the right to *equal protection and benefit of the law* [thus not only receiving the lesser protection of the neighbouring rights system]”.¹⁶⁶ Section 9(3) provides that the state “may not unfairly discriminate directly or indirectly against anyone on one or more grounds, *including ... ethnic or social origin ...*”¹⁶⁷ From this perspective the law cannot, in according copyright protection to musical works, favour the Western conception of music to the detriment of its African conception. Rather than compelling African creators to conform their music creation practices to Western compositional norms in order for such music to be eligible for copyright protection, the law should instead recognise African music creation practices in their own right, as long as there has been a combination of sounds for listening to, intended for and appreciated by an audience, as

¹⁶² Ibid.

¹⁶³ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC), at para 43; *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81, at paras 106 - 108.

¹⁶⁴ This has been understood to be the position since the *Laugh it Off* case *ibid*. See also the earlier ruling of the Supreme Court of Appeals in the same matter, *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2005 (2) SA 46 (SCA), at paras 10 – 11. Subsequent rulings have confirmed this position. See *National Soccer League v Gidani (Pty) Ltd* [2014] 2 All SA 461 (GJ), para 105; *Moneyweb (Pty) Limited v Media 24 Limited and Another* *ibid*.

¹⁶⁵ See Currie and De Waal *Bill of Rights Handbook* 537.

¹⁶⁶ Emphasis added.

¹⁶⁷ Emphasis added.

observed in the *Sawkins* case.¹⁶⁸ This, it is submitted, would be consonant with the Constitutional imperative.

It is acknowledged that others, like Dean and Karjiker, may find this expansive interpretation of the Constitution to be unjustified, instead holding the view that “the protection granted to intellectual property by [section 25 of the Constitution] is of a very limited ambit”, confined essentially to “the taking away of *existing* property” and “[placing] no obligation on the state to continue facilitating the creation of intellectual property in the future.”¹⁶⁹ However the same authors acknowledge the international law roots of intellectual property and the fact that, in terms of s 39(1) of the Constitution, when interpreting the Bill of Rights a court must have regard to international law and may consider foreign law.¹⁷⁰ In this regard it needs to be observed, as highlighted above, that the Berne Convention, to which South Africa is a signatory, does not impose a rigid categorisation of works eligible for copyright protection, nor does it dictate that a work must be fixed in material form for it to attain copyright protection.¹⁷¹ In addition foreign law, in particular the *Levola* decision discussed in this chapter, is increasingly following a trend where the strict categorisation of works eligible for copyright protection and the fixation requirement are “not identifying characteristics of copyright laws.”¹⁷² Finally, the categorisation requirement has also been criticised for not being consistently adhered to.¹⁷³

5.4 The requirements for the subsistence of copyright

The fact that a work is capable of qualifying as a subject-matter of copyright does not *per se* imply that such work would be capable of being vested with copyright, as certain requirements or conditions need to be complied with first. In dealing with the question of the requirements for the subsistence of copyright in a work some have distinguished between so-called *inherent* requirements and *formal* requirements.¹⁷⁴ We shall, in line with such convention, also make a similar distinction. It also needs to be noted that, unlike other forms of intellectual property rights such as patents and trademarks, copyright law does not require any formalities (such as registration) prior to copyright subsisting in a work.¹⁷⁵

¹⁶⁸ *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565 at paras 53, discussed above.

¹⁶⁹ Dean and Karjiker *Handbook of Copyright Law* 1-4A. Emphasis added.

¹⁷⁰ *Id* at 1-3.

¹⁷¹ See n 130 *supra*.

¹⁷² *US v. Martignon* 492 F. 3d 140 (2d Cir. 2007), at 151, in respect of duration and fixation.

¹⁷³ Derclaye 2014 *Revue Internationale du Droit d'auteur* <http://eprints.nottingham.ac.uk/3613/> 3, commenting on the inconsistencies in the categorisation requirement in UK law, observes: “First, even if the categories are supposed to be waterproof, because of bad drafting, some are not. Thus a single effort can be at the same time a literary and an artistic work. Second, judges have also made one category of ‘entrepreneurial works’ (film) overlap with one category of ‘creative works’ (dramatic work). It may appear pedantic or purely cosmetic to the non-expert but it is not, because in UK law, the category in which a work falls determines its regime, so not only its duration (like in civil law countries) but also the rights and exceptions attached to it.”

¹⁷⁴ See Visser (ed) *Mercantile & Company Law* 710 – 712; Jansen 2005 CILSA 345; Havenga (gen. ed.) *Commercial Law* 267 - 268. Klopper *et al* speak about *inherent features* and *external circumstances*. Klopper *et al* *Law of Intellectual Property* at 161. Still Copeling *Copyright and the Act of 1978* 14 speaks about common law and statutory requirements. On the other hand Dean and Karjiker *Handbook of Copyright Law* 1-21 – 1-130 refer to “general” and “specific” requirements.

¹⁷⁵ This requirement of copyright law arises internationally from the Berne Convention, which enjoins its member states not to impose any formalities for the enjoyment and exercise of copyright (Article 5(2) of the Paris text of the Convention). It

5.4.1 Inherent requirements

Two inherent requirements exist in relation to the subsistence of copyright, namely the fact that the work needs to be original (originality), and the fact that it needs to be embodied in a material form (material embodiment, or the requirement of *fixation*, as discussed above).¹⁷⁶ It was indicated above that often the consideration of the requirement of originality is intertwined with a consideration of whether the subject-matter under consideration amounts to a work. It is however important to consider closely what amounts to originality in copyright law.

5.4.1.1 Originality

Section 2(1) of the Copyright Act identifies certain works¹⁷⁷ as being eligible for copyright, “if they are original”. The Act does not however, define the meaning of originality.¹⁷⁸ It has therefore been left to the courts to define what originality entails. This was succinctly dealt with by Corbett CJ in *Appleton & Another v Harnischfeger Corporation & Another*,¹⁷⁹ where the honourable judge had this to say:

Originality in this context does not require that the work should embody a new or inventive thought or should express a thought in a new way or inventive form. Originality refers to original skill or labour in execution: it demands that the work should emanate from the author himself and not be copied. This does not mean that a work will be regarded as original only where it is made without reference to existing subject-matter. An author may make use of existing material and yet achieve originality in respect of the work which he produces. In that event the produced work must be more than a slavish copy: it must in some measure be due to the application of the author's own skill or labour. Precisely how much skill or labour he need contribute will depend upon the facts of each particular case.

From the foregoing it is clear that originality entails the following:

may be worth mentioning that prior to its accession to the Berne Convention in 1989 the United States, having been a signatory of the Universal Copyright Treaty (which does require formalities), had a requirement for a copyright notice to be placed on works that underwent a general publication. Failure to have such a notice resulted in a work being “immediately and irreversibly divested ... of copyright protection”. Although this requirement is no longer applicable since 1 March 1989, it has been strongly suggested that US copyright owners continue to make use of the copyright notice as its use “precludes the ability of a defendant to mitigate damages pursuant to an innocent infringement defense.” See Lind *Copyright Law*, especially at 119 – 125. In South Africa a voluntary but commendable registration system exists in respect of cinematograph films in terms of the Registration of Copyright in Cinematograph Films Act 62 of 1977.

¹⁷⁶ It will be noticed that in the EU case of *Levola* discussed above, “expression” is treated as a separate requirement for the subsistence of copyright and not as part of the requirement of originality as is the case in South African copyright law. See n 84 supra. This is similar to the approach used in the United States. Under the US law, the treatment of expression as a separate requirement for the subsistence of copyright relates to the emphasis of the fact that it is the author's original expression of ideas, and not the ideas themselves, albeit totally original, that constitute a copyright work. See in this regard Moser and Slay *Music Copyright Law* 27. In this regard reference has been made to the “spectrum ranging from the clearly unprotected abstract idea to the literal expression constituting the work as a whole”, where the objective is “to determine where, on that spectrum, the material allegedly taken lies.” Halpern *Copyright Law* 51. In the traditional English provision, which is the position applicable in South Africa, considerations of expression are taken into account when addressing the originality requirement, where the position is that it is the relevant form of expression that is protected but this “does not prevent use of the information, thoughts or emotions expressed in the copyright work”. Garnett, Davies and Harbottle *Copinger and Skone James* 140.

¹⁷⁷ Literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, programme-signals, published editions and computer programs.

¹⁷⁸ Copeling *Copyright and the Act of 1978* 14, in dealing with the “common law” requirements for the subsistence of copyright (in which he includes the requirements of *propriety* and originality), states that these requirements are so-called “because they are universally regarded as copyright requirements whether or not specified as such in the act itself.”

¹⁷⁹ *Appleton & Another v Harnischfeger Corporation & Another* 1995 (2) SA 247 (A) at 262. Emphasis added. See also *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 22H-23B.

(i) *The work does not have to be a vehicle of new or inventive thought or express a thought in a new or inventive form*

This position is to be contrasted with the position applicable to patents, where an invention is required to be new in order to be patentable.¹⁸⁰ In the case of copyright it is merely required that the work must emanate from the author himself and not be a copy of another work.¹⁸¹ This is particularly relevant in the case of music copyright where, it has been observed, there is a limited number of musical notes.¹⁸² Thus where the effort of two authors working independently of each other produces an identical work, the requirement of originality would have been satisfied and copyright will subsist in each of the works.¹⁸³ In this regard the words of Jerome Frank in a decision of the US Appeals Court for the Second Circuit are apt:

Original in reference to a copyright work means that the particular work owes its origin to the author. No large measure of novelty is required. ... All that is needed ... is that the author contributed something more than a merely trivial variation, something recognizably his own, Originality in this context means little more than a prohibition of actual copying.¹⁸⁴

Relying on this decision Robert S. Lasnik held in the case of *ZZ Top v. Chrysler Corp.*¹⁸⁵ that the use by the defendant of the guitar riff in the plaintiff's song, *La Grange*, amounted to an infringement of the copyright in the song despite the fact that the guitar riff was similar to those used in prior musical works. The court found that the defendant, in contesting the claim of copyright infringement, had only focussed on the guitar riff and not considered other aspects of the song; and further that it had not 'objectively analysed the various riffs to show that the "idea" and objective characteristics of *La Grange's* guitar riff are not original".¹⁸⁶ In conclusion the court found that the song *La Grange* and its guitar riff was something recognisably attributable to the plaintiff and that the plaintiff had contributed more than a merely trivial variation "to the common idea of a guitar riff", thus finding the defendant liable for infringing the plaintiff's valid copyright.¹⁸⁷

¹⁸⁰ See section 25(1) of the Patents Act 57 of 1978 (as amended).

¹⁸¹ See De Kock J in *Kalamazoo Division (Pty) Ltd v Gay* 1978 (2) SA 184 (C), at 1190, where he held: "What is required is not that the expression of thought must be in an original and novel form, but that the work must emanate from the author himself and not be copied from another work." This is in line with the ruling of Lord Pearce in the English decision of *Ladbroke v William Hill (Ltd)* (1964) (1) All ER 465 (HL), at 479 – 480. See also, *inter alia*, *University of London Press Ltd v University Tutorial Press Ltd* 1916 2 Ch 601; *Cavendish Textiles Ltd v Manmark (Pty) Ltd* 115 JOC (T) and *Topka t/a Topring Manufacturing & Engineering v Ehrenberg Engineering (Pty) Ltd* 71 JOC for a further elaboration of this.

¹⁸² See Macdonagh 2012 *International Review of Intellectual Property and Competition Law* 409 – 410. See also Learned Hand observing in the US decision of *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 (2d Cir. 1940): "It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing, and much fewer still suit the infantile demands of the popular ear." See also *Bridgeport Music, Inc. v Dimension Films*, 401 F. 3d 647, 653 (6th Cir. 2004), where similar observations are made.

¹⁸³ See Copeling *Copyright and the Act of 1978* 15. See also *University of London Press Ltd v University Tutorial Press Ltd* *ibid.*

¹⁸⁴ *Alfred Bell & Co. v. Canada Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) 102 – 103.

¹⁸⁵ 54 F. Supp. 2d 983 (W.D. Wa. 1999).

¹⁸⁶ *Id* at paras 3 – 5.

¹⁸⁷ *Id* at para 6.

It needs to be noted however that, even though the standard of originality has been said to be low,¹⁸⁸ originality must be determined from the perspective of the work as a whole, and not elements of the work.¹⁸⁹ In this regard it has been said that the author of a work cannot cherry-pick features or extractions of the work that should satisfy the originality requirement or be seen as constituting “the material copyright work”.¹⁹⁰ Thus where the claimant identified three features in a song as constituting the musical work itself and as being the part that the defendant had infringed, the court held that these features “[could] not, by any stretch of the imagination be said to be sufficiently separable from the remainder of the song as themselves to constitute a musical work.”¹⁹¹ The court then held succinctly:

What the copyright work is in any given case is not governed by what the claimant alleging copyright infringement chooses to say that it is. Rather, it is a matter for objective determination by the court.¹⁹²

(ii) *Originality refers to original skill or labour in execution*

This requirement was confirmed by Streicher JA in *Haupt v Brewers Marketing Intelligence (Pty) Ltd*,¹⁹³ where the honourable judge remarked,

... a work is considered to be original if it has not been copied from an existing source and if its production required a substantial (or not trivial) degree of skill, judgment or labour.

¹⁸⁸ See Dean and Karjiker *Handbook of Copyright Law* 1-23 and the sources cited therein. Note however Torremans *Intellectual Property Law* (2013) 199, who suggests that after the *Infopaq* case (see below at n 189) a “somewhat higher level of originality” may be required in the European Union, thus affecting the UK position.

¹⁸⁹ See *Biotech Laboratories (Pty) Ltd v Beecham Group PLC* 2002 (4) SA 249 (SCA) at 257H, para 8; confirmed in *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81, at para 16. This position is well recognised internationally - see Vaver *Principles of Copyright* 33; and can be traced to the ruling of Lord Pearce in *Ladbroke v William Hill (Ltd)* (1964) (1) All ER 465 (HL) at 479, where he observed: “In deciding ... whether a work ... is original, it is wrong to start by considering individual parts of it apart from the whole”, indicating with specific reference to compilation works that while many compilations “have nothing original in their parts ... the sum total of the compilation may be original.” See also *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565 at para 49, where it was held: “It is wrong to make [the] assessment [of whether copyright subsists or not] by dissecting the whole into separate parts and then submitting that there is no copyright in the parts.” However it has been recognised that in considering whether a work is original or not it may then be found that certain parts of the work are not original, as in the case of so-called “partially-original” works, in which case copyright shall only subsist in such parts. See in this regard Dean and Karjiker *South African Copyright Law* 1-23. Compare however *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] E.C.R. I-06569, a judgment of the European Court of Justice, where it was held (at para 38): “As regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/29 or any relevant directive indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, *they share the originality of the work.*” Emphasis added.

¹⁹⁰ See the judgment of Blackburne J in *Coffey v Warner / Chappell Music Ltd* [2006] E.M.L.R. 2 at para 11. The court further relied on the judgment of Laddie J in *IPC Media Ltd v Highbury Leisure Publishing Ltd* [2004] EWHC 2985 (Ch), at para 8, where the honourable judge warned about “the possibility of being misled by what may be called *similarity by excision*”, where the claimant may chip away and ignore “all the bits which are undoubtedly not copies”, in order to create the illusion of copying in what is left. *Id* at para 9. The converse is also true, where the dissected parts, standing alone, may be seen as not constituting a copy, while if, in the case of music, they are seen from the perspective of the whole work, they may be proven to affect “the totality of the sound produced by the musicians.” *Sawkins* *ibid*.

¹⁹¹ *Coffey* *id* at para 12. In this case the court had in fact also found that the features relied upon by the plaintiff, namely the vocal expression, pitch contour and syncopation, “[appertained] to interpretation or performance characteristics by the performer, which *is not the legitimate subject of copyright in the case of a musical work*”. *Id* at para 6. Emphasis added. For which contrast the discussion supra in respect of the subject-matter of copyright. That discussion was concerned with the recognition of rhythmical performances as a form of musical expression, and not with melodic performance. The writer is thus in agreement with the *Coffey* court’s observations with regard to vocal expression, pitch contour and syncopation appertaining to performance and thus not being eligible for copyright protection.

¹⁹² *Id* at para 10.

¹⁹³ 2006 (4) SA 458 (A) at 60.

The expression “skill, judgment or labour” is generally known as the “sweat of the brow” (or “pure industriousness”) doctrine. In *Moneyweb (Pty) Limited v Media 24 Limited and Another* it was contended by counsel for the respondents that the “sweat of the brow” approach is no longer a test for originality in our law.¹⁹⁴ The court however refuted this contention, observing that such a conception arises from the imprecise nature of the expression “sweat of the brow” and its propensity for being misunderstood. Affirming the continuing application of the doctrine in our law the court then observed:

Our law still regards the time and effort spent by the author as a material consideration in determining originality. But the time and effort spent must involve more than a mechanical, or slavish, copying of the existing material. In other words, there must be sufficient application of the author’s mind to produce a work that can be judged to be “original”. ...¹⁹⁵

In this regard it has been noted that whether a work is original is a question of degree depending on the facts placed before the court with regard to the amount of skill, judgment or labour involved in making the work.¹⁹⁶ Accordingly it has been held that the resultant work does not need to be “unprecedented”.¹⁹⁷ In this regard the requirement of skill, judgment or labour must be contrasted from the requirement of creativity or “creative spark” applicable in American law.¹⁹⁸ In the *Haupt* case¹⁹⁹ Streicher JA countered the submission by the respondents, on authority of American case law (and its acceptance by the court *a quo*), that a “minimal degree of creativity” was required to satisfy the requirement of originality. In this case the judge, finding support in Canadian case law,²⁰⁰ held that because English copyright law, from which both South African and Canadian copyright law originate, does not require creativity to make a work original, the same position obtains with regard to South African copyright law.²⁰¹ In this regard it has been observed that “[w]hile creative works will

¹⁹⁴ *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81, at para 11.

¹⁹⁵ *Id* at para 15.

¹⁹⁶ See Dean and Karjiker *Handbook of Copyright Law* 1-21. See also *Waylite Diary CC v First National Bank Ltd* 1995 (1) SA 645 (A) at 538 – 539 [JOC], where it was held that while time and effort (labour) are a material factor in determining originality, whether such time or effort produces something original is a value judgment. Also *Moneyweb* *ibid* where it was observed: “A court will only be able to determine originality after it has weighed up all relevant considerations and made a value judgment.”

¹⁹⁷ Laddie, Prescott and Vitoria *Modern Law of Copyright* 84.

¹⁹⁸ For the position on American law see Halpern *Copyright Law* 19 – 20, where it is indicated that a creative spark, “no matter how crude, humble or obvious” it is, is required, and that a work under US law ‘must not only be “independently created by the author,” but must also possess “at least some minimal degree of creativity”. In *Baltimore Orioles v. Major League Baseball Players*, 805 F.2d 663 (7th Cir. 1986) it was held that “[a] work is creative if it embodies some modest amount of intellectual labor.”

¹⁹⁹ *Haupt v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (A).

²⁰⁰ While highlighting the differences that do exist between Canadian law and South African, English and Australian law, particularly with regard to the contention in Canadian law that “[t]he “sweat of the brow” approach to originality is too low a standard.” The Canadian case referred to is *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339, and the quotation is from para 24 of the case.

²⁰¹ In *CCH Canadian Ltd* *ibid* the court observed: “... [T]he creativity standard of originality is too high. A creativity standard implies that something must be novel or non-obvious — concepts more properly associated with patent law than copyright law. ...” Whatever the case, there should be agreement about the fact that, whether in respect of the US creativity standard, the EU independent creation standard, the “sweat of the brow” doctrine, or its modified “skill and judgment” version as applicable in Canada, the legal concept of originality for purposes of copyright law does not imply or require artistic originality, as observed in the US 7th circuit decision of *Gracen v. Bradford Exchange*, 698 F.2d 300 (7th Cir. 1983).

by definition be “original” and covered by copyright, creativity is not required to make a work “original”.²⁰²

Pursuant to the foregoing it has been observed that “little originality is required of a person's contribution to a piece of music in order to attract copyright in the altered work which results”, so that copyright can subsist in a mere “straightforward arrangement of a well known song employing for the purpose well known musical devices and clichés.”²⁰³ We find in this regard “very borderline” cases of works that “only just” succeed in meeting the requirements of originality.²⁰⁴ Notwithstanding the foregoing, it needs to be observed that the Copyright Amendment Bill 2017 (version B13B-2017),²⁰⁵ that has recently been passed by both houses of Parliament and awaits the signature of the President,²⁰⁶ has introduced several concepts and principles arising from American copyright law.²⁰⁷ With these introductions, if the Bill becomes law it is conceivable that South African copyright law may in future experience greater influence from American copyright law, including with regard to its conception of the originality requirement.

Even where South African copyright law continues to follow UK law, it needs to be noted that the *Infopaq* ruling²⁰⁸ of the EU Court of Justice is generally considered to have shifted the traditional view of originality applicable in UK copyright law, as stated in the *University of London Press* case,²⁰⁹ namely the “skill, judgment or labour” criterion.²¹⁰ It has been said that the *Infopaq* decision has in effect harmonised EU copyright law, where originality and work are now understood as referring to “subject-matter which is original *in the sense that it is its author's own intellectual creation*”.²¹¹ Prior to this the UK only applied the “intellectual creation” criterion in respect of databases in order to comply with the EU *acquis*, with the result that the UK did not therefore apply a single test of originality.²¹² The *intellectual creation* criterion espoused in the *Infopaq* ruling has been held to have raised the bar in respect of the traditional originality requirement applicable to UK

²⁰² *CCH Canadian Ltd id* at para 25.

²⁰³ *Godfrey v Lees* [1995] EMLR 307, at 326.

²⁰⁴ Thus a piano accompaniment to a largely finished song, which was of a straightforward and largely-repetitive nature, was held to be sufficient to qualify the contributor as a joint author of the song. See *Godfrey v Lees id* at 328, where the court observed: “Although the accompaniment is of a straightforward and largely repetitive nature, to my ear it forms a feature and, where it is clearly audible ... a significant feature of the recording ... sufficient but only just to qualify [the plaintiff] as a joint author of the work ...”

²⁰⁵ For a further discussion of this see Chapter 7 *infra*.

²⁰⁶ Available at <https://pmg.org.za/bill/705/> (date of use: 04 July 2019).

²⁰⁷ See the discussion in Chapter 7 *infra*.

²⁰⁸ *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] E.C.R. I-06569.

²⁰⁹ *University of London Press Ltd v University Tutorial Press Ltd* 1916 2 Ch 601, at 608 – 609; cited in *Ladbroke v William Hill Ltd* (1964) (1) All ER 465 (HL).

²¹⁰ See Derclaye 2010 *European Intellectual Property Review*; Derclaye 2014 *Revue Internationale du Droit d'auteur* <http://eprints.nottingham.ac.uk/3613/> (date of use: 09 January 2019).

²¹¹ See *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] E.C.R. I-06569, at para 37. This position was confirmed in *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* (C-393/09) [2010] ECR I-13971, para 45, and *Football Association Premier League v. QC Leisure and Karen Murphy v Media Protection Services* (C-403/08 and C-429/08) [2012] F.S.R. 1, paras 96 – 98. This position has also been recently upheld in the *Levola Hengelo BV v Smilde Foods BV* [2018] EUJECJ C-310/17 (13 Nov. 2018) case.

²¹² Derclaye 2014 *Revue Internationale du Droit d'auteur* <http://eprints.nottingham.ac.uk/3613/> (date of use: 09 January 2019), at 4. As Derclaye observes, the UK was in fact required to apply the “intellectual creation” criterion in respect of photographs, computer programmes and databases, but only applied it in respect of databases. The *Infopaq* decision changed the position by harmonising EU law with regard to this question. See Synodinou “The Foundations of the Concept of Work” 93 – 113, in Synodinou (ed) *Codification of European Copyright*.

copyright law.²¹³ Thus in the EU Court of Justice judgment of *Football Dataco*²¹⁴ the following was observed:

29. Under Article 3(1) of Directive 96/9, 'databases' within the meaning of Article 1(2) of that directive are protected by copyright if, by reason of the selection or arrangement of their contents, they constitute the author's own intellectual creation. ...

37. ... [A]s is apparent from recital 16 of Directive 96/9, *the notion of the author's own intellectual creation refers to the criterion of originality* ...

38. As regards the setting up of a database, that criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, *its author expresses his creative ability in an original manner by making free and creative choices* ...

42. ... [T]he fact that the setting up of the database required, irrespective of the creation of the data which it contains, significant labour and skill of its author, as mentioned in section (c) of that same question, cannot as such justify the protection of it by copyright under Directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of that data.²¹⁵

A consideration of the above observations would confirm the view that the independent creation criterion espoused in the *Infopaq* case did indeed raise the standard with regard to the originality requirement in EU (and thus UK) copyright law. Nevertheless the standard does not require "adding important significance" to existing material.²¹⁶ In this regard it has been observed that the difference between the European approach to originality, compared to the traditional British approach may be "very small or non-existent", so that "*Infopaq* may therefore be a mere confirmation of a somewhat higher level of originality being required."²¹⁷ It has nevertheless been further observed that this *does* mean that certain works will no longer be eligible for copyright protection in the UK and that "copyright can no longer be used as a stop-gap solution to protect these works".²¹⁸ Derclaye however expresses the opinion that the *Infopaq* decision merely highlights the fact that "creativity is the criterion of originality", and that this would not affect the status of musical works because generally most, if not all musical works can be described as "creative".²¹⁹

²¹³ See Derclaye *Legal Protection of Databases* 159 – 162; 174 – 190, asserting that the *sui generis* right in respect of databases applicable in the UK in order to implement EU law (i.e. Directive 96/9/EC, also known as the "Database Directive"), entailed a higher standard meant to replace the UK sweat of the brow standard. See also Torremans *Intellectual Property* (2016) 199 arguing, conversely, that the fact that under the *Infopaq* decision originality is considered in respect of both the work as a whole and the separate parts of the work means that this decision has now broadened the scope of copyright so that "[o]ur limitations and exceptions may now become too narrow and copyright owners may get an unduly broad protection".

²¹⁴ *Football Dataco Ltd & Others v Yahoo! UK Ltd & Others* (C-604/10) 2012 (ECJ).

²¹⁵ *Id* at paras 29, 37, 38 and 42.

²¹⁶ See *Football Dataco Ltd & Others v Yahoo! UK Ltd & Others* (C-604/10) 2012 (ECJ) at para 41.

²¹⁷ Torremans *Intellectual Property* (2016) 199.

²¹⁸ *Ibid.* The *Infopaq* standard was applied in the UK decision of *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch); affirmed [2011] EWCA Civ 890. In this case it was held that any historical analysis of the English law of copyright was "overtaken by the decision of the ECJ in **Infopaq**". The court went further to observe (at para 87): "The effect of **Infopaq** is that even a very small part of the original may be protected by copyright if it demonstrates the stamp of individuality reflective of the creation of the author or authors of the article. ... Is there merely a commonplace arrangement of unoriginal words ... ? Or has substantial use been made of the skill and labour which went into the creation of the original work? ..."

²¹⁹ Derclaye 2010 *European Intellectual Property Review* 248 – 249.

(iii) *A work can be deemed original even where existing subject-matter is used*

As indicated above,²²⁰ a work shall be considered to have satisfied the requirement of originality even if it is identical to another work, provided that the author of each of the works produced the work independently of the other. It should further be noted that the requirement that a work must not be copied does not imply that the work needs to be made without reference to existing subject-matter. As Copeling has noted, if this were the case, “the great majority of works would be denied the benefit of copyright protection.”²²¹ It is suggested that this would even be more applicable to music copyright, where, as observed earlier, “we live in a musical era marked by covers, musical sampling, and dubiously similar songs”,²²² and where historically composers “have drawn heavily” from folk music and current popular music, and “borrow directly” from one another.²²³ Consequently where an author uses existing subject-matter in creating his work, the requirement for originality would still be satisfied if the work is, “in some measure ... due to the application of the author’s own skill or labour” and not a mere slavish copy of the existing work.²²⁴ In this regard the author is required to expend sufficient skill or labour as to impart to his work some quality or character *not existing in the material he is using*, thus substantially distinguishing his work from the existing material.²²⁵

What was said above applies generally to works that draw from existing subject-matter in which copyright does not subsist (e.g. songs that are in the public domain). However, questions of originality often arise in cases where an alleged infringement of the copyright in a work in which copyright subsists, is made.²²⁶ What is the position where a work is based on existing subject-matter in which copyright subsists (i.e. infringing works)? Section 2(3) of the Copyright Act deals with this issue, providing that “[a] work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.” Thus in the *Haupt* case²²⁷ Streicher JA held that where an improved work satisfies the requirement for originality, i.e. where the improvement or refinement of a work in which copyright subsists is “not superficial”, and where the alteration to the original work is substantial,

²²⁰ Par. 6.4.1.1(i) supra.

²²¹ Copeling *Copyright and the Act of 1978* 15.

²²² Castanaro 2008 *Fordham Intell. Prop. Media & Ent. L.J.* 1272

²²³ Keyt 1988 *Cal.L.Rev.* Vol. 76(2) 424.

²²⁴ Copeling *Copyright and the Act of 1978* 15.

²²⁵ *Ibid.* See also *Macmillan & Co Ltd v Cooper* [1923] 40 TLR 186, where Lord Atkinson held that it is the product of a person’s labour, skill and capital that must not be misappropriated, not the raw elements or raw materials; thus the new work needs to display some quality or character that the raw materials did not possess, ‘and which differentiates the product from the raw material.’ Thus in the case of musical works, seeing that all music makes use of the raw material of musical notes, it would be the composer’s unique arrangement of the musical notes (through melody, rhythm or harmony), that would distinguish his work from those of others and thus vests copyright in such work.

²²⁶ As Dean and Karjiker *Handbook of Copyright Law* 1-65 – 1-66 have observed, questions around the (direct) infringement of copyright generally concern “the unauthorised copying of the work”, in particular with regard to the question whether a substantial part of the work has been taken. In this regard the eminent authors write: “In practical terms, in many instances the question of whether or not a substantial part of a work has been taken amounts to the degree of similarity between the original work and the alleged infringing copy. ... The degree of similarity between a copyrighted work and an alleged infringing copy must also be assessed against the background of *what it is about the copyrighted work which is original.* ...” Emphasis added.

²²⁷ *Haupt v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (A), at 470D-F.

copyright would also subsist in the improved work. In the music business, other than possible cases of direct copying, the making of original, yet infringing works would generally take the form of so-called “arranged” (or “re-arranged”) works and “remixes”, where such take place without the authorisation of the owner of the original copyright work, as occurs often.

In an enlightening judgment of the Federal Court of Australia in *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited*²²⁸ the court enumerated the test applicable in determining whether a musical work constitutes an infringement of an earlier work as follows: (i) there must be a sufficient degree of objective similarity between the works and a causal connection between them (where causal connection means that the infringer must have copied the plaintiff’s work, i.e. the work must be the source from which the infringing work derives); (ii) the question of the objective similarity of musical works must not be determined by a note to note comparison but “by the eye as well as by the ear”,²²⁹ and depends largely upon the aural perception of the judge and upon the expert evidence; and (iii) the test is whether the substance of the copyright work was taken, thus the new work needs not be identical with the original work.

It is evident from the foregoing that, as one commentator has argued, the “dividing line” between original works and non-original works “remains an uncertain and shifting one”.²³⁰ One area where this becomes more pronounced is the area of compilation or collection of various existing works, where the existing works are selected to create a new compilation work. The existing works may both be works in which copyright subsists or non-copyright material. In this regard it should be noted that protection given in respect of compilation works is not only in respect of the chosen material but also in respect of “the actual arrangement and layout of the assembly of material.”²³¹ In the music industry this has traditionally taken the form of *compilation albums*²³² and *playlists*. Playlists have traditionally taken the form of radio playlists; however new challenges are now presented through the prevalence of playlists in online music streaming services and DJ playlists, also termed “livesets”, which may be performed before audiences or on radio.²³³ Does copyright subsist in such a “perfect combination of tracks”?²³⁴

The answer to the above question is dependent on a country-by-country analysis of the applicable laws.²³⁵ It has been stated that the selection and arrangement of music compilations and playlists

²²⁸ [2010] FCA 29, Par 48 – 52.

²²⁹ See also Goldstein *Goldstein on Copyright* (2019) 10:52 observing: “... [W]orks that on dissection appear to be the same, note for note, may sound completely different to the intended audience, and ... works that will sound substantially similar to the intended audience may on dissection differ from note to note.”

²³⁰ Ricketson 1991 *CR* 1.

²³¹ Dean and Karjiker *Handbook of Copyright Law* 1-10.

²³² The expression “compilation album” as used in the music industry can be defined as referring to a compilation of sound recordings embodying the performance, by one or several recording artists, of several musical works. Examples are so-called “Greatest Hits”, “Best Of”, or “Various Artists” albums, but also include themed compilations, e.g. those relating to Christmas songs, romantic songs etc. See in this regard Fritzsche 2016 *Pace. Intell. Prop. Sports & Ent. L.F.* 259.

²³³ Fritzsche *ibid.* See also Iverson “Original Compilations of Musical Works”, in Bonadio and Lucchi *Non-Conventional Copyright* in respect of DJ sets and playlists, who identifies among such DJs (at 201), “a radio DJ broadcasting to millions, a nightclub superstar DJ spinning tracks for thousands of revellers, or a famous DJ working with a record label to create a multi-platinum selling dance compilation”.

²³⁴ An expression used by Iverson *ibid.*

²³⁵ Fritzsche 2016 *Pace. Intell. Prop. Sports & Ent. L.F.*; Iverson *ibid.*

(i.e. the “gathering” and “ordering” of songs) “can be decisive” of their success and can therefore be valuable.²³⁶ In this regard it has also been noted that “there can be genuine artistic creativity involved in compiling and executing [a DJ] set”, and that this is not about “[s]imply standing at the decks and playing some popular tracks one after the other”.²³⁷ It has been observed that the question whether copyright subsists in playlists is not settled in the laws of the major music markets of the world.²³⁸ It appears that the reason why it has been observed that “copyright protection for music compilations and playlists under the current U.S. Law is *unlikely*” owes to the fact that US law uses a higher standard to determine originality,²³⁹ i.e. “the modicum of creativity necessary to transform mere selection into copyrightable expression”.²⁴⁰ In view of this Fritzsche has observed:

... [C]ompilations and playlists are just an arrangement of preexisting materials or data. ... [C]an a music compilation or playlist be depicted in different ways? The answer is no, because basically, it is a list. And, whatever category, style or genre the arrangement falls under, there generally is a dominating logical element of order in it that withdraws any approach of creativity.²⁴¹

Fritzsche then charges that “it could be argued that the selection falls under the “sweat of the brow” doctrine and is merely a necessary work process”.²⁴² It is of course common course that, after *Feist*,²⁴³ the “sweat of the brow” doctrine does not apply in the United States. In the European Union, where, as discussed above, the “intellectual creation” criterion introduced by the *Infopaq* case²⁴⁴ is seen as equally representing a higher standard than the “sweat of the brow” standard,²⁴⁵ Recital 19 of the Preamble to Directive 96/9/EC of the European Union and of the Council²⁴⁶ excludes “the compilation of several recordings of musical performances on a CD” from the scope of the Directive, “both because, as a compilation it does not meet the conditions for copyright protection and because it does not represent a substantial enough investment to be eligible under the *sui generis* right.”²⁴⁷ However, writing on UK law prior to the *Football Dataco* case,²⁴⁸ when the “sweat of the brow” doctrine still played a major role in UK copyright law, Laddie, Prescott and Vitoria observed:

... [A] person can research and put together a compilation of songs and create something which must be properly considered as constituting the author’s own intellectual creation. Whether or not a compilation album amounts to the author’s own intellectual creation will depend on all the facts. Some will qualify, others will not. It is submitted that it *depends on what kind of work goes into the creation of*

²³⁶ Fritzsche *id* at 259.

²³⁷ Iverson “Original Compilations of Musical Works”, in Bonadio and Lucchi *Non-Conventional Copyright* 202.

²³⁸ Iverson *id* at 217.

²³⁹ Fritzsche 2016 *Pace. Intell. Prop. Sports & Ent. L.F.* 259 – 262. Emphasis added.

²⁴⁰ As per the US Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.* 499 U.S. 340 (1991).

²⁴¹ Fritzsche 2016 *Pace. Intell. Prop. Sports & Ent. L.F.* 260 – 261.

²⁴² Fritzsche *id* at 261.

²⁴³ *Feist Publications, Inc. v. Rural Telephone Service Co.* 499 U.S. 340 (1991).

²⁴⁴ *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] E.C.R. I-06569.

²⁴⁵ See also *Football Dataco Ltd & Others v Yahoo! UK Ltd & Others* (C-604/10) 2012 (ECJ).

²⁴⁶ The so-called “Database Directive”.

²⁴⁷ Fritzsche 2016 *Pace. Intell. Prop. Sports & Ent. L.F.* 263 has suggested that “it seems only logical that today’s playlists, which are basically “electronic versions” of CDs, are also meant to be comprised by the 19th recital, though not explicitly mentioned”, as “[t]he only difference between the two things is the storage medium.

²⁴⁸ *Football Dataco Ltd & Others v Yahoo! UK Ltd & Others* (C-604/10) 2012 (ECJ).

the compilation. Notwithstanding the words of Recital 19 there is no absolute rule that a compilation of recordings of musical performances cannot qualify for copyright protection.²⁴⁹

The authors therefore here resorted to the “sweat of the brow” standard as the basis for claiming the subsistence of copyright in musical compilations. However, as noted, this was before the ECJ ruling in the *Football Dataco* case, where the “intellectual creation” criterion was held as superseding the “sweat of the brow” standard. The position under UK law will therefore probably be different than what is proposed by Laddie, Prescott and Vitoria, and be more aligned to the position under US law as proposed by Fritzsche. The matter has not yet been decided by the courts so the position remains uncertain. The matter could have been resolved when, in 2013, Ministry of Sound, a well-known dance music record label in the UK instituted proceedings in the UK High Court against Spotify, an online music streaming service.²⁵⁰ Ministry of Sound claimed copyright infringement in respect of playlists uploaded by users on Spotify’s streaming service that copied the label’s compilation albums. As observed, the case “hinge[d] on whether compilation albums qualify for copyright protection *due to the selection and arrangement involved in putting them together ... [i.e.] whether the compilation structure - the order of the songs - can be copyrighted.*”²⁵¹

In the case, Ministry of Sound had argued that it did “a lot more than putting playlists together”; that a lot of research went into creating the compilation albums “and the intellectual property involved in that”,²⁵² and that it was therefore “not appropriate for someone to just cut and paste them”.²⁵³ Ministry of Sound further argued that its work with regard to creating the compilation albums was in the nature of “curation”. The court did not however, get to make a ruling on the matter as the parties reached an “amicable” out-of-court settlement of the dispute, with Spotify agreeing to remove the offending playlists from its search engine and to ‘block new users from “following” them on its service’, without however deleting the playlists.²⁵⁴

What would the position be in South Africa? In the South African Copyright Act compilations are protected as a genre of a literary work, where a literary work is defined as including, “*irrespective of literary quality and in whatever mode or form expressed ... tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer, but shall not include a computer program*”.²⁵⁵

²⁴⁹ Laddie, Prescott and Vitoria *Modern Law of Copyright* at 32.32. Emphasis added.

²⁵⁰ See <https://www.theguardian.com/technology/2013/sep/04/ministry-of-sound-sues-spotify> (date of use: 14 January 2019).

²⁵¹ Ibid.

²⁵² No doubt Ministry of Sound had in mind Laddie, Prescott and Vitoria’s observation that “a person can research and put together a compilation of songs and create something which must be properly considered as constituting the author’s own intellectual creation.” See supra n 249.

²⁵³ <https://www.theguardian.com/technology/2013/sep/04/ministry-of-sound-sues-spotify> (date of use: 14 January 2019).

²⁵⁴ <https://www.theguardian.com/technology/2014/feb/27/spotify-ministry-of-sound-lawsuit-settlement> (date of use: 14 January 2019).

²⁵⁵ Paragraph (g) of the definition of “literary work” in s 1 of the Copyright Act 98 of 1978. Compare the position under the UK Copyright Act 1988, where a literary work is defined as “... any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—

(a) a table or compilation other than a database ...”. On the contrary, a compilation is defined in its own right as a distinct work in the US Copyright Act, where it is defined as “a work formed by the collection and assembling of preexisting

It is evident therefore from the foregoing, that the protection of compilations in South African copyright law envisages the “sweat of the brow” doctrine in which what is required is simply that labour, skill and capital should have been expended in such sufficient levels as to impart some quality or character to the product (i) which did not exist in the raw material, and (ii) which thus differentiates the product from the raw material.²⁵⁶ Furthermore, it is clear from the definition that this would include compilations used in online media (“embodied in a computer or a *medium used in conjunction with a computer*”).

In conclusion, it would seem that musical compilations and playlists would be protectable by copyright under South African copyright law if these do not amount to a mere slavish copying of existing material; and where the claimant expended skill, judgment or labour, provided that the labour expended exhibits skill and judgment (i.e. if it produces something original). In this regard nevertheless it is useful to note the appeal court’s decision in *Waylite Diary*, where the court pointed out to the fact that while “time and effort”, i.e. labour, is a material factor in determining originality, it is a value judgment whether such time or effort has produced something original.²⁵⁷

It would also be relevant to refer in this regard to the provisions of the proposed section 2A(2) and (3) to the Copyright Act, introduced by clause 2 of the Copyright Amendment 2017, which was recently passed by the National Assembly and also approved without changes by the National Council of Provinces are relevant.²⁵⁸ The proposed provisions read as follows:

(2) A table or compilation which by reason of the selection or arrangement of its content, constitutes an original work, shall be protected as such by copyright.

(3) The copyright protection of a table or compilation contemplated in subsection (2) does not extend to its content.

The provision is in some ways, superfluous, as the copyright protection of tables and compilations is already provided for in the definition of “literary work” in section 1 of the Act. The provisions of the proposed section 2A(2) would have made more sense if it was expressed as follows:

A table or compilation shall only be protected by copyright if, by reason of the selection or arrangement of its content, it constitutes an original work.

Be that as it may, if the Bill is passed into law and escapes a Constitutional challenge²⁵⁹ the proposed section shall confirm the fact that under South African copyright law compilations and playlists would be protectable by copyright if the time and effort expended in selecting or arranging their content gives rise to a work that meets the originality requirements of the Act.

materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” Definition of “compilation work” in US Copyright Act Title 17 U.S.C. § 101.

²⁵⁶ See *Macmillan & Co Ltd v Cooper* [1923] 40 TLR 186, at 188. Consider in this regard the use of the phrase “irrespective of literary quality” in respect of the definition of “literary work”, which as shown, includes compilations.

²⁵⁸ Version [B13B—2017], available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/B13B-2017_Copyright.pdf (date of use: 13 July 2019).

²⁵⁸ [2010] FCA 29, Par 48 – 52.

²⁵⁹ For which see chapters 7 and 8 infra.

5.4.1.2 Material embodiment (“fixation”)

Section 2(2) of the Copyright Act²⁶⁰ provides that, apart from a broadcast or a programme-carrying signal, all works of copyright must be “written down, recorded, represented in digital data or signals or otherwise reduced to a material form” in order to be eligible for copyright. This embodiment in a material form determines the time when the work is deemed to have been made.²⁶¹ It should be observed that the question as to the time when a work was made plays a crucial role in determining the ownership of copyright in the work. More particularly where two or more persons lay claim to ownership of copyright in a work,²⁶² the identification of the true owner may hinge on the ability to determine the time when the work was made (which in turn determines the author of the work, i.e. person who first clothed the work with material embodiment).²⁶³ In the music industry, where the need to “establish a chain of title”²⁶⁴ is real, answering this question appropriately is crucial – and difficult.²⁶⁵ The difficulty in determining the moment of the creation of a work (particularly as a result

²⁶⁰ Read with s 44.

²⁶¹ Section 44(1).

²⁶² Other than in a case where it is proved that each of the authors of works that are identical or otherwise similar created the works independently of the others, dealt with above at paragraph 6.4.1.1(i).

²⁶³ See Dean and Karjiker *Handbook of Copyright Law* 1-31.

²⁶⁴ The expression “establish (or ‘prove’) a chain of title’ referring to the need to determine all the transfers of copyright that would have taken place from the first owner to the current claimant, is a way of proving the legitimacy of the claimant’s claim to copyright ownership. Garnett, Davies and Harbottle *Copinger and Skone James* 286 indicate that this situation arises from two features of copyright “which combine to create difficulties when it comes to establishing title”, namely the potential longevity of copyright works and the absence of a system of registration of title “or the existence of any rule whereby a good title can be deduced from a transfer made at least a certain number of years ago, or a concept equivalent to a possessory title of land.” Seeing that music copyright is, in the majority of cases, assigned by the author to others (who may also further assign the copyright to further parties), determining the chain of title is often crucial in music copyright cases.

²⁶⁵ Ordinarily, in the absence of a registration system for copyright, a person claiming to be the author of a work that is the subject of an infringement action would depose to an affidavit indicating the circumstances under which he created the work, as a way of showing that the requirements for the subsistence of copyright (including the requirement of embodiment in a material form) were met. (See in this regard *MCA International BV v Movie Time* 33 JOC (D), at 38, where it was noted in respect of a party alleging to be the author of certain films without stating when any of the films were made or first published: “In any event, the bold statement that the applicant was the author of the films within the meaning of that term in the Act, would also in my view have been insufficient to comply with the requirements ..., unless the deponent also set forth the facts upon which that statement was made.”) The author could possibly also depose to an affidavit prior to the incident of infringement, before a notary public, who would attest to the identity of both the deponent and the work concerned (see for example *Punch-line (Pty) Ltd v International Micro-computers Inc* 329 JOC (SEC) for a case where evidence adduced by notarised affidavits was admitted). To do this the notary public would sign, stamp and date not only the affidavit but also the work, as proof that the work was in fact presented to him on the particular date. The purpose of such a deposition would not be to prove that copyright subsists in the work *but rather to prove that the work was in existence on the date of deposition*. A person claiming ownership of copyright in the work would have to prove an earlier date in which he created his work. In this case it is submitted that it would be best, to facilitate the notary’s attestation, if the musical work were embodied in a written score (i.e. in the form of sheet music), rather than in a sound recording. Another possible solution is to deposit the work with a depository institution, such as a bank or other trusted institution; provided that the date of deposit can be easily determined. Another method generally acknowledged by many as sufficient to prove the date of the making of a work is the system of “notification of works” used by many collective management organisations in the music industry (CMOs, or “collecting societies”, as dealt with in Chapter 6 *infra*). CMOs generally require members and applicants for membership to “notify” their works to the CMO, meaning that the members or applicants have to submit to the CMO a list of the works that they claim to have created (using forms made available for this purpose). While the obvious reason for this is to enable the society to administer the works on behalf of the member concerned, it has often been said (at times without full understanding), that another benefit for this is that it assists in proving the date or time for the making of a musical work. Thus Chislett *One, Two, One, Two*, commenting on this notification system as used by the Southern African Music Rights Organisation (SAMRO), writes, “... [T]he moment you compose a song you are recognised as the owner of its copyright. All that remains after that is to make sure that you can prove this if such a fact should ever be disputed. In the case of the music business, this is most easily achieved by becoming a member of SAMRO and lodging each new song that you write with it. In this way *the date of the membership* acts as a legal and binding proof of the date of origination and of your right to be recognised as the owner of the copyright on [sic] the work” (at 135, *emphasis added*). It is obvious that the significance, if any, of the notification process, in relation to proving the time of the making of a work, would be in indicating *the date of notification* (rather than *the date of admission to membership*, which often takes place much later), as constituting the date of the making of the work. CMOs normally

of the non-existence of a registration system in respect of copyright works) has led to some proposing some intriguing “solutions” to circumvent this situation.²⁶⁶ Ultimately however, determining the moment of creation (and thus the author) is a question of fact.²⁶⁷

In view of the fact that certain types of works such as literary, dramatic and musical works may undergo several stages of development before assuming their final form,²⁶⁸ the question has often to be asked as to the particular stage at which a work comes into existence.²⁶⁹ This question is closely related to arguments relating to the so-called *idea versus expression* dichotomy.²⁷⁰ It is a maxim of copyright law that it is the embodiment of ideas that is protectable by copyright and not the ideas themselves, however original they may be.²⁷¹ Only the material form in which the idea is expressed attracts copyright protection.²⁷² Where a work avails itself to various stages of development,²⁷³ at

stamp, or otherwise date the notification of works form to reflect the date in which it was received. Having indicated this, whether in any of the scenarios mentioned herein it can be said that a person is the author or owner of copyright would depend on the facts of each case.

²⁶⁶ One of the solutions proposed, especially in respect of music composers, is the use of the so-called “poor man’s copyright”. Since employing some of the methods of establishing the time of copyright creation (such as use of a notary public’ services or depositing a work with a bank) could have cost implications, it appears that the concept of a “poor man’s copyright” implies that this is a cheap way of safeguarding one’s copyright, affordable even to the poor. The UK Intellectual Property Office seems to acknowledge this “poor man’s copyright” system (although acknowledging that proving the originality of a work is “[u]ltimately ... a matter for the courts to decide”), and explains the process as follows: “[S]end copies to yourself by special [postal] delivery (which gives a clear date stamp on the envelope), leaving the envelope unopened when it is returned to you”. This is for the purpose of proving that one’s work “existed at a certain time.” See <http://www.ipo.gov.uk/c-basicfacts.pdf>. (Date of use: 05 September 2013). N.B. It seems that this information has since been removed from the website of the UK Intellectual Property Office, but its existence at the time of accessing the website can be verified by these two websites: <http://ipkitten.blogspot.com/2009/08/getting-in-flap-over-copyright.html> and <https://www.snopes.com/fact-check/poor-mans-copyright/>; date of use: 14 January 2019). Elsewhere however the courts have been sceptical and indeed scathing of this “poor man’s copyright” concept. (See the US case of *Selletti v Carey* 23 U.S.P.Q. 2d 1269 (D.C.S.D.N.Y. 1997), aff’d 173 F.3d 104 (2nd Cir. 1999), where the court had this to say in respect of the plaintiff: ‘Selletti also mysteriously, and somewhat bizarrely, contends that he possesses an envelope containing the Selletti composition, which he alleges is “strikingly similar” to the song “Hero”. He claims that he mailed the envelope to himself prior to the date Carey allegedly composed “Hero”, and contends that the envelope is postmarked across the seal (Par. 2). ... As to the mysterious envelope ... Selletti has made no effort to explain why he would have mailed a copy of the composition to himself in 1989.’ (at Par. 3). This should not however, be construed as saying that our courts could not, depending on the circumstances of each case, rule that a particular case of ‘poor man’s copyright’ does prove the time in which a work was made. In this regard a plaintiff should be prepared to deal with possible contentions from the defendant, such as the contention that finding something in the envelope when it is opened does not mean that it was there when the envelope was mailed, as the plaintiff could have posted the envelope to himself without sealing it and without inserting anything, only later inserting the product and sealing the envelope.”

²⁶⁷ See *MCA International BV v Movie Time* 33 JOC (D). See also *Pan African Engineers (Pty) Ltd v Hydro Tube (Pty) Ltd and Another* 1972 (1) SA 470 (W); *Accesso CC v Allforms (Pty) Ltd* (Case No 11) 677 (JOC); *Peter-Ross v Ramesar and Another* 2008 (4) SA 168 (C).

²⁶⁸ As for example, distinguished from artistic works (paintings, photographs etc), where “it is only when the particular painting, photograph or other work is executed that the idea for it is transmuted into expression”. Cornish and Llewelyn *Intellectual Property* at 11-33.

²⁶⁹ Cornish and Llewelyn *ibid* at 11-33 – 11-34. See also Dean and Karjiker *Handbook of Copyright Law* 1-31.

²⁷⁰ See the English case of *SAS Institute Inc v World Programming Ltd* [2011] R.P.C. 1 (Chancery Division), where the court held (at paras 206 – 207), that a distinction needs to be made between “expression” and “ideas, procedures, methods of operation and mathematical concepts as such”, and that the skill, judgment and labour that is required for copyright to subsist in a work is one in relation to the “expression”, and not in relation to ideas etc.

²⁷¹ See *Bradbury, Agney & Company v Day* (1916) 32 TLR 349 (KB), where the learned judge observed that “... it was the embodiment which was the subject of copyright, for though the idea was not original, if the embodiment of this idea or any substantial part of it was copied, copyright was infringed; whereas the idea might be adapted, even if it was original, but if the embodiment of such idea or a substantial part thereof was not copied, no copyright was infringed.” *Bradbury* was cited with approval in *Rapid Phase Entertainment CC v SABC* 597 JOC (W), where the court further held (at 606) that the presentation of an *incident* from a cartoon strip in dramatic form with live characters not bearing the names of those portrayed in the cartoon strip (as an artistic work) did not amount to a broadcast of “the work”, observing: “To constitute an infringement it is the artistic features or attributes of the work which have to be transformed or adapted, not some concept which it conveys”. Per Wunsch J.

²⁷² See *Payen Components South Africa Ltd v Bovis Gaskets* CC 473 JOC (W), at 479, where Van Zyl J refers to this “well known *dictum*”.

²⁷³ Such as where there are different “working versions” of the work, leading to the “final version”.

what stage can it be said that the idea has taken material expression? It is this conundrum, i.e. the fact that copyright does not protect ideas, which has led to scepticism about the validity of the idea-expression dichotomy.²⁷⁴ Dean and Karjiker have for example suggested that it is generally the “final complete version which is ready for utilisation or commercial exploitation” which should enjoy copyright protection.²⁷⁵ It is submitted that this may be too simplistic a view, as certain works, such as literary works, by their nature convey ideas and it would thus be difficult to extricate the ideas from the work.²⁷⁶

In relation to the foregoing it has been contended – it is submitted correctly - with specific reference to musical works, that

... however elegant the distinction between idea and expression may seem as a matter of legal theory, empirically it is an impossible distinction to make. In music there is no “idea” or “expression” to be distinguished.²⁷⁷

Castanaro elaborates on this as follows:

Music is ... a special genre of copyright with regard to the idea-expression dichotomy. ... The elements of musical works are not easily separated into those constituting original expression and those that are part of the basic, mechanical ideas. *An artist’ musical expression is inextricably linked to the mechanics of the music.* The sequencing of notes and chords, the harmony, melody, beat, tempo, composition, and lyrics *all work together to create a musical expression.* Individually, each of these components, except for the lyrics, constitutes an unoriginal, un-copyrightable idea. Collectively, certain lyrics set to certain notes and chords, played in a certain way creates an expression. It’s an

²⁷⁴ See for example *Galago Publishers (Pty) Ltd and another v Erasmus* 1989 (1) SA 276 (A), at 283J – 285B, where it was observed, *inter alia*: “It has often been stated that there is no copyright in ideas or thoughts or facts, but only in the form of their expression; and if their expression is not copied, there is no infringement of copyright As pointed out, however ... *this pithy statement is liable to lead to confusion.* ...” Emphasis added.

²⁷⁵ Dean and Karjiker *Handbook of Copyright Law* at 1-31 – 1-32.

²⁷⁶ This position was expressed in *Peter-Ross v Ramesar and Another* 2008 (4) SA 168 (C), which somewhat spelled a death knell to the maxim that copyright does not subsist in ideas by holding that literary works are a vehicle of ideas and that in the case of a scientific work the precise mode of expression was of less importance and the contribution of ideas (which were of a scientific nature) were more crucial. This is because a scientific work is less concerned with the creative expression of ideas than it is with the conveyance of the ideas themselves. See also *Galago Publishers* *ibid*. In this regard it needs to be expressed that Dean and Karjiker do acknowledge this situation, noting firstly that “[e]ach case will be determined by its own facts”; and secondly that “[i]nterim versions of a work in the creation process can, of course, enjoy copyright, provided they are original, and if copied or otherwise misused without authority copyright infringement occurs ...” Dean and Karjiker *id* at 1-32. However the Copyright Amendment Bill 2017 approved by Parliament and currently awaiting the President’s signature (version B13B-2017) and available at <https://pmg.org.za/bill/705/> (date of use: 13 July 2019), would, if passed into law, have the effect of not only resuscitating the idea / expression dichotomy but would, furthermore, introduce the American so-called “merger doctrine”, “a close cousin to the idea/expression dichotomy [in terms of which] copyright protection will be denied to even some expressions of ideas if the idea behind the expression is such that it can be expressed only in a very limited number of ways.” *Toro Company v. R & R Products Co.*, 787 F.2d 1208 (8th Cir. 1986) para 14. See for the idea / expression dichotomy the proposed s 2A(1)(a); and for the merger doctrine the proposed s 2A(4)(a) in clause 2 of the Copyright Amendment Bill. See also Chapter 7 *infra* for further deliberation on this matter.

²⁷⁷ Keyt 1988 *Cal.L.Rev.* 421 at 442 – 443. See further to this Macdonagh 2012 *International Review of Intellectual Property and Competition Law* 409 – 410, who opines: ‘The idea/expression dichotomy is of dubious value in relation to music. ... [M]usic “collapses” the idea/expression dichotomy. One reason for this is that there are a limited number of musical notes in a standard major scale. ... [S]ome chord progressions and musical phrases are ... too common to be protectable. For instance ... the “twelve-bar blues structure” ... could be described as the example of a general musical “idea” which cannot be made subject to copyright.’

expression that becomes an experience to the person who listens to and engages with it. *Removing the individual ideas would destroy the musical work as a whole.*²⁷⁸

In view of this it is contended that the essence of musical works is such that they are not required to undergo different stages of development prior to attracting copyright protection,²⁷⁹ so that each “working version” of a musical work created prior to arriving at a “final complete version which is ready for utilisation or commercial exploitation”²⁸⁰ would qualify as a work in which copyright subsists. It is submitted that commercial viability in respect of musical works is a matter of aesthetic judgment which has little bearing on whether a work will ultimately achieve commercial success or not. History can point to many musical works that were once shunned for not exhibiting great creativity, which however later achieved great success. It can be contended that as soon as a musical creation satisfies the requirements of originality and is reduced into a material form, it would qualify as a musical work, whether or not it is considered to be commercially viable. This would be in line with Harms’ proposition that the correct way to understand the idea-expression dichotomy is to see copyright as “protect[ing] the form in which an idea is cast and not the idea itself.”²⁸¹

While the composer of a musical work may choose to use one version of the work as the commercially viable one, this does not detract from the fact that earlier versions of the work, if they satisfy the inherent and formal requirements of copyright, would equally be protectable by copyright. Thus any unauthorised adaptation of a “pre-final” version of the musical work would constitute copyright infringement all the same. Furthermore, seeing that there is generally no requirement for

²⁷⁸ Castanaro 2008 *Fordham Intell. Prop. Media & Ent. L.J.* at 1282. Emphasis added. It has to be mentioned however, that the current writer is not in agreement with the exception of the lyrics from this scenario. It is contended that just as musical works are made from a musical scale and musical phrases comprised of a combination of notes, pitches, rhythms etc, so also lyrics, which are protected as literary works, are made from a combination of existing letters of the alphabet, words in the vocabulary, etc. Thus lyrical phrases like “I love you baby”; “You are the best”; “Hold me close” are common phrases in popular music. In this regard it should also be noted that the courts have held that copyright does not subsist in a single word. See the English decision *Exxon Corp. v Exxon Insurance Consultants International Ltd* [1982] Ch. 119. More specifically the US district court decisions of *O’Brien v Chappel & Co.*, 159 F. Supp. 58 (S.D.N.Y. 1958) and *Acuff-Rose Music, Inc. v Jostens, Inc.* 988 F. Supp 289 (S.D.N.Y. 1997) are relevant in this regard. In the *O’Brien* case the plaintiff alleged copyright infringement against the defendant on the ground that the defendant had read an unpublished composition of the plaintiff containing the phrase, “Sharing my dreams with a star, asking the moon if it’s soon when you’ll be mine, *night and noon*”, and that he had, together with another, copied and plagiarised the phrase in a song forming part of the musical “*My Fair Lady*” in which the phrase “I’ve grown accustomed to the tune you whistle *night and noon*” appeared. In this regard the court held (at 59): ‘It is well established that copyright or literary rights do not extend to words or phrases isolated from their context, nor do they extend to abstract ideas or situations. ... The plaintiff apparently thinks that he can get sole rights to the phrase “night and noon” no matter in what context the phrase is used. Such a common phrase in of itself is not susceptible of copyright nor of appropriation by any individual....’ Likewise in the *Acuff-Rose Music* case the court refused to find the defendant guilty of copyright infringement, where the defendant had used a theme from the plaintiff’s song, “You’ve Got to Stand for Something”, which had become a “hit” on the national charts. The song contained the line “You’ve got to stand for something or you’ll fall for anything” and the defendant had used this theme (based on the theme of a father admonition a child to stand for principles), in an advertising campaign making use of, among others, a promotional video / slide show with music, lyrics and narration, where the slogan “If You Don’t Stand for Something, You’ll Fall for Anything”, was used. It was contended on behalf of the defendant that a prior use search for the slogan was no conducted and permission to use the slogan was not sought because the defendant ‘considered it to be “the expression of an idea which was not entitled to copyright protection ...”’ (at 292). While the court affirmed that the defendant had found inspiration for its slogan from the plaintiff’s song and had copied the song, it found that the plaintiff failed on the ground of improper appropriation, remarking (at 294): “... That both works employ the identical phrase does not constitute substantial similarity, in light of the written lyric’s status as an unprotected cliché and the fundamental differences in the parties’ usage of the phrase. ... While especially creative phrases may be protected, there is nothing unique about the use of standing/falling imagery to convey the importance of living a principled life. ...”

²⁷⁹ Even though, as a matter of fact, such stages of development may take place.

²⁸⁰ Dean and Karjiker *Handbook of South African Copyright Law* 1-31.

²⁸¹ Harms 2013 *PELJ* 505.

the copyright owner to exploit the work commercially,²⁸² so that all he could do is to prohibit others from exploiting the work (and to, himself, do nothing about the work), it cannot be a requirement of copyright law that the work be commercially viable.²⁸³ This position can clearly be illustrated by the phenomenon of so-called “never-before released songs”, which are often released posthumously and often become “great hits”. The internet teems with information about such never-before released songs in respect of various famous and not-so-famous artists.²⁸⁴ These are usually songs that were recorded as demonstration records (“demos”)²⁸⁵ or songs initially rejected for their unlikelihood to be commercially viable but which often later proved very valuable.²⁸⁶ In this case it needs to be observed that copyright would subsist in respect of all versions of the song concerned, including the earlier rejected version.

In conclusion, a note needs to be made regarding the manner in which music is embodied in a material form. As indicated above, sections 2(2) and 44 of the Copyright Act provide that a work (other than a broadcast and a programme-carrying signal) must be “written down, recorded, represented in digital data or signals or otherwise reduced to a material form” in order to be eligible for copyright. All these forms of embodiment apply in respect of musical works. However, a distinction needs to be made between the protection given to the words sung with the music (the lyrics) and the musical work itself. Lyrics have a distinct protection as a literary work, independent of

²⁸² Or to authorise others to do so – except in the limited cases of compulsory licensing of copyright.

²⁸³ For further light into this see the remarks of Streicher JA in *Haupt v Brewers Marketing Intelligence* (Pty) Ltd 908 JOC (A), at 916, Par. 23, where he indicated that the contention by the applicant that a computer program was not eligible for copyright because it produced incorrect results and because sections of the raw data could not be read at all, [which can be interpreted to say that it was not “ready for utilisation or commercial exploitation”] was incorrect. In this regard the learned judge seemed to emphasise the fact that the subsistence of copyright in a work has to be determined from the definition of the work under the Act. In the current case the judge found that the work qualified as a computer program because it brought about a result (as required in the definition of computer program), albeit the result was “sometimes correct, sometimes wrong”. A literary work is for example defined as such, “irrespective of literary quality” (thus irrespective of whether or not it is “ready for utilisation or commercial exploitation”). See s 1(1) of the Copyright Act.

²⁸⁴ See for example in respect of Jimi Hendrix <https://www.usatoday.com/story/life/music/2018/02/15/exclusive-listen-one-jimi-hendrixs-last-songs-experience/332296002/> and in respect of Michael Jackson https://www.thestar.com/entertainment/music/2010/03/17/60_unreleased_michael_jackson_songs_available_for_new_albums.html (date of use: 15 January 2019).

²⁸⁵ Defined as “[a] recording made to demonstrate the capabilities of a musical group or performer or as preparation for a full recording. <https://en.oxforddictionaries.com/definition/demo> (date of use: 15 January 2019).

²⁸⁶ See in this regard <http://mentalfloss.com/article/502946/10-hit-songs-were-almost-never-released> as an example. (Date of use: 15 January 2019).

the musical work.²⁸⁷ When music is written down however, this is still a musical work and not a literary work.²⁸⁸ In this regard Garnett, Davies and Harbottle²⁸⁹ have remarked:

To the extent that notation or words are written down and are intended to represent sounds which qualify as music ... it seems that they are excluded from the definition of literary work, even though they can in one sense be read.

This situation is in contradistinction to the one obtaining in the historical development of copyright protection for musical works, starting in the United Kingdom, where music was protected as a genre of literary works (in the form of sheet music or otherwise in printed form). As dealt with in Chapter 3 above, since the enactment of the Imperial Copyright Act however, musical works began to be protected as a separate, standalone work alongside literary works. The statement by Garnett, Davies and Harbottle above regarding “notation or words” being intended “to represent sounds” may create some confusion, especially in respect of what has been said about words (lyrics) being protected as literary works. What the authors are referring to however, are words “intended to represent sounds which qualify as music”; i.e. *words the utterance of which results in music being heard*. What comes to mind is the representation of music through what is termed *tonic sol fa* (or *solfa notation*).

While the writing of music in *staff notation* makes use of certain signs, marks or symbols that represent the music, in *tonic sol fa* the music can accurately be said to be represented by *words* (as in *do, ray, mi, fa, sol, la, ti, do*, and their variants).²⁹⁰ Words are part of a language and music has been said to resemble language.²⁹¹ That, it is submitted, is the meaning intended by the above authors in relation to their reference to the term “words” – namely words as used in the language of music to express musical sounds.²⁹² Having indicated the above it should be mentioned that in

²⁸⁷ This position is distinct from the position that obtains in the United States, where lyrics that form part of a musical composition are considered part of the composition, although both the composition and the lyrics are capable of being protected separately (as a musical work and a literary work, respectively). See in this regard Moser and Slay Music Copyright Law 31, observing: “If words are written independently of music without any intention at the time of creation that they will be combined with music, the work will be considered to be a literary work. However, if created to be combined with music, the words will be part of a musical work.” Similarly it was observed in *Acuff-Rose Music, Inc. v Jostens, Inc.* 988 F. Supp 289 (S.D.N.Y. 1997) (at 292): “... A copier will be liable for copying the musical work in its entirety, that is, the composition’s words and music together, as well as for copying just the music or the words alone. ...” This arises from the fact that under US copyright law musical works are understood as “including any accompanying words”. § 102(a)(2) US Copyright Act 117, U.S.C. 101 et seq. This is to be contrasted with the position under South African law, UK law and the laws of most other common-law jurisdictions where words are specifically excluded from the definition of musical work. Such a differentiation is contemplated and permissible in the Berne Convention, where reference is made to “musical compositions *with or without words*” (emphasis added) as forming part of the works protected by copyright.

²⁸⁸ See the remark of Jacob J in the English case of *Anacon Corp v Environmental Research Technology* [1994] F.S.R. 659, at 663, where he noted: “... [M]usical notation is written down but needs expressly to be taken out of the definition of ‘literary work’.”

²⁸⁹ Garnett, Davies and Harbottle *Copinger and Skone James* 97 – 98.

²⁹⁰ The definition of the term “word” as “[a] sound or a combination of sounds, or its representation in writing or printing, that symbolizes and communicates a meaning and may consist of a single morpheme or a combination of morphemes” (see The Free Dictionary, available at <http://www.thefreedictionary.com/word>, date of use: 15 September 2013), would encompass the notes used in solfa notation.

²⁹¹ See Adorno <https://www.msu.edu/~sullivan/AdornoMusLangFrag.html> (date of use: 15 September 2013).

²⁹² This is clear from what the authors say in the very next sentence, when they recognise that “words which are sung with music do not form part of the musical work”. Garnett, Davies and Harbottle *Copinger and Skone James* 98.

modern times the composition of music in written form is no longer widespread.²⁹³ Many well-known musicians have not studied music, and even where they have, material embodiment generally takes the form of physical sound recordings (i.e. “recorded” music, as in the use of CDs) or digitally-created compositions (“represented in digital data or signals”, as in software-aided MP3 recordings).²⁹⁴ Technology has thus made it easier for composers who have not studied music to express their musical ideas in material form.²⁹⁵

5.4.2 Formal requirements

The formal requirements for the subsistence of copyright relate to the external circumstances at the time when the work is made.²⁹⁶ In *Biotech Laboratories (Pty) Ltd v Beecham Group Plc*²⁹⁷ the court encapsulated the formal requirements for the subsistence of copyright (i.e. the alternative circumstances under which copyright can be conferred) under the Copyright Act in the following manner: first, the existence of a work eligible for copyright and made by a qualified author (or a joint author, in the case of a work of joint authorship) in terms of section 3; second, where the work eligible for copyright, while not made by a qualified person, is nevertheless first published in South Africa, in terms of section 4, and third, where the work is a work made by or under the control of the State in terms of section 5(2), provided the work is original and reduced to a material form. In the case of copyright conferred in terms of sections 3 and 4 initial ownership vests in the author unless the work was made in the course or scope of employment or where it was commissioned, in terms of Section 21(1). However, where the work is made in terms of section 5 ownership initially vests in the State or a prescribed international organisation, and not in the author.²⁹⁸ Harms JA further

²⁹³ There are a number of software programmes that can create sheet music, but these are often used incidentally as part of the digital creation of music. I.e., in the majority of cases the focus in these cases is to create digital sound recordings of the musical works and not to create sheet music. An instance where the use of written compositions continues unabated is in the area of so-called “serious music”, namely Western “art” or classical music (e.g. orchestral music created for opera, ballet etc.) as well as choral music.

²⁹⁴ The phrase “digitally-created” is not used in the same sense here as the phrase “computer-generated” was used by the court in *Haupt v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (A) (at 918, paras 31 – 32). See the discussion below in Chapter 7, under paragraph 7.3.1.3.

²⁹⁵ Thus rendering it unnecessary to hire an arranger and eliminating the spawning copyright ownership disputes (where the hired arranger may claim to be a co-composer or the sole composer. For more information on disputes that could arise from musical arrangements see Chapter 7 below.) This is especially so because, prior to the advent of digital technology, high quality recording of music was an expensive undertaking within the control of a few recording labels. Digital technology has minimised the practice of singer-composers with no training in music composition, having to express their un-fixed compositions through vocal or instrumental rendition, while another with financial means (e.g. a record label) would record the song, thus often denying the singer composer copyright protection who then has to “seek legal protection elsewhere, particularly through contracts and legislation protecting performers.” Klopper *et al Law of Intellectual Property* 164. Since the compositions were not recorded, i.e. reduced to a material form prior to the studio or other recording, another, including the record label, might claim copyright protection in respect of the compositions. In explaining this situation Garnett, Davis and Harbottle *Copinger and Skone James* 98, commenting on the definition of “musical work” in the UK Copyright Act (which is defined in the same way as in the South African Act), observe: “There is no requirement in the statutory definition of a musical work that the music must be expressed in writing or other notation. However ... for music to be the subject matter of copyright it must satisfy the requirement as to fixation. A composer who composes a piece of music entirely in his head, therefore, will be creating a musical work for the purposes of the 1988 Act. Equally, where a musician plays music which has not previously been composed, what is produced is a musical work. In any such case, however, no copyright will be capable of subsisting in such work until it is fixed, and for purposes of the 1988 Act the date the musical work is made will be the date it is fixed, not when it was first conceived or performed.”

²⁹⁶ See Klopper *et al* *ibid*.

²⁹⁷ 786 JOC (A), at 793 at para 15.

²⁹⁸ Section 21(2). In this regard it needs to be mentioned that the Copyright Amendment Bill 2017, passed by both houses of Parliament (version B13B-2017) and awaiting the signature of the President, available at <https://pmg.org.za/bill/705/>

indicates that in terms of ranking one first has to consider if a work was made under the circumstances in section 5(2), and if not, under sections 3 or 4.²⁹⁹

5.4.2.1 A work made by a qualified person

Section 3(1) defines a qualified person, in the case of an individual, as a person who is a South African citizen, or is domiciled or resident in the Republic;³⁰⁰ and in the case of a juristic person, as a body incorporated under the laws of the Republic.³⁰¹ The provisions of the Act also apply in respect of works emanating from a member country of the Berne Convention, as well as in respect of persons who are citizens of, or are domiciled or resident (and in the case of body corporates, are incorporated) in a member country of the Berne Convention.³⁰²

Regarding juristic persons it needs to be noted that copyright law recognises as authors certain parties (including juristic persons), in respect of certain works, that may not have been involved in the actual physical making of such works. Thus the Copyright Act provides that the author of a sound recording or a cinematograph film is “the person by whom the arrangements for the making of the [relevant work] were made”.³⁰³ Seeing that the first owner of copyright is the author,³⁰⁴ the juristic persons who make these arrangements then become the owners of copyright in such works, unless and until they transfer ownership to another in terms of section 22. It is presumably on this basis (namely that they make the arrangements for the making of music recordings), that record companies become owners of copyright in respect of sound recordings.³⁰⁵ This position does not however, apply generally in respect of the making of musical (and literary) works. In this case copyright initially vests in the author of the work, as contemplated in section 21(1)(a), and a music publisher or other entity would only obtain copyright ownership in such a work if the work is assigned to it by the author in terms of section 22.³⁰⁶

(date of use: 13 July 2019), has added a prescribed “local organization” among the entities eligible for ownership of copyright in terms of s 5(2). It is not clear what the intention was in this regard. See further in this regard Chapter 7 infra.

²⁹⁹ *Biotech Laboratories (Pty) Ltd v Beecham Group PLC* 786 JOC (A) at 793 para 16.

³⁰⁰ As to what constitutes *citizenship*, *domicile* and *residence* the Copyright Act does not define these terms, and thus deference has to be made to the applicable national laws in this regard. See also in this regard Klopper *et al Law of Intellectual Property* at 165.

³⁰¹ Section 3(1) however exempts a work of architecture erected in the Republic (or any other artistic work incorporated in a building or any other permanent structure) from the requirement of a qualified person.

³⁰² See s 37 of the Copyright Act, read with GN 1558 GG 17517 of 1 November 1996 and s 3(1). For a detailed discussion of the application of this section see generally *Appleton and Another v Harnishfeger Corporation and Another* 515 JOC (A) and *Nintendo Co Ltd v Golden China TV-Game Centre and Others* 488 JOC (T) at 504 - 505. See also Dean and Karjiker *Handbook of South African Copyright Law* 1-29 – 1-30.

³⁰³ Section 1(1) of the Copyright Act. Similarly the author of a computer-generated literary, dramatic, musical or artistic work or computer program is “the person by whom the arrangements necessary for the creation of the work were undertaken.”

³⁰⁴ Section 21(1)(a) of the Copyright Act.

³⁰⁵ The use of the word “probably” is based on the fact that s 21(1)(c) of the Copyright Act also provides another basis upon which a record company may claim ownership of copyright in a sound recording, namely the commissioning of such a sound recording. It appears that the record company could choose the basis upon which it lays claim to ownership of copyright in a sound recording, which creates an untenable situation. This discussion however is outside the scope of this work and has to be pursued elsewhere.

³⁰⁶ Although the music publisher who makes logistical and financial arrangements for the making of demo recordings for purposes of composing music would generally be entitled to claiming copyright ownership of the *sound recording* in terms of s 1(1) of the Copyright Act, in practice music publishers do not do this as they are more interesting in the musical composition itself, for which they acquire copyright ownership through written assignment of rights from the composer. For the practice of making demo recordings of musical compositions see Jarret and Day *Music Composition* 28 – 30.

Another point to note in respect of juristic persons is that it is those juristic persons that satisfy the requirements of “a body incorporated under the laws of the Republic” that would be considered to be a qualified person. It is thus important that music business professionals ensure that they only use entities that qualify as juristic persons incorporated under the laws of the Republic, as vehicles to own copyright. Companies, close corporations,³⁰⁷ trusts³⁰⁸ and even certain forms of non-profit entities³⁰⁹ would meet the requirements of a qualified person in this regard. However, sole proprietorships, partnerships and other unincorporated entities would not meet the requirements of a “qualified person” because they are not “incorporated under the laws of the Republic”.³¹⁰ Another matter to consider is the protection of works belonging to qualified persons who are non-South African citizens (i.e. those that are citizens of, or are domiciled or resident in, or in the case of companies, are incorporated in a member state of the Berne Convention). The determination of this issue often gives rise to choice-of-law questions, namely questions as to which court has jurisdiction, what law is applicable in determining the issue, and (after judgment has been given), the conditions under which a court will recognise and enforce the judgment given by a foreign court.³¹¹ These are important matters for consideration in relation to music copyright because of the general trans-jurisdictional nature of the music business.³¹²

It needs to be noted that in dealing with the question of the applicable law two “distinct” issues often have to be determined, which would have an impact on determining the choice-of-law question, namely the issue of title (i.e. ownership of the rights) and the issue of the substantive rights (or scope of protection).³¹³ The conflict of law issues in copyright cases mainly arise from the fact that copyright (as also other forms of intellectual property) is essentially a territorial system of protection limited to the territory of protection.³¹⁴ However, it has been observed that the internet imposes a

³⁰⁷ It should be noted that under the Companies Act 71 Of 2008 no new close corporations can be incorporated, while existing close corporations may continue existing as such, or convert to be companies.

³⁰⁸ A trust is, under the new Companies Act (Act 71 of 2008), a juristic person (though not a company). This applies in respect of trusts established in South Africa and those established outside South Africa. See in this regard *Melville v Busane and Another* [2012] 1 ALL SA 675 (ECP).

³⁰⁹ In the music industry non-profit entities are used particularly in respect of collective management organisations (CMOs or collecting societies). Traditionally the corporate form used was the company limited by guarantee, based on the English tradition. The 2008 Companies Act (Act 71 of 2008) has however now abolished the company limited by guarantee, and so a CMO would either register as a non-profit company under the Companies Act, as a non-profit trust, or as a non-profit organisation in terms of the Nonprofit Organisations Act 71 of 1997.

³¹⁰ Unless of course the incorporation of such forms of conducting business is permissible in terms of the laws of a member country of the Berne Convention, and they are so incorporated under such laws, as discussed immediately below.

³¹¹ See Sterling *World Copyright Law* 136. These questions are components of the “Conflicts of Law” or Private International Law regime.

³¹² See for example *Gramophone Co Ltd v Music Machine (Pty) Ltd & Others* 1973 (3) SA 188 (W), decided under the 1965 copyright legislation, which dealt with questions about the copyright protection of sound recordings impacting upon three jurisdictions, namely the United Kingdom, the United States of America and South Africa; as well as raising questions relating to the scope of the Berne Convention.

³¹³ Courts have either dealt with these issues separately, or treated them generally under the expression “subject-matter jurisdiction”. See the US case of *Itar-Tass Russian News Agency v Russian Kurier, Inc* 153 F.3d 82 (2nd Cir. 1998), where it was held that Russian copyright law was applicable in respect of the question of initial ownership, while US law, as the *lex loci delicti*, applied in respect of the question of infringement (seeing also that the defendant was a US corporation). Compare this approach with that of the UK Supreme Court in *Lucasfilm Limited and Others v Ainsworth and Another* [2011] UKSC 39 (see n 314 *infra*). This is to be contrasted with the ruling of our appeal court in *Gallo Africa Ltd v Sting Music (Pty) Ltd* 1103 JOC (A), where Harms DP (at para 22) relied on *Lucasfilm Limited and Others v Ainsworth and Another* [2009] EWCA Civ 1328, where it was held that the question was whether, in spite of the court having personal jurisdiction, there was *causa jurisdictionis*, i.e. subject-matter jurisdiction.

³¹⁴ This is the position followed by the court in *Gallo Africa Ltd v Sting Music (Pty) Ltd* *ibid*, relying on *Lucasfilm Limited and Others v Ainsworth and Another* [2009] *ibid*. It needs to be noted however that this decision was overruled in *Lucasfilm*

threat to this traditional principle of territoriality.³¹⁵ Questions have often arisen as to the source of the conflict rules to be applied in these cases, with some holding that such rules emanate from the principle of national treatment provided for in international copyright treaties (e.g. the Berne Convention and the TRIPs Agreement), and some holding that they emanate from national principles of private international law.³¹⁶

5.4.2.2 A work first made or published in South Africa or a member country of the Berne Convention

Where the author or any co-author of a work is not a qualified person as provided for in section 3, copyright can be conferred on the work, if eligible for copyright, under certain circumstances generally relating to the country of publication or making of the work, or the origin of the work.³¹⁷ Thus copyright shall be conferred on a literary work, musical work, artistic work and sound recording, if any such work was first published in South Africa or a member country of the Berne

Limited and Others v Ainsworth and Another [2011] UKSC 39, where the UK Supreme Court held (see paras 60 – 61) that the judgment of the Supreme Court of Victoria in *Potter v Broken Hill Pty Co Ltd* [1905] VLR 612, affd (1906) CLR 469, had been wrongly interpreted to say that it relied solely on the extension of the rule in *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (the so-called *Moçambique* rule) to patents. The *Moçambique* rule emphasised the distinction between matters that are local as opposed to matters that are transitory, and provides that “it is contrary to international law, or comity, for one state to exercise jurisdiction in relation to land in another state” (*Lucasfilm Limited and Others v Ainsworth and Another* [2011], para 56. See also *Gallo Africa Ltd v Sting Music (Pty) Ltd* *ibid* 22). The court in *Lucasfilm Limited and Others v Ainsworth and Another* [2011] held (at para 61) that *Potter v Broken Hill Pty Co Ltd* in fact dealt with four strands (not necessary to repeat here), of which the *Moçambique* rule was but “one of the elements” that the court took into account. The court held that contrary to the view that *Potter v Broken Hill Pty Co Ltd* relied on the *Moçambique* rule, “the effect of the decision in *Potter v Broken Hill Pty Co Ltd* was to apply the *Moçambique* rule and, especially, the *act of state doctrine* to actions for patent infringement” (at para 68. Last emphasis added). Thus “it is the act of state doctrine, rather than the *Moçambique* rule, which is the essential foundation of the judgments in [*Potter v Broken Hill Pty Co Ltd*]” (at para 67). The court then went on to show that “in the case of copyright infringement, it has been held that the act of state doctrine has no application because there is no need to pass on the validity of acts of foreign government officials” seeing that the Berne Convention bars administrative barriers. Para 84. After noting the fact that *Potter v Broken Hill Pty Co Ltd* appears to stand alone in the Commonwealth in using the act of state doctrine “as an impediment to actions for infringement of foreign intellectual property rights” (para 85), the court concluded that the act of state doctrine “should not today be regarded as an impediment to an action for foreign intellectual property rights, even if validity of a grant is in issue, simply because the action calls into question the decision of a foreign official” (para 86). On this basis, the court held that the claim (which concerned an infringement of US copyright) was justiciable and that the English courts thus had jurisdiction to hear the matter. The conclusion herein can only be that, inasmuch as Harms DP relied on a faulty interpretation of the use of the *Moçambique* rule in *Potter v Broken Hill Pty Co Ltd* and *Hesperides Hotels v Aegean Turkish Holidays* [1979] AC 508 (both of which were discarded in *Lucasfilm Limited and Others v Ainsworth and Another* [2011]), then the decision in *Gallo Africa Ltd v Sting Music (Pty) Ltd* can be faulted, in spite of the fact that the *Moçambique* rule itself “[coincides] with the position under Roman law” (*Gallo Africa Ltd v Sting Music (Pty) Ltd* *ibid* 22).

³¹⁵ See in this regard Tydniouk 2004 *Brook. J. Int'l. L* 899.

³¹⁶ Tydniouk *ibid*, generally, recounts this position, where she speaks about, first, “the conventional understanding of national treatment”, “which comports with the related principle of territoriality” in which the law of the protecting country determines all issues of copyright (at 900 – 901). The conventional approach was clearly followed by the court in *Lucasfilm Limited and Others v Ainsworth and Another* [2009], as well as our Appeal court in *Gallo Africa Ltd v Sting Music (Pty) Ltd*. Secondly, Tydniouk (at 901) speaks about the approach followed in *Itar-Tass Russian News Agency v Russian Kurier, Inc*, where the court “imported the modern conflict of laws analysis into the world of copyright law” by finding that the national treatment principle did not contain a choice of law provision. However, highlighting the problems that arise from a general conflicts of law approach, Tydniouk (at 902) advocates for the establishment of “supranational equitable principles”, which “would be a step towards universal copyright law, and would be easier to achieve because it would not cause interference with sensitive policies underlying national copyright regimes.” This “universalist” approach was clearly favoured by the UK Supreme court in *Lucasfilm Limited and Others v Ainsworth and Another* [2011], where the court observed: “There is no doubt that the modern trend is in favour of the enforcement of foreign intellectual property rights” (para 108); “[t]here are no issues of policy which militate against the enforcement of foreign copyright. States have an interest in the international recognition and enforcement of their copyrights ...”; further noting that while the Appeal Court had “thought that it was relevant that there was no international regime for the mutual recognition of copyright jurisdiction and of copyright judgments”, this was “no reason for the English court refusing to take jurisdiction over an English defendant in a claim for breach of foreign copyright” (at para 109).

³¹⁷ Section 4 of the Copyright Act.

Convention; and on a cinematograph film, if the film was first published or made in South Africa or a member country of the Berne Convention.³¹⁸ Thus in respect of works published in a member country of the Berne Convention, protection would be accorded to such works “as if the works had been first published in the Republic.”³¹⁹ In view of this, it is crucial to understand what constitutes “publication” or “publishing” under the Act.³²⁰ In this regard it suffices, for present purposes, to indicate that, except for cinematograph films and sound recordings, publication entails the issuing to the public, with the consent of the copyright owner, of copies of the work in sufficient quantities so as to reasonably meet the needs of the public.³²¹

It suffices for present purposes to note that publication normally entails the commercial dealing in *copies* of the original work and “[i]t is therefore not essential that the work concerned be published in the manner in which it is first created or reduced to tangible form.”³²² Thus in the case of musical works, this would refer to a reproduction of the work or an adaptation, including “cover versions”. It is also important to note that it is the *first publication* of the work, either in South Africa or a member country of the Berne Convention, that would result in copyright being conferred in the work under South African law. Where a work is published simultaneously in a member country of the Berne Convention and a non-member country, the country of origin in respect of the work is deemed to be the Convention member-country, and where the work is published simultaneously in several countries that are members of the Convention, the country of origin is deemed to be the country whose laws give the shortest term of protection to the work.³²³ The expression “first publication” includes a publication that takes place within thirty (30) days of an earlier publication taking place elsewhere.³²⁴

With the advent of internet technology many musicians³²⁵ find that the internet is a cheap and convenient platform on which they can make their works available to prospective fans. Does making works available on the internet in this way constitute publication as contemplated in the Copyright

³¹⁸ Sections 4(1)(a) and 4(1)(d) of the Copyright Act, respectively, read with s 37 and GN 1558 GG 17517 of 1 November 1996.

³¹⁹ See Smith *Copyright Companion* 6.

³²⁰ Smith *id* at 7. For a detailed and critical discussion of what constitutes “publication” and “publishing” see Baloyi 2012 SA *Merc LJ* 218.

³²¹ Section 5(a) of the Copyright Act. In the case of sound recordings and cinematograph films publication takes place when copies of the sound recording or film are sold, let for hire or offered for sale or hire to the public (s 5(b)).

³²² Smith *Copyright Companion* 7. In fact it would be close to impossible or rather not commercially viable to publish works in their original forms. Works are generally published as copies of the original. Further to this, a copy is defined as a *reproduction* of a work and in the case of certain works (including literary and musical works), includes an adaptation of the work. In respect of literary and musical works publication further includes a reproduction in the form of a record or a cinematograph film (s 1, Copyright Act). Thus it is clear that a reproduction does not have to be in the form in which it originally existed. See further Smith *ibid*. Attempting to reproduce works in their original forms would take the music industry backwards to the days of Edison’s phonogram, Berliner’s gramophone and the piano roll (see Chapter 3 *supra* and <http://www.collectionscanada.gc.ca/gramophone/028011-3004-e.html> generally. (Date of use 18 September 2013). In this regard it needs to be further noted that while in the past musical works would be published as copies of the original work (in the form of sheet music and orchestral scores), in modern times musical works are mainly published through the medium of sound recordings, cinematograph films (including all forms of audio-visual works) and digital copies (through downloads).

³²³ Section 1(b), GN 1558 GG 17517 of 1 November 1996.

³²⁴ Section 1(5)(c). It has been observed that this is intended “to permit a person wishing to comply with publication requirements internationally to arrange for substantially simultaneous publication of a work in a number of countries”. Smith *Copyright Companion* 8.

³²⁵ In particular those that have not yet secured a recording or publishing deal and must therefore take steps to self-promote their works.

Act? It has been observed that opponents of the view that making works available on the internet constitutes publication often base their view on two arguments: (i) They argue that the internet owner cannot possibly issue copies to the public because what is streamed from the internet does not constitute a copy but is rather bits that only become a copy once assembled by the user's computer. The second argument relates to the position that (ii) because the website proprietor plays only a passive role the works made available through the internet do not amount to publication.³²⁶ It has in this regard been argued that the fact that a work is available online should not have an effect on the conferment of copyright protection, as "[c]ourts interpret the law in a purposive manner to ensure that it remains effective in the digital environment."³²⁷

5.4.2.3 A work made by or under the control of the State

A work made by or under the control of the state in terms of s 5(2), provided it is eligible for copyright, initially vests in the State and not in the author.³²⁸ The fact that the work initially vests in the State means that the State could potentially assign ownership of this work to another.³²⁹ It is inconceivable under what circumstances the State would do so, but a possibility would be where the State assigns a musical work created by an author under its control to the author. In terms of this provision a work would automatically vest in the State by virtue of it having been made by or under the control of the State.³³⁰ It is thus not necessary for the State to undertake any further action, such as passing special legislation, for copyright to vest in it.³³¹ For administrative purposes copyright created in terms of section 5 is deemed to vest in an officer of the public service designated by proclamation by the President.³³² Copyright conferred in terms of section 5 nullifies any claim to copyright under sections 3 and 4.³³³ Thus, as stated above, Harms JA has observed that in terms of ranking one first has to consider if a work was made under the circumstances in section 5(2), and if not, under sections 3 or 4.³³⁴

Not long ago a row erupted with regard to ownership of "Nkosi Sikelel' iAfrika", one of the components of the national anthem of the Republic of South Africa designated pursuant to section 4 of the Constitution.³³⁵ The row apparently related to a claim by some that "Nkosi" is a royalty-earning

³²⁶ See Klopper *et al* *Law of Intellectual Property* 166.

³²⁷ *Ibid.*

³²⁸ Section 21(2) of the Copyright Act.

³²⁹ This, it is submitted, is the effect of the current provision of the Act. It is to be noted however that the Copyright Amendment Bill proposes to change this position under clause 23(a), where it is provided that "copyright owned by, vested in or under the custody of the state may not be assigned." See the further discussion below under paragraph 7.3.2.8(b)(i).

³³⁰ For a discussion of what the expression "by or under the control of the state" entails see *Biotech Laboratories (Pty) Ltd v Beecham Group PLC* 786 JOC (A).

³³¹ Where however, the State acquires ownership of copyright in a work through assignment, the state may find it necessary to pass an act of parliament to validate this action. See for example in this regard the "Stem van Suid-Afrika" Copyright Act 2 of 1959, validating the assignment to the South African government of the literary work "Die Stem van Suid-Afrika" and its recognition, in its musical form, as the official national anthem of South Africa; and the "Vlaglied" Copyright Act 9 of 1974.

³³² Section 5(6), Copyright Act.

³³³ See s 5(5) of the Copyright Act.

³³⁴ *Biotech Laboratories (Pty) Ltd v Beecham Group PLC* 786 JOC (A) at para 16.

³³⁵ Constitution of the Republic of South Africa, 1996. The proclamation was made in Government Gazette No. 18341 of 10 October 1997. See regarding this row the article titled "An Anthem to Ignorance – The case of Nkosi Sikelel' iAfrika", which appears to have been written by Owen Dean, [former] Professor of Intellectual Property at Stellenbosch University

song, that the South African government is the correct party to earn such royalties but that it has forfeited its right to do so by not registering with a collecting society, and that in doing so others had benefitted from the royalties, at its expense.³³⁶ The national anthem is a composite work comprised of abridged versions of “Nkosi” and “Die Stem van Suid Afrika”, as well as new English words written by a well-known composer and set to the tune of “Die Stem”. The author of the article analysed the situation by stating that (a) “Nkosi” is out of copyright, since fifty (50) years have elapsed since the death of its author, and so no royalties are payable in respect thereto; (b) although “Die Stem” was assigned to the South African government, its assignment has since lapsed and the rights have since reverted to the heirs of the author, who are entitled to earning royalties;³³⁷ and, (c) the author of the English lyrics of “Die Stem”, and not the State, is entitled to copyright ownership thereto and should thus be receiving royalties in respect of that work.³³⁸

While the afore-mentioned analysis appears plausible it needs to be mentioned that much in this regard will depend on an analysis of the position of the arrangers of the two works and the composer of the new English lyrics at the time of working on the anthem. Regarding the legal position in respect of composite works Garnett, Davis and Harbottle have observed³³⁹:

In the case of collective or composite works ... there will be distinct copyrights, namely the copyright in the entire work and the copyright in the various separate contributions. The person who gathers together and arranges the entire work will be the author of the whole work, considered as a compilation. The fact that he is assisted in this by others will not make him any the less the author if it is he who compiled and arranged the information. As to the separate contributions, the authors of these will be the persons who wrote them. Thus where a person has written the entries in a work such as a directory using information supplied by others he will be the author of those entries, unless he has done nothing more than simply copy such information verbatim.

It is submitted however that the more pertinent issue to determine is the relationship that existed between the arrangers of the two works, the composer of the new English lyrics and the State when the composite work was compiled. It cannot, and should not simply be assumed that the arrangers and composer are entitled to copyright without regard first, to a determination of the question whether the work was made by or under the control of the State in terms of section 5(2). As indicated earlier, the effect of section 5(5) of the Copyright Act is that copyright conferred in terms of

and former intellectual property attorney, available at <http://blogs.sun.ac.za/iplaw/2012/06/18/an-anthem-to-ignorance-the-case-of-nkosi-sikelel-iafrika/> (date of use 22 September 2013).

³³⁶ <http://blogs.sun.ac.za/iplaw/2012/06/18/an-anthem-to-ignorance-the-case-of-nkosi-sikelel-iafrika/> *ibid*.

³³⁷ He was referring in this regard to the provisions of s 5(2) of the now-repealed 1911 British Imperial Copyright Act, made law throughout the British Empire (including South Africa), which provided that if an author assigned his copyright, the copyright would revert to the Executor of his estate 25 years after the author's death, regardless of any other assignments of the copyright that might have happened in the meantime. This provision remains part of our law and is applicable to copyright created under it through the preservation provisions of both the 1965 and the 1978 Copyright Acts. See in this regard Dean 2006 *De Rebus* 16 – 21.

³³⁸ <http://blogs.sun.ac.za/iplaw/2012/06/18/an-anthem-to-ignorance-the-case-of-nkosi-sikelel-iafrika/> (date of use 22 September 2013). The author identifies Professor Jeanne Zaidel-Rudolph as being the compiler of the composite work, and as having written the English words of the song. However, the Government Gazette No. 18341 of 10 October 1997 shows that while Prof. Zaidel-Rudolph was responsible overall for the “re-arrangement” of “Die Stem” and the English words, M. Khumalo (Professor Mzilikazi Khumalo) was responsible for arranging “NKosi”.

³³⁹ Garnett, Davis and Harbottle *Copinger and Skone James* 236 – 237.

section 5 nullifies any claim to copyright under sections 3 and 4.³⁴⁰ Harms JA has observed that section 5 of the Copyright Act is broad enough to include not only employees of the State but, in certain cases, also persons in a contractual relationship with the State.³⁴¹ The learned judge mentioned the possibility of commissioned works falling within the ambit of the provision³⁴² and inferred that the expression “by the state” would cover works of organs of the State and possibly employees also, while the preposition “*under*” governs direction or *control*; furthermore, “an important pointer in assessing whether State copyright vests or not may be whether the work was made for or on behalf of the State ...”.³⁴³ The learned judge then concludes:

[T]he production of the work needs to be the principal object of State direction and control and not merely an incidental or peripheral consequence of some generalised governmental ... monitoring power; the direction and control should be directly and specifically expressed with respect of the work in question, and should not be inferred from the fact of some residual or ultimate government veto.³⁴⁴

In other words, the State has to control the *making* of the work or the intellectual effort exerted *in its genesis* and not merely control the *fate* of the work in an administrative sense.³⁴⁵ It is contended that the State had control over the making of the national anthem in the sense of controlling the making of the work. The constitutional imperative required the State to be involved with the making of the national anthem in more than just an administrative sense in that an official of the State (i.e. the President) had to *determine* the national anthem.³⁴⁶ In this regard an anthem committee was established under the control of the State to oversee the making of the work.

5.5 Conclusion

This Chapter was concerned with providing an expository, contextual and often critical elucidation of the general principles applicable to the protection of copyright, with an emphasis on copyright in musical works. The Chapter was not merely a regurgitation of the well-rehearsed general principles of copyright protection. The writer was careful not to merely rehearse the well-known principles in this regard but rather to provide context focussed on the copyright protection of musical works. The Chapter commenced with a critical consideration of the nature and meaning of modern copyright. In this regard the writer challenged the generally-accepted notion of copyright as a negative right. The writer instead contended that copyright should be seen as both a positive and a negative right. The writer’s main interest in this regard is in the conception of copyright as a legal instrument that can be used by authors to actively participate in economic life. It is contended that a conception of copyright

³⁴⁰ See in this regard Harms AJ’ statement in *Biotech Laboratories (Pty) Ltd v Beecham Group PLC* 786 JOC (A) at para 16, as highlighted above.

³⁴¹ *Biotech Laboratories id* at para 17.

³⁴² *Ibid.*

³⁴³ *Ibid* paras 17 – 18.

³⁴⁴ *Ibid* para 22.

³⁴⁵ *Ibid.*

³⁴⁶ Section 4 of the Constitution of the Republic of South Africa, 1996, reads: “The national anthem of the Republic is *determined by the President* by proclamation.” Emphasis added. The expression “determine” means to “*cause (something) to occur in a particular way or to have a particular nature.*” <http://www.oxforddictionaries.com/definition/english/determine> (date of use 22 September 2013). Emphasis added.

as a negative right does not provide the necessary theoretical basis to use copyright to spur economic activity.³⁴⁷

In particular, the writer critically considered the concept of work and the subject-matter of copyright protection and argued that it is generally exclusionary of traditional musical expressions of African origin. This, it was submitted, arises from the fact that the concept of “musical work” in copyright law is based on the Western system of harmonic tonality that extols the elements of melody and harmony, while generally discarding the role of rhythm in musical expression. This strict categorisation of a musical work means that traditional African musical expressions of a rhythmical nature would rarely meet the requirements of protection as a musical work. Even where such expressions were to be reduced to material form, they would very likely be protected under the regime of “related rights”, as fixated performances, rather than as musical works.

The writer praised the recent EU Court of Justice decision of *Levola* as revolutionary and as signalling a new era where the strict categorisation of works and the fixation requirement are not the critical considerations for the recognition of copyright subject-matter. It was in this regard submitted that following the line of reasoning used in the *Levola* case it would be possible to develop an African epistemology of copyright law, in terms of which African traditional rhythmical performances would be recognised as meeting the requirements of musical expression. The writer further commented on the idea / expression dichotomy, especially commenting on how difficulties arise in applying this doctrine in respect of musical works. This, it was submitted, arises from the limited raw materials (e.g. notes, chords, musical styles etc.) used to create musical works, resulting in the argument that when it comes to musical works, the idea is inextricably merged with the expression.

Similarly, the question of compilation works and the possibility of according protection to music compilations and playlists under South African copyright law was mooted. The writer made several other observations, including a consideration of works made by or under the control of the State. In this regard it was suggested that copyright in the national anthem, as a composite work, probably vests in the State and not in any of the persons who participated in the arrangement of the work.

³⁴⁷ For the writer’s other work on this theme see Baloyi 2014 *PELJ*.

Chapter 6: The Collective Management of Musical Works: A Contextual Overview

“... New technologies have given rise to new, high-volume markets for works in respect of which individual exercise and control of rights is at worst, impossible, or at best impractical.”¹



¹ Garnett, Davies and Harbottle *Copinger and Skone James* 1790.

6.1 Introduction: The Essence of Collective Management of Copyright

6.1.1 The Need for Collective Management

Under normal circumstances, the rights accorded by copyright to rights-holders should be exercised by them individually. This in fact is the essence of the exclusive nature of these rights.² As Ficsor has stated, the exclusive right of authors to exploit their works or authorize others to do so “is a basic element of copyright” and may only fully be enjoyed if exercised by the rights-holder individually.³ This is because the rights-holder may then determine the conditions under which the work may be used, including the remuneration payable.⁴

Having indicated the above, there are certain instances where, in particular with respect to certain of the rights, it becomes difficult and at times close to impossible for rights-holders to individually exercise these rights in an effective and efficient manner.⁵ This is often as a result of multiple users using the works at different places and varying times or needing rapid access to such works, thus making it difficult or costly to negotiate with the users, to monitor uses and to collect usage fees.⁶ Under such circumstances rights-holders may only derive the best value from the exercise of such rights with the assistance of a third party. This would counter the view by some, highlighted by Ficsor, that if rights-holders cannot effectively exercise the rights granted to them, such rights should be abolished or be converted from exclusive rights to remuneration rights.⁷ The writer agrees with Ficsor that there is no justification for such a view and that the system of collective management becomes a better and more effective alternative under such circumstances.

6.1.2 The Benefits of Collective Management

The positive benefits of collective management have been repeatedly highlighted.⁸ Ficsor distils the functions of collecting societies⁹ as entailing (i) monitoring the use of their members' works; (ii) negotiating with prospective users; (iii) issuing licences; (iv) collecting remuneration and (v) distributing the remuneration among the members whose works were used.¹⁰ Collective management also has benefits for users, enabling easy access to a large body of works from a single source and simplifying negotiations.¹¹ It has, in this regard, to be mentioned that collective management of copyright has never been seen, in its historical origins and development, as conflicting with or obstructing the individual management of copyright by the rights-holders

² See the discussion in Chapter 5 supra regarding the exclusive nature of copyright protection.

³ Ficsor *Collective Management* at 15 and 16.

⁴ Ficsor 2003 *Copyright Bulletin* 1.

⁵ See Garnett, Davies and Harbottle *Copinger and Skone James 1790*.

⁶ See Ficsor *Collective Management* 19; Von Lewinski *International Copyright Law* 61; WIPO *Intellectual Property Handbook* 387; UNESCO *The ABC of Copyright* 73.

⁷ Or else converted to a non-voluntary licensing system. See Ficsor *id* at 17.

⁸ See WIPO *Intellectual Property Handbook* 387 – 400 generally; Garnett, Davies and Harbottle *Copinger and Skone James 1790 – 1794*; UNESCO *The ABC of Copyright* 78; Bently and Sherman *Intellectual Property* 269 – 270 and Riccio and Codiglione 2013 *Masaryk U. J.L. & Tech*.

⁹ Also popularly known as collective management organisations (CMOs). The two phrases are used interchangeably in this thesis.

¹⁰ Ficsor *Collective Management* 17, at para 21.

¹¹ Ficsor *id* at 17 – 18.

themselves. It has rather been seen as a system and / or mechanism that can be contrasted with and is complementary to the system of *individual rights management*, leaving the rights-holder with the freedom to individually administer his rights “in constellations in which the right holder is in a position to contract directly with the user(s) of his work(s).”¹²

In view of the foregoing it has been observed that “a collecting society acts instead of the right holder, but ultimately on his behalf.”¹³ This is an important observation and thus where the system of collective management is seen as replacing the rights-holder’s ability to administer the rights himself then such a system is misdirected and unjustifiable. One of the well-recognised rationales for the existence of the collective management system is that it serves to overcome *high transactions costs* that arise from the market failure in relation to the identification of and negotiation with large numbers of users by individual rights-holders.¹⁴ Schovsbo expresses this phenomenon in the following manner:

On the level of the *market* several things happen. First and foremost, collectivization opens up access to the use of works which would otherwise have been inaccessible because of transaction costs. This in turn transfers money to authors from users ... To this process collectivization is instrumental because it makes copyright work in areas where no individual markets exist, or where such markets would be sub-optimal. ...¹⁵

Collective management organisations play a critical role in the administration of music copyright in South Africa and their importance has become a topical issue in South Africa. However, not much has been written about the nature and legal basis of their operations. This section will thus provide much assistance in understanding the operations of CMOs and the idiosyncrasies of the system, focussing on the South African environment.

6.2 Dealing with the Monopolistic Nature of Copyright Societies

It is common cause that CMOs are *de facto* (and sometimes *de iure*) monopolies. Their role in reducing transaction costs is however seen as legitimising their existence in spite of their monopolistic position.¹⁶ In view of this, CMOs have sometimes been called “natural monopolies”.¹⁷ It

¹² Hilty RM, “Individual, multiple and collective ownership: what impact on competition?”, in Rosén *Individualism and Collectivism* 35.

¹³ Hilty *id* at 37.

¹⁴ See in this regard Handke and Towse 2007 *IIC*; Hansen and Bischoffshausen 2007 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=998328 and Schovsbo J “The necessity to collectivize copyright – and dangers thereof”, in Rosén *Individualism and Collectivism*. Transaction costs have been called “costs of exchange”, and include *search costs* (finding an “exchange partner”, or someone who can buy or sell one’s products); *bargaining costs* (successful negotiations, including the conclusion of contracts), and *enforcement costs* (monitoring performance and “punishing violations”, which would include costs relating to the institution of infringement actions against copyright violators). See in this regard Cooter and Ulen *Law and Economics* 88. Nevertheless, it needs to be noted that collective management’s function in reducing transaction costs is a benefit that applies equally for users as it does for rights-holders. See Ficsor *Collective Management* 18.

¹⁵ Schovsbo *id* at 177.

¹⁶ See Riccio and Codiglione 2013 *Masaryk University Journal of Law and Technology* 291 – 293. Because of the benefits provided by the collective management system Riccio and Codiglione have observed that “it seems difficult to overcome the dogma of a centralized collective management.” *Id* at 293.

¹⁷ A natural monopoly exists where “a sole supplier can offer a good or as the case may be, a bundle of goods, on a relevant market at lower production costs than two or more suppliers (so-called sub-additive cost function)”. Hansen and

has been said that in respect of CMOs, the concept of natural monopoly is used in relation to “the relationship between the demand and the technology of supply”, where “the costs associated with the management solutions provided by collecting societies make it economically preferable for one single entity to serve the entire market.”¹⁸ In view of this, collecting societies are often exempted from competition laws and regulated separately to prevent rising market costs.¹⁹ It is likewise believed that CMOs offer efficiencies and benefits that far outweigh “the cost associated with their monopolistic nature.”²⁰ Not everyone is however enthusiastic about the idea of collecting societies being seen as natural monopolies.²¹ In this regard Katz argues that the cost efficiency argument in favour of CMOs is not that straightforward, as many of the underlying cost efficiencies attributed to CMOs are merely assumed and could be achieved “under less restrictive arrangements”.²² Having indicated this, the prevailing view is one that sees CMOs as natural monopolies that should be exempt from strict competition rules while subject to other forms of government regulation.²³

Bischoffshausen 2007 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=998328 9 n 66. More specifically, “[a] natural monopoly arises when the average costs of producing a product or service declines as more of the product or service is supplied to the market.” Ghosh 2008 *U. Ill. L. Rev.* 1138. For the application of the concept in respect of intellectual property see Duffy 2004 *U. Chi. L. Rev.* generally. For the idea of CMOs being seen as natural monopolies see also Handke and Towse 2007 *IIC* generally and the US decision of *Broadcast Music, Inc. v Moor-Law Inc.* 527 F. Supp. 758 (D.Del.1981), at 762 – 763, where the court agreed that Broadcast Music Inc. (BMI), a performing rights society, was a natural monopoly.

¹⁸ Flanagan and Montagnani *Intellectual Property Law* 148.

¹⁹ Drexel *Research Handbook on Intellectual Property* 396; Drexel J “Competition in the field of collective management: preferring ‘creative competition’ to allocative efficiency in European copyright law”, in Torremans (ed) *Copyright Law* 263 – 264; also Kretschmer 2002 *EIPR* 126. In this regard Drexel *et al* 2013 <https://ssrn.com/abstract=2208971> further note: “... [T]he natural monopoly of collecting societies should be accepted as an efficient market solution. In principle, law should not try to impose competition on natural monopolies; otherwise it would endanger the efficiencies arising from the monopoly. Yet law should regulate the monopoly by addressing its anti-competitive effects and, more specifically act against abuse of the market dominance of collecting societies.” Similarly Throsby *Economics of Cultural Policy* 205 argues that “the natural monopoly” reason for the emergence of a single supplier is that “[t]he cost efficiency of a strong natural monopoly in any market provides an effective barrier against the entry of new firms, since a new entrant is unlikely to be able to achieve *the same scale economies* as those enjoyed by the incumbent firm.”

²⁰ Katz 2005 *J. Comp. L. & Econ.* 551.

²¹ Ricolfi M “Individual and Collective Management of Copyright in a Digital Environment”, in Torremans (ed) *Copyright Law* 298 highlights the position that the argument “... that CRMOs are a remedy for market failure has now become obsolete.”

²² See Katz 2005 *J. Comp. L. & Econ.* especially from 553 – 593. See also Katz 2006 *J. Comp. L. & Econ.* generally. One of the arguments advanced by Katz for this position is that other entities, such as music publishers can achieve the same “economies of scale and scope” attributed to CMOs, arguing that this explains “the common practice” whereby songwriters assign their full copyright to publishers “in exchange to the publisher’s service and payment of the writer’s share for the royalties collected by the publisher”. Katz *id* at 554. It has however, been shown that songwriters do not always conclude publishing agreements willingly but because they feel compelled to do so, and that such contracts are often couched in unconscionable terms. See in this regard Baloyi 2012 *SA Merc LJ* 218 – 232 and Baloyi 2014 *PELJ* 86 – 167 generally. In this regard it has been argued that those who criticise the collecting society system are often *exploiting businesses* (such as music publishers), “who have an own interest in acquiring and exercising certain authors’ rights”, and those who are under obligation to pay a remuneration. Von Lewinski 2004 http://portal.unesco.org/culture/en/files/19552/11515904771/svl_e.pdf/svl_e.pdf 1. As to Katz’s argument that “... the existence of multiple publishers of varying sizes suggests that the minimum efficient scale for copyright administration ... can probably be achieved at scales that fall well short of monopoly” one needs to heed the warning of Riccio and Codiglione 2013 *Masaryk U. J.L. & Tech.* (at 299), that “the market opening process may increase majors [i.e. major publishers]’s commercial power, that could manage bigger and enormous musical repertoires, increasing also their own contractual power, passing from a “collecting societies monopoly to a “major right owners monopoly”.

²³ See in this regard Torremans *Copyright Law* 264, and 263 – 268, generally and Dworkin G “Monopoly, non-participating rightowners, relationship authors/producers, Copyright Tribunal”, in Jehoram, Keuchenius and Seignette *Collective Administration* 12 – 14. The tolerance for the monopoly status of CMOs was expressed by the Court of Justice of the European Union (CJEU) in *Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* Case C – 351/12, where the court observed (at para 72) that “... legislation ... which grants a collecting society ... a monopoly over the management of copyright in relation to a category of protected works ... must be considered as suitable

Perhaps a more balanced view is that presented by Ghosh, who relates the concept of natural monopoly to the intellectual property system itself. In this regard Ghosh argues that the use of the natural monopoly concept in relation to intellectual property is in fact a metaphor arising from the exclusive nature of intellectual property, as “the exclusivity associated with intellectual property can be understood in the same terms as the exclusivity enjoyed by a natural monopolist.”²⁴ According to Ghosh the outcome of such a view is that the intellectual property system can itself be seen as a regulatory system capable of safeguarding consumer interests and enhancing potential competition.²⁵ Kretschmer on the other hand, envisages a different rationale for copyright “beyond the private property premise”, whereby collecting societies would, themselves, be converted into “regulatory instruments”, based on the principle that “wherever commerce is generated through the use of creative content, a share of revenues should flow back into creative production.”²⁶ It is suggested that a system of measured regulation, allowing room for the use of competition rules where appropriate, would be more appropriate one for CMOs to ensure their more efficient operations – at least in the South African context.

6.3 Has Digital Technology Rendered the Role of CMOs redundant?

There are those who have argued that the advent of digital technology with the concomitant use of digital rights management (DRM) systems has rendered the role of CMOs obsolete or irrelevant, as rights-holders may now easily control the use of their works.²⁷ In this regard it is argued that, because “DRM enables rightsholders to individually monitor and meter the use of copyright protected works, resort to it would ultimately make CRMOS [collective rights management organisations – another alternative for CMOs] redundant.”²⁸ Thus, because rights-holders can now (supposedly) easily do what CMOs did for them, it is argued that the role of CMOs has been rendered redundant.²⁹ Katz, displaying greater confidence in the veracity of this argument, has

for protecting intellectual property rights, since it is liable to allow the effective management of those rights and an effective supervision of their respect in the that territory.” For various approaches regarding the regulation of CMOs see Thorpe 1998 *Prometheus* 317 – 329 and Street, Laing and Schroff 2016 *International Journal of Cultural Policy* 1 – 19.

²⁴ Ghosh 2008 *U. Ill. L. Rev.* 1128.

²⁵ Ghosh *ibid* generally. For a similar view see Liu 2004 *N.C. L. Rev.* generally, and at 102 – 103, where the author asserts that ‘all copyright legislation “regulates” the copyright markets.’

²⁶ Kretschmer 2002 *EIPR* 135 – 136.

²⁷ See for example in this regard Ricolfi M “Individual and Collective Management of Copyright in a Digital Environment”, in Torremans *Copyright Law* 283 – 314, and Katz 2006 *J. Comp. L. & Econ.* generally. Ricolfi for example clearly states (at 298): “DRM may be visualised as a device for replacing collective management through individual management”, further observing (283): “At times, it even appears that in the long run collective rights management and collective rights management organisations (CRMOS) might end up being altogether displaced from the digital environment.” Katz is even more pronounced on his views. See also Graber *et al Digital Rights Management* generally, for a debate on these questions.

²⁸ Ricolfi *id* at 283. Ricolfi also makes reference to another school of thought which suggests that the displacement of CMOs shall be carried out through the setting up of “levy-based neo-regulatory devices”, e.g. a so-called “governmentally administered reward system” which would in the long, “phase out copyright in the entertainment sector.” *Ibid*. According to this theory, in the neo-regulatory system or “plan” the compensation or “final price” will be set by states, and such compensation will be “in exchange for the whole package of all registered works” instead of individual works, making it “impossible for rightsholders to engage in the educated guess of anticipating demand for a given work ... and of setting the price accordingly.” *Id* at 306.

²⁹ Ricolfi gives the analogy of a comet in explaining this theory. Just as the tail of a comet follows its head (and is thus dependent on the head), so collective management of copyright was, before the advent of digital technology, a *secondary form* of exploitation following upon and dependent on the success of the *primary uses* controlled by individual rights-holders. [See below in Chapter 8 for the distinction between primary and secondary uses of copyright works]. However (so

suggested that digital technology will result in collecting societies shedding their current activity of collective management and assuming new roles such as online merchants, infringement monitors and / or standard-setting organisations.³⁰ In this regard Katz asserts that, apart from the limited role of only administering back catalogues, “[the CMOs’] traditional functions of collective administration would no longer exist.”³¹

The view that CMOs will lose their relevance in the digital environment has been countered by others. Firstly it needs to be noted that it has been over ten years since Katz predicted the demise of CMOs, and this prediction does not seem to have come true as CMOs continue their activities unabated. There is also continuing governmental and intergovernmental support for CMO activities, in particular in the European Union and the developing world.³² Meyer³³ outlines a number of tasks performed by CMOs that cannot be replaced by DRMs, including the documentation of works and rights-holder information; the monitoring of music usage; the negotiation of tariffs and lobbying. Hansen and Bischoffshausen mention, *inter alia*, the search and information costs of users;³⁴ the role of CMOs in the administration of copyright levies and the economies of scale and of scope realised through the blanket licensing of copyright works (as opposed to the individual or transactional licensing inherent in DRM systems).³⁵ Garnett, Davies and Harbottle point out to the fact that DRMs can in fact be used positively by CMOs “to facilitate the administration of rights in the digital environment.”³⁶

Perhaps offering a more balanced analysis, Gervais argues that the role of CMOs in the digital environment can best be described as “evolutionary”, arguing that CMOs would need to adapt in order to remain efficient and relevant.³⁷ In particular, Gervais argues that CMOs can be instrumental in resolving the problem of *fragmentation* of copyright, by “bundling fragments” for purposes of licensing copyright usages (e.g. through the issuing of a single fee licence representing the rights

the argument goes), after the advent of digital technology (and the demise of the “factory” which characterised the analogue, primary use market), “it does not make sense any longer to speak of primary and secondary exploitation, of the head and of the tail of a comet, because the very sequence of acts of exploitation no longer needs to start from a ‘factory’. Maybe the comet has been replaced by a Milky Way Galaxy. ...” Ricolfi *id* at 285; 312 – 313.

³⁰ Katz 2006 J. Comp. L. & Econ. 273 – 277.

³¹ Katz *id* at 277. It needs however to be noted that Katz made this prediction over ten years ago (in 2006) and there is no indication that the role of collecting societies is, in any way, diminishing. The passing of instruments such as the EU Directive on Collective Management of Copyright, and the growing interest in collective management amongst developing nations signifies the confidence of regulators in collective management and its continuing relevance.

³² The passing of the EU Directive on Collective Management in 2014 has affirmed the EU’s long-standing support of collective management as an effective system of copyright management, while ensuring that CMOs operate within acceptable guidelines and principles to ensure their greater efficiency and the safeguarding of the interests of rights-holders and users. Collective management has also shown growth in Africa (though not without problems). See in this regard Baloyi JJ and Pistorius T “Collective Management in Africa”, in Gervais *Collective Management of Copyright* (2016) 369 – 424 and Monyatsi ARIPO Survey <http://www.aripo.org/news-events-publications/announcements/item/113-survey-on-the-status-of-cmos-in-aripo-member-states>.

³³ Meyer A “DRMs Do Not Replace Collecting Societies”, in Graber *et al Digital Rights Management* 64.

³⁴ When seeking to determine which works to use and who the copyright owners of such works are. This may be problematic, especially where foreign works are used.

³⁵ Hansen and Bischoffshausen 2007 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=998328 13 et seq.

³⁶ Garnett, Davies and Harbottle *Copinger and Skone James* 1826 – 1829.

³⁷ Gervais D “Collective Management of Copyright: Theory and Practice in the Digital Age”, in Gervais *Collective Management of Copyright* (2016) 7. In this regard it is observed: “What is certain ... is that the ability of CMOs to meet the needs of both authors and users is contingent on the evolution of both their internal practices, and the framework in which CMOs work to alleviate the many concerns of fragmentation within the current system.” Gervais *id* at 23.

controlled by several CMOs), where the bundle can then be “split” for distribution purposes without any hassles for users.³⁸

6.4 Collective Management in Africa – General Observations

Despite growing criticism of collecting societies, the relevance of the system of collective management for less developed nations such as those in Africa cannot be negated. With lack of developed copyright markets and a lack of sophistication and / or resources in the individual administration of rights, rights-holders in less developed nations are often vulnerable to exploitation and unconscionable conduct by “exploiting businesses”.³⁹ Consequently, a well-functioning and well-resourced copyright society can go a long way in assisting rights-holders from such countries to reap benefits from the use of their musical works.⁴⁰ It was pointed out above that despite the assertions of some, the advent of digital technology has not, as such, rendered obsolete the role of collective management of copyright. In some instances digital technology may have strengthened the need for progressive, highly-responsive CMOs.⁴¹ In particular in Africa, where high internet connectivity costs limit transacting in the digital environment,⁴² CMOs can play a role by streamlining the processes and thus saving costs. Moreover, the traditional market for collective management (i.e. licensing of phono-mechanical rights, broadcast rights and public performance rights) remains intact in most of Africa, and seems poised to do so for the foreseeable future. Although physical music sales have recently been overtaken by digital sales,⁴³ the physical market remains a viable market in many African countries, and the transition to digital broadcasting has been at a snail pace.⁴⁴ This, coupled with the fact that music continues to be used in hundreds of public performance venues such as restaurants, pubs, hotels, retail establishments, halls and stadiums, validates the continuing importance of collecting societies.

³⁸ Gervais *id* at 15; 20-23. Gervais argues that CMOs can, in this regard, play a rationalising and organising role. Fragmentation is explained as arising from the fact that copyright is a bundle of rights, where each sub-right (or copyright fragment), e.g. publishing rights, reproduction rights or performing rights, can be owned by different rights-holders with the result that a single use of a copyright work would often require multiple authorisations from different rights-holders. See Gervais *id* at 12 – 15.

³⁹ For barriers experienced by rights-holders from developing nations with regard to the exploitation of their copyright works, and the unfair advantage taken by “exploiting businesses” (e.g. music publishers and record companies) as a result see generally Baloyi *PELJ* 86 – 167.

⁴⁰ Individual licensing in respect of some rights (especially those that are not normally administered through collective management) will of course, remain open to rights-holders, but, as observed, it is in the area of individual management that many authors and composers are subjected to unconscionable arrangements. See Baloyi *ibid* and Baloyi 2012 *SA Merc LJ* generally. Furthermore it has been observed that “... the culture of payment of royalties with respect to authors’ rights ... is virtually unknown or non-existent [in many African countries] except at the collecting society level”, prompting many musicians to prefer a “buy-out” of rights, “since they don’t have much faith on [the] royalties mode of payment”, with the result “collective management of rights represents the better known or better established system of royalty earnings ... [and for] many authors/composers ... the only system from which they can ever hope to earn royalties.” Baloyi 2014 *MEIEA* 65 – 66.

⁴¹ As Gervais has observed, it is difficult to see how the online mass and P2P market can be organised (through the provision of “a broad license to use ... music”) without the involvement of CMOs. See Gervais D “Collective Management of Copyright: Theory and Practice in the Digital Age”, in Gervais *Collective Management of Copyright* (2016) at 22.

⁴² See Muwanga http://wikieducator.org/images/f/f3/PID_289.pdf. Some reasons attributed for the high cost of internet connectivity in Africa include inadequate investment in basic infrastructure, unfavourable economic market conditions and insufficient competition in certain market segments. See ITU Study 2013 https://www.itu.int/en/ITU-D/Regulatory-Market/Documents/IIC_Africa_Final-en.pdf at 30 - 33.

⁴³ See IFPI Global Music Report 2016 <http://www.ifpi.org/downloads/GMR2016.pdf>.

⁴⁴ See Vourlias 2016 <http://variety.com/2016/digital/global/africa-transition-digital-1201745102/>. There has also been an observable resurgence in vinyl record sales, at one stage also surpassing digital record sales. See Billboard March 14, 2015.

As indicated above, there has been a growing interest in collective management amongst African nations and many have only recently set up CMOs or updated their laws to make provision for this. A number of African countries have hosted several collective management seminars under the auspices of international and inter-governmental organisations such as WIPO, ARIPO and KOPINOR. This notwithstanding, it is the observation of the writer that the euphoria associated with collective management in Africa and its benefits does not always give rise to effective and empowering policies, laws and regulations in relation to the formation and functioning of CMOs. The writer has often observed a slant towards over-regulation, which, rather than facilitating an environment conducive to the smooth and proper functioning of collecting societies, has instead often resulted in a chaotic state leading to a highly litigious environment. Invariably rights-holders bear the brunt of such mishaps. This trend has particularly been observed in Nigeria, Kenya and here in South Africa. This is a worrying trend as these are the leading economies in Africa and thus should set an example for the proper functioning of CMOs.

It is the writer's conviction that this trend often arises from an obsession with overly-regulated mandatory systems of collective management, implemented (whether consciously or subconsciously) as a punitive measure against what are perceived as unsavoury practices of CMOs. Rather than remedying the situation however, such measures only stifle the proper functioning of CMOs and thus fail to safeguard the interests of rights-holders. As Von Lewinsky has observed, this is often as a result of regulators "[having] little regard to the particularities of authors' rights."⁴⁵ In the ensuing pages the writer will discuss the operations of copyright societies in South Africa, with a focus on the operations of SAMRO, the largest CMO in Africa. This is to highlight the typical operations of a CMO in Africa. This will be followed by an analysis of the regulation of CMOs in Nigeria, Kenya and South Africa, with the aim of critically highlighting the pitfalls in the regulatory systems applicable to such CMOs and proposing a better model of collective management in Africa. This exercise shall be completed in Chapter 8 with a consideration of the EU Directive on Collective Management and how the adoption of some of its principles can assist South Africa (and hopefully other African countries) in implementing a more effective regime for collective management.

6.5 The History and Nature of Collective Management of Musical Works in South Africa⁴⁶

The history of collective management in South Africa (as in many other African countries) can be traced back to colonial times. South Africa being a colony of the British, the UK's Performing Right Society (PRS), formed in 1914, had operations in South Africa from 1925 until 1961.⁴⁷ The PRS

⁴⁵ See Von Lewinski 2004

http://portal.unesco.org/culture/en/files/19552/11515904771svl_e.pdf/svl_e.pdf 1. Emphasis added.

⁴⁶ Information on the history of collective management in South Africa is sparse, and thus much of the discussion in this section is based on research conducted by the writer published in Baloyi JJ and Pistorius T, "Collective Management in Africa", in Gervais *Collective Management of Copyright* (2016) 369 – 424, in particular at 374 – 397.

⁴⁷ See <https://prsformusic.com/about-us/history> (date of use: 25 April 2017). For a full history of the PRS see Ehrlich *Harmonious Alliance* generally.

established an agency in the Union of South Africa (as South African was then known) in 1925 and this was, in fact the PRS's first overseas agency.⁴⁸ At the time the following was observed:

... Until recently ... [the performing right] has not been of much practical importance in South Africa owing to the fact that little or no attempt has been made to enforce it, but with the advent of the Performing Right Society, Ltd., a society formed for the express purpose of enforcing this right on behalf of its members, the matter has become of the greatest importance to conductors of orchestras and proprietors of place of entertainment throughout the country. ...⁴⁹

The *modus operandi* of the PRS was to appoint agents to represent its interests not only in the Union, but also in South West Africa (now Namibia), British Bechuanaland (now Botswana), Basutoland (now Lesotho) and Swaziland. This observation is important in that it can be linked to the concept of a "SAMRO territory" that has been prevalent in the licensing activities of SAMRO for a concerted period. The "SAMRO territory" was this *PRS territory* in Southern Africa (incorporating in particular South Africa, Botswana, Lesotho and Swaziland), i.e. the areas in which the PRS exercised its rights before transferring these to SAMRO in 1961 (the year of South Africa's independence from Britain). This is in fact, the reason why SAMRO's name was changed from *South African Music Rights Organisation* to *Southern African Music Rights Organisation*, where it is acknowledged that "[t]he new name sought to reflect that SAMRO was not just for South Africans but would be active throughout the region".⁵⁰

From the time that the PRS handed over its operations to SAMRO the later conducted its licensing operations in the "SAMRO territory", and the standard SAMRO licence agreement always reflected this position. This often created conflicts with these other countries – particularly after they themselves started to have interest in collective management.⁵¹ Obviously these SAMRO territory countries were all British colonies so the PRS's reach to these countries could be justified on this basis.⁵² After these countries gained independence from Britain however (and after South Africa itself gained independence from Britain), the only justification for SAMRO's involvement in these sovereign countries (which was not limited to licensing activities but also entailed SAMRO being the *de facto* CMO in these countries), would be that these countries had under-developed or poorly-enforced copyright laws. Secondly, on a practical level many South African businesses that set up

⁴⁸ See in this regard Billboard Nov. 6, 1976 C-44; also <http://www.prsformusic.com/aboutus/ourorganisation/ourhistory/Pages/timeline.aspx> (date of use: 25 April 2017).

⁴⁹ Duncan 1925 S. *African L.J.* 292 – 293.

⁵⁰ <http://www.samro.org.za/news/articles/announcing-passing-era-passing-paul-roos> (date of use: 25 April 2017).

⁵¹ This was certainly the case in Botswana after the enactment of its Copyright and Neighbouring Rights Act, 2000 (as revised in 2006), which dealt comprehensively with collective management. As SAMRO Head of Legal at the time, the writer has personal knowledge of the Botswana's resistance to SAMRO's licensing endeavours after the enactment of this legislation (in particular the 2006 revision).

⁵² The exception here is South West Africa (Namibia), which was a German colony until the First World War. The UK's reach over South West Africa was as a result of the fact that South West Africa was placed under a British mandate after the First World War, with its administration handed over to the Union of South Africa as a result of Article 22 of the Covenant of the League of Nations and the conclusion of a Class C Mandate Agreement of the League Council. South Africa's control over South West Africa continued unabated after the Second World War, albeit controversially and in conflict with the United Nations (especially after the later asserted its sovereignty over the territory in 1967), until South West Africa, now called Namibia, gained independence from South Africa in 1990. See generally in this regard <http://www.sahistory.org.za/places/namibia> (date of use: 25 April 2017).

shop in these countries were willing⁵³ to extend the scope of their licensing agreement with SAMRO, concluded in South Africa, to include their operations in these other countries.⁵⁴ It is arguably this latter scenario that continued to provide the real lifeline for the “SAMRO territory” licensing model. This is because, from a legal standpoint, SAMRO’s licensing of activities taking place in these other countries based on licences concluded in South Africa in terms of South African legislation would be on shaky ground.⁵⁵ Currently SAMRO’s licensing operations in these other territories have decreased drastically.⁵⁶

The events leading to the formation of SAMRO are well captured in the following extract:

The PRS agents were usually firms of attorneys based in the various territories and reporting to a Chief Agent who was based in South Africa. From April 1938 until September 1961 the PRS’ Chief Agent was the firm of Ivan Christian Silberbauer. In 1959 Dr. Gideon Roos Snr., a former Director-General of the SABC, commenced discussions with the PRS with a view to obtaining the PRS’ assistance in establishing South Africa’s own collective management organization. These discussions culminated in the conclusion of an agreement between the PRS and Dr. Roos in July 1961, appointing the later [sic] as its South African General Manager pending the formation of a South African company that would take over the PRS’ operations in the five countries. Dr. Roos would replace Silberbauer as the PRS’ representative in South Africa and, pending the formation of the new company, the PRS would execute a power of attorney in favor of Dr. Roos to enable him to represent the PRS in the five territories. The PRS would also assist with the formation of the new company and would ensure that Dr. Roos was appointed as the first General Manager of the new company.⁵⁷

It has been observed that SAMRO is the oldest, and in fact the most-established and effective CMO in Africa, contributing over fifty percent (50%) of African collecting society revenues as of 2015.⁵⁸ SAMRO was originally constituted as a society primarily concerned with the administration of performing rights, taking over the role previously played by the PRS. SAMRO’s constitutive

⁵³ Or perhaps made to believe that this was required, in their licensing negotiations with SAMRO.

⁵⁴ The writer is aware of this through his former senior management employment at SAMRO.

⁵⁵ The issue here is one of enforceability, arising from the territorial nature of copyright based on which it would not be feasible to enforce in South Africa copyright infringements that took place another country and vice versa. This position was reinforced in the case of *Gallo Africa Limited & Others v Sting Music (Pty) Ltd & Others* [2011] 1 All SA 449 (SCA), at paras 15 – 20.

⁵⁶ As indicated, Namibia gained independence from South Africa in 1990 and enacted its Copyright and Neighbouring Rights Protection Act in 1994 (Act No. 6 of 1994), which made it possible for collective management to commence in Namibia. There are currently two collecting societies in Namibia, namely NASCAM (in respect of musical works), formed with the support of WIPO, CISAC and SAMRO, and NAMRRO (in respect of reprographic rights), formed with the support of UNESCO, IFFRO and DALRO. See <https://www.ifla.org/files/assets/clm/country-reports/2012/namibia-2012.pdf> (date of use: 25 April 2017). After this, only Botswana, Lesotho and Swaziland remained of the foreign countries forming part of the SAMRO territory. After the 2006 revision of its Copyright legislation, Botswana started preparations (with the support of *inter alia*, SAMRO and CISAC) for the formation of its first collecting society, COSBOTS, which was formed in 2008. The writer has ascertained from SAMRO (through its current General Manager: Sales, Mr. Stephenson Mhlanga), that SAMRO has since ceased its licensing operations in Botswana. SAMRO however continues to undertake licensing activities in Swaziland and Lesotho, as these countries do not have collecting societies yet (although the laws of Lesotho do make provision for the establishment of a CMO). See in this regard Monyatsi ARIPO Survey <http://www.aripo.org/news-events-publications/announcements/item/113-survey-on-the-status-of-cmos-in-aripo-member-states> at 17 – 18 (date of use: 26 April 2017). Consequently, SAMRO’s current licence agreement still defines the territory covered as including “the Republic of South Africa, the Kingdom of Lesotho, the Kingdom of Swaziland and any other jurisdiction in which SAMRO is operational from time to time directly and not through an Affiliated Society.” (A copy of the current SAMRO licence template was provided to the writer through the courtesy of Mr. Stephenson Mhlanga).

⁵⁷ Baloyi and Pistorius in Gervais *Collective Management of Copyright* 384.

⁵⁸ Baloyi and Pistorius *id* at 374.

documents (its erstwhile memorandum and articles of association) however, permitted it to administer a whole range of other music-related rights, including mechanical and synchronisation rights. Because SAMRO's members also had an interest in mechanical rights, the Board of SAMRO resolved in July 1962 to also administer mechanical rights on behalf of SAMRO's members. This led to some conflict with the Mechanical Copyright Protection Society,⁵⁹ the UK's mechanical rights society, which, like the PRS, had operations in South Africa.⁶⁰ After deliberations SAMRO limited its mechanical rights administration to only one case,⁶¹ paving the way for the MCPS and its successor, the South African Recording Rights Limited (SARRAL), to administer mechanical rights without the threat of competition from SAMRO.

SARRAL was formed in 1963 and its first members were the MCPS, Chappell⁶² and some local music publishers. In this regard the following has been observed:

By 1965 SARRAL had had little success with efforts to obtain assignments of mechanical rights from composers, as they appeared to trust SAMRO's ability more than those of the new CMO. In view of this a tentative agreement was reached that SAMRO would obtain assignments from its members both in respect of performing rights and mechanical rights ... and thereafter "sub-assign" the appropriate portion of the mechanical rights to SARRAL for it to administer them. This thus began the practice whereby SARRAL became an agency in respect of mechanical rights, while SAMRO continued to obtain three forms of deeds of assignment from its members [i.e. in respect of performing rights, mechanical rights and synchronisation rights] so that by 2006, when SAMRO took the decision to enter into the administration of mechanical rights ... it had stacks of mechanical and synchronization agreements that it could immediately use.⁶³

SARRAL however continued to experience an uphill battle with the administration of mechanical rights "to a point where in 1970/71 [its membership] was virtually nil and the very existence of the society was in jeopardy..."⁶⁴ As part of this crisis a break-away organisation, the National Organisation for Reproduction Rights in Music (NORM), was formed "with the support of the major record-label aligned publishers", following the trend in the 1970's where record label groups acquired ownership of publishers.⁶⁵

SARRAL's revival took shape around 1976, championed by certain major European collecting societies, namely SACEM (France), SDRM (France), GEMA (West Germany) and MCPS (UK),

⁵⁹ MCPS, formed in 1910 as the Mechanical Copyright Licences Company (Mecolico), becoming MCPS in 1924 with the merger between Mecolico and the Copyright Protection Society (CPS). In 1997 / 98 MCPS and PRS started an "operating alliance" termed the MCPS-PRS Alliance, rebranding as PRS for Music in 2009. In 2013 the parties reviewed their relationship when MCPS became a client of PRS for Music, and in 2017 the parties entered into "a new 'long term' administration agreement ... bringing to an end the long-running saga over which company would run MCPS' back office functions." See <https://prsformusic.com/about-us/history>; also <http://www.musicweek.com/publishing/read/mcps-seals-new-long-term-admin-deal-with-prs/068518> (date of use: 11 September 2017).

⁶⁰ See Baloyi and Pistorius in Gervais *Collective Management of Copyright* 375.

⁶¹ The licensing of the activities of the South African Information Service (the Department of Information), which had insisted on obtaining one licence from SAMRO in respect of the administration of both performing and mechanical rights. Baloyi and Pistorius *ibid*.

⁶² Now Warner / Chappell Music.

⁶³ Baloyi and Pistorius in Gervais *Collective Management of Copyright* 375 – 376.

⁶⁴ Billboard Nov. 6, 1976 C-44.

⁶⁵ Baloyi and Pistorius in Gervais *Collective Management of Copyright* 376 and 388.

which became its “main members”.⁶⁶ As observed, “[t]his triggered off a program of reorganization and replanning which resulted in the steady growth of the society in becoming the mechanical rights collection agency for South Africa. ...”⁶⁷ With time, NORM’s membership was largely comprised of publishers (including the major publishers) and fewer authors, while SARRAL’s membership was largely comprised of authors (both composers and lyricists) and fewer publishers. SARRAL’s control of the author market was also enhanced by its affiliation with foreign collecting societies.⁶⁸ As a result, the two mechanical rights organisations focussed on different areas of mechanical rights administration: NORM, because of its publisher link to record labels, was mainly involved in the licensing of “commercial music”,⁶⁹ while SARRAL “largely focused on the licensing of mechanical rights in the area of radio, TV, film, private pressing, background music etc., with limited involvement in the field of commercial music.”⁷⁰

It has been observed that the administration of mechanical rights in South Africa has been historically beset with problems and “fallen short of its real potential.”⁷¹ This has mainly been as a result of difficulties in licensing radio and television uses, and the contentions that arose between SARRAL and NORM. This era in South African music rights administration is important to highlight because it ultimately led to the liquidation of SARRAL in the case of *Shapiro and Galeta v South African Recording Rights [Association Limited]*,⁷² ushering in a new era in collective management of mechanical rights with the formation of the Composers, Authors and Publishers Association (CAPASSO) in 2014.⁷³ SARRAL in fact championed broadcast mechanical licensing in South Africa.⁷⁴ Initially SARRAL faced an uphill battle with regard to this.⁷⁵ This was mainly as a result of the *ephemeral provisions* in copyright legislation, which permits a broadcaster to reproduce a musical work without paying compensation as long as such reproduction is destroyed within a period of six months of making the reproduction, or, where the reproduction is of an exceptional

⁶⁶ Billboard Nov. 6, 1976 C-44.

⁶⁷ Billboard Nov. 6, 1976 C-44.

⁶⁸ SARRAL became a member of both CISAC and BIEM in 1976. NORM never became a member of these organisations and only represented the repertoire of the major and other foreign music publishers through their South African affiliates / representatives.

⁶⁹ The expression “commercial music” is used to refer to music recorded by recording artists through the involvement of recording companies for purposes of sale to the public, and forms part of so-called “popular music” (see the definition at <https://www.britannica.com/art/popular-music> (date of use: 12 October 2017)). The expression “commercial music” is used here in contrast to “commissioned music”, which is music specifically composed by a composer on behalf of another person (e.g. a broadcaster, an advertising agency, a production music library etc.) and usually used in films, television, adverts etc. Because SARRAL’s membership was largely comprised of composers, SARRAL controlled this market.

⁷⁰ Baloyi and Pistorius in Gervais *Collective Management of Copyright* 376.

⁷¹ Baloyi and Pistorius *id* at 388.

⁷² Unreported case no. 14698/04 (06 November 2009), South Gauteng High Court. The case report omits the phrase “Association Limited”, but this is actually a clerical error. See for where the name was correctly reflected, *Shapiro v South African Recording Rights Association Limited (Galeta Intervening)* 2008 (4) SA 145 (W), which was part of the same proceedings.

⁷³ For an in-depth discussion of this see Baloyi and Pistorius in Gervais *Collective Management of Copyright* 374 – 377; 387 – 394.

⁷⁴ Broadcast mechanical licensing is the licensing of broadcasters for the reproduction of musical works for purposes of broadcasting such works, as opposed to so-called “phono-mechanical licensing” in respect of the reproduction of musical works in CDS, records, tapes and the like, and “digital mechanical licensing” in respect of the reproduction of digital copying and downloads and reproduction by means of ringtones etc.

⁷⁵ See Baloyi and Pistorius in Gervais *Collective Management of Copyright* 388 - 390.

documentary nature, archived before the end of the period of six months.⁷⁶ Clearly as a way of using these provisions to its advantage the SABC insisted on using in-house facilities when reproducing musical works, or

where [it] used recordings made by outside studios [it] insisted on the use of cheap, production music or music that was directly commissioned ... from local composers, where the musicians were paid nominal once-off fees in exchange to giving the SABC the right to make virtually unlimited recordings of the musical works.⁷⁷

However, because of a number of factors, namely (a) the fact that production needed to be completed long before broadcasting took place; ((b) the need to repeat broadcasts; (c) the need to license broadcasts to other users in order to recoup costs and (d) the difficulty arising from the licensing of the works on a transactional (i.e. work-by-work) basis, the SABC finally gave in and agreed to procure a blanket mechanical rights licence from SARRAL. The first television blanket licence was concluded in 1984 (effective from 1983).⁷⁸ Although the negotiations were initiated by SARRAL, the licence was actually signed between SARRAL and NORM on the one part, and the SABC on the other. It was observed that

SARRAL was prompted to invite NORM to form part of the agreement because the SABC had required SARRAL to indemnify it against any claim that might arise from the SABC's use of any recordings not represented by SARRAL.⁷⁹

However, when the second television blanket licence was concluded in 1992 SARRAL deliberately excluded NORM from the agreement, with the intention of excluding works "falling within the repertoire of NORM members from the indemnity clause while still allocating royalties to such works."⁸⁰ Explaining this incident Baloyi and Pistorius have observed:

The exclusion of NORM from the 1992 agreement arose from a disagreement between NORM and SARRAL regarding the issue of the use of interest earned on license fees pending distribution. SARRAL's modus operandi was to use the interest to defray its operational expenses, and to cover whatever remained outstanding of these expenses from a commission charged on royalties. It appears that NORM was demanding a share of this interest, a move resisted by SARRAL. It also appears that SARRAL benefited the most from the SABC blanket license (as opposed to NORM), with not more than 15% allocated to NORM's repertoire at any given time. By 2001 the total blanket license amount paid by the SABC was ZAR 13, 966.300 million (about USD 1.2 million). Meanwhile NORM felt that its full repertoire was not taken account of, especially with regard to music videos ...⁸¹

⁷⁶ Under the Copyright Act 63 of 1965 these provisions were contained in Section 7(5), and under the current Copyright Act they are contained in Section 12(5).

⁷⁷ Baloyi and Pistorius in Gervais *Collective Management of Copyright* 390.

⁷⁸ SARRAL had earlier entered into a blanket licence agreement with the SABC in the 1960's in respect of the SABC's radio transcription service, "which did not qualify for the ephemeral exception as the recordings were made for various purposes and were retained permanently", and "[providing] for a nominal annual license fee, based on a minimal number of recordings." Baloyi and Pistorius *id* at 389.

⁷⁹ Baloyi and Pistorius *id* at 390.

⁸⁰ *Ibid.*

⁸¹ *Id* at 391.

By excluding NORM from the 1992 agreement SARRAL made a blunder that signalled the beginning of its demise. NORM, which had been dissatisfied with the arrangement between it and SARRAL, began to make demands for its own blanket licence with the SABC. This led the SABC to give notice of its intention to terminate the blanket licence with SARRAL in 2002, while continuing to pay royalties on a month-to-month basis. The SABC then appointed audit consultants to determine the extent of its licence fee liability, concluding that it was paying more than was warranted. Consequently, the SABC reduced the licence fee and divided the reduced amount equally between SARRAL and NORM, resulting in SARRAL's royalty collections decreasing by about seventy percent.⁸² This created a situation where SARRAL was no longer able to meet its expenses, tempting it, around 2004, to change its accounting method to be similar to SAMRO's, as a way of ameliorating the effect of the reduction in licence fees.⁸³ This is explained in the following manner:

Rather than continuing to act as an agent and deducting its expenses from interest and from commissions (which ranged between 7% - 9%), SARRAL claimed that its accounting method had been incorrect and that it, in fact, owned the royalties it was collecting. On this basis, SARRAL claimed that after deducting its expenses from both the interest income and commissioning fees, it was entitled to deduct *all* outstanding expenses from royalty income, prior to paying out what was left to members.

...⁸⁴

In this regard SARRAL, without the approval of its members, switched to the accounting method used by SAMRO, resulting in almost fifty percent of royalties due to members being used to cover SARRAL's expenses. It was this situation that provided the justification for the winding up of SARRAL in the *Shapiro* case.⁸⁵ In this regard the court made the following observation:

It is common cause or not in dispute that from the date of its incorporation until 2003, a period of some 40 years, the respondent recognised and treated royalties collected as belonging to its members. The respondent's audited financial statements were always drawn on the basis that it was an *agent* and that royalties did not accrue to it or form part of its revenue. ... Royalties were consistently reflected in its financial statements as a liability to its members. ...⁸⁶

The above observation is very important in understanding the difference between SAMRO and SARRAL in particular and performing rights societies and mechanical rights societies in general, regarding the basis of their relationship with their members. While SAMRO (and many other performing rights societies internationally), has operated on the basis of an assignment of copyright by the author to SAMRO – essentially making the performing rights society the owner of the

⁸² This created a situation where SARRAL's royalty collections decreased from just over R23 million (twenty three million rand) in 1999, to R11, 625 162.00 (eleven million six hundred and twenty five thousand and one hundred and sixty two rand). See *Shapiro and Galeta v South African Recording Rights [Association Limited]* supra n 72 at 9 - 10.

⁸³ See <http://colinshapiro.co.za/truthaboutsarral/release.html> (date of use: 13 September 2017).

⁸⁴ Baloyi and Pistorius in Gervais *Collective Management of Copyright* 391. Emphasis in text.

⁸⁵ *Shapiro and Galeta v South African Recording Rights [Association Limited]* supra n 82. The court observed in the case (at page 5), "The fundamental issue between the parties concerns the respondent's treatment of the royalties collected by it and more particularly the respondent's entitlement to apportion royalty moneys to supplement its revenues in order to meet operational costs."

⁸⁶ *Ibid.* Emphasis added.

copyright assigned to it by the author⁸⁷ – many mechanical rights societies (in particular those from Commonwealth jurisdictions) have merely acted as agents of the copyright owners with no transfer of copyright to them.⁸⁸ Thus it has been noted, in respect of the MCPS:

Unlike many other societies, [notably those from the civil law jurisdictions] the MCPS does not take an assignment or license of the copyright of its members. Instead the society acts as an agent for its members in granting licenses and in collecting revenue.”⁸⁹

In the same way, Article 4.1.15 of the CAPASSO Memorandum of Incorporation (MOI)⁹⁰ provides that one of the objects of CAPASSO is to “administer *on an agency basis*, the copyrights in Works of Music as defined in the Copyright Act”.⁹¹ This is also the manner in which SARRAL administered the rights entrusted to it by its members.⁹² For this reason, SARRAL’s membership agreement contained a provision that stipulated:

Where necessary to protect, enforce and / or collect mechanical royalties due to the owner, the owner shall cede, transfer and assign his copyright to SARRAL for the sole purpose of instituting action for the necessary relief in SARRAL’s or its nominee’s name.⁹³

⁸⁷ Thus Clause 2(a) of SAMRO’s current Deed of Assignment for authors provides: “... [T]he ASSIGNOR hereby assigns, transfers and makes over to the ORGANISATION all Performing Rights (hereinafter referred to as the assigned rights) ... during the continuance of the ASSIGNOR’s membership of the ORGANISATION”. Accessible from <http://www.samro.org.za/forms> (date of use: 14 September 2017). The SAMRO deed of assignment has always contained wording of this nature in respect of the relationship between SAMRO and its members. Regarding this method of rights administration by performing rights collecting societies see also Ficsor *Collective Management* 42, at para 84, where it is stated: ‘Composers and text-writers, as a rule, transfer their “performing rights” to collective management organisations either for a certain period or without a time limit, and this transfer usually also covers future works. ... Generally, the organization is in an exclusive position to license the use of the works included in its repertoire; authors themselves cannot, in general, exercise their performing rights thus transferred.’ The exception, hinted to by Ficsor, is in certain countries, “mainly those where antitrust legislation is applied to collective management organizations ... [where] quite a lot of attention is paid to guaranteeing alternative possibilities of individual licensing for authors.” A notable example in this regard is the United States, where the performing rights societies are prevented from acquiring assignment of copyright and exclusive licences from their members as a result of “consent agreements” concluded with the Department of Justice over many years, and are required to offer a transactional (or per-program) licence along with the blanket licence “on an economically meaningful basis.” See Leafer *Understanding Copyright Law* 377/378. For the legal reason why an organisation like SAMRO or the PRS administer the rights of members on the basis of an assignment of rights see the discussion below under paragraph 6.6.2.2(b).

⁸⁸ SAMRO was, in this regard, a notable exception as it procured mechanical rights deeds of assignments from its members along with the performing rights and synchronisation rights deeds, from its beginning years. SAMRO however, never exercised its mechanical and synchronisation rights deeds of assignment until 2006, when it attempted to enter into mechanical rights administration as a result of the SARRAL problems. SAMRO’s success in the area of mechanical rights administration can however, best be described as modest, and there were serious conflicts between SAMRO and NORM in this regard (see the discussion further below). This led to negotiations between SAMRO and NORM that led to the formation of CAPASSO.

⁸⁹ Gervais *Collective Management of Copyright* (2010) 259. See also Hviid, Sanchez and Jacques 2017, accessible at <http://www.create.ac.uk/publications/digitalisation-and-intermediaries-in-the-music-industry/> page 14, para 72 (date of use: 14 September 2017). This notwithstanding, MCPS membership has to be exclusive (i.e. a person cannot be a member of both the MCPS and another collecting society in respect of mechanical rights in the UK). This was the subject of a 1999 investigation by the UK Competition Authority. In the end however, the Competition Authority granted exemption to the MCPS’ membership agreement, ruling that the exclusive nature of the agreement “was mitigated by the fact that members could choose to exercise their own rights while retaining their membership.” Anderman (ed) *Intellectual Property Rights* 363 – 364.

⁹⁰ Accessible from <http://www.capasso.co.za/index.php/company-documents.html> (date of use: 14 September 2017).

⁹¹ Emphasis added.

⁹² See supra n 63 where it was pointed out that initially SARRAL attempted to obtain assignments from rights-holders but was unsuccessful, resulting in the situation where SAMRO, the preferred CMO, obtained assignments from its members in respect of mechanical rights and sub-assigned “the appropriate portion of the mechanical rights to SARRAL ... [beginning] the practice whereby SARRAL became an agency in respect of mechanical rights”.

⁹³ See <http://colinshapiro.co.za/truthaboutsarral/release.html>, at the hyperlink with the text “terms of the agreements”. (date of use: 21 September 2017).

This provision strengthens the position that SARRAL merely acted as an agent on behalf of its members and did not own copyright in the members' works, thus requiring a special assignment to institute legal proceedings for the enforcement of the members' rights. The position is further supported by the observation of the Copyright Review Commission of 2011, in which it was stated:

In a system of collective administration, the owners of copyright authorise one or two collecting societies to administer their rights. ... These societies acquire from their members copyright by assignment or *act as agents or licensees* on behalf of their members to enforce copyright belonging to their members.⁹⁴

Certain mechanical rights societies have, of course, operated on the basis of receiving a grant of exclusive licences or even an assignment of rights, in addition to being agents.⁹⁵ This was however not the case with SARRAL. It was in fact SARRAL's attempt to unilaterally change the basis of its relationship with its members from being that of an agent to being that of principal in the collection of royalties - justifying a change in its accounting system and the treatment of royalties - that led to its liquidation. As the court in the *Shapiro* case observed, the "vital issue" in that case was whether SARRAL was "entitled in terms of its constitutive documents to treat royalties collected as its own revenue and not as a liability to members", and whether SARRAL could permissibly deduct operating expenses from the royalties collected.⁹⁶ As the court held, "[a] finding one way or the other on this issue [was] fundamental to the question whether the respondent [was] factually insolvent", systematically mismanaged or guilty of material misstatements in its audited financial statements.⁹⁷ The effect of SARRAL's change of its accounting system was that "the significant liability of SARRAL, reflected in all its prior financial statements was converted into the respondent's own revenue and profit", thus hiding unpaid royalties to its members in excess of eleven million rand (R11 000 000).⁹⁸

The court held that SARRAL's change of its method of doing business was in breach of its constitutive documents and its position of trust, concluding that liquidation was the most reasonable and proper order to grant. In arriving at this decision the court placed much emphasis on the fact that SARRAL charged a commission for its services. The court ruled that this was "a most significant feature", seeing that a commission is by its nature, "remuneration for services for work done as an

⁹⁴ See Copyright Review Commission Report 2011 <https://www.gov.za/documents/copyright-review-commission-report-2011>, at 40. Emphasis added. (date of use: 22 September 2017). The Copyright Review Commission was established in 2010 by the Minister of Trade and Industry "to assess concerns and allegations about the collection societies model that is in place for the distribution of royalties to musicians and composers of music." The Copyright Review Commission Report *id* at 7. See further on this issue Bently and Sherman *Intellectual Property Law* 4 ed 306 – 307 and *WIPO Report on Fact-Finding Missions* 45 – 46.

⁹⁵ A notable example in this regard is the Australasian Mechanical Copyright Owners' Society Limited (AMCOS). See in this regard Article 3(a) and (b) of the AMCOS Memorandum of Association, which provides that one of the objects of the society is to acquire rights from members "by assignment, licence, agreement, or by any other means". See the AMCOS constitution available at http://apraamcos.com.au/media/1468/amcos_constitution.pdf (date of use: 23 September 2017). As indicated, SAMRO also administered mechanical rights on the basis of assignment of copyright, which led to the conflict between SAMRO and NORM.

⁹⁶ *Shapiro and Galeta v South African Recording Rights [Association Limited]* supra n 72 at 11.

⁹⁷ *Ibid.*

⁹⁸ *Id* at 8.

agent”;⁹⁹ and, quoting the ruling in *Drielsma v Manifold*,¹⁰⁰ “the most general word that can be used to describe the remuneration paid to an agent for an agency work other than a salary.” This is in contrast to how SAMRO and many performing rights societies operate. As indicated, SAMRO operates on the basis of an assignment of rights from its members.¹⁰¹ This essentially means that SAMRO legally owns the copyright in respect of the assigned rights and thus, unlike SARRAL, truly owns the money collected from the licensing of the rights.

The foregoing is evident from the definition of “Licence Revenue” in the SAMRO MOI as contrasted with the definition of “Royalty Payment”.¹⁰² It is clear from this that what amounts to a “Royalty Payment” is to be determined by the SAMRO Board after transfers to or from the Royalty Reserves; and after making the “Permitted Royalty Deductions”. The expression “Permitted Royalty Deductions” is in turn defined in Article 30.5 of the SAMRO MOI as “[certain deductions] from the Licence Revenue ... of the Company”,¹⁰³ relating to “such amounts as are determined by the Board as they regard as reasonably required” to settle or provide for certain matters. It is clear from this therefore that *licence revenue* is regarded as belonging to the company (i.e. SAMRO) and as only available as *royalty payment* after the making of transfers to or from the *royalty reserves*, and after making certain *permitted royalty deductions*. Although the amount of any deduction for purposes of administration costs is at the discretion of the Board, SAMRO has largely kept its administration costs within the thirty percent (30%) ceiling recommended by CISAC.¹⁰⁴ Furthermore, from the outset SAMRO has not used the interest earned from the investment of licence revenue pending distribution, for its own administration costs but as additional distribution to members.¹⁰⁵

While SARRAL’s liquidation case was in progress, SAMRO announced its intention to enter into the field of mechanical rights administration in 2016. SAMRO indicated that it took this decision “after listening to the representations made by our members ... about the difficulties they face regarding the administration of their reproduction rights.”¹⁰⁶ Naturally many SARRAL members (who happened to be also SAMRO members in respect of performing rights) were in a state of anxiety regarding the

⁹⁹ *Id* at 29.

¹⁰⁰ (1894) 3 CH 100 at 107.

¹⁰¹ See n 87 *supra*.

¹⁰² This is evident from the definition of “Licence Revenue” in the SAMRO MOI, as contrasted with the definition of “Royalty Payment”. See http://www.samro.org.za/sites/default/files/SAMRO_MOI_as_amended_Sept_2016_-_Final.pdf (date of use: 24 September 2017). “Licence Revenue” is defined as “the royalties, licence fees, and other proceeds (all excluding VAT) received by the Company directly from the Company’s Administration of the Administered IP Rights (to be determined and attributed by the Board in applying the Payment Rules)”. In contrast “Royalty Payment” is defined in Article 30.2 as “[the] amount equal to the Licence Revenue (adjusted for transfers to and from Royalty Reserves) received by the Company during the relevant financial year minus the Permitted Royalty Deductions ... as reasonably determined by the Board, applying the Payment Rules with reference to the Licence Revenue attributed to the respective Member’s Granted IP Rights.” The article further provides that “[t]he Board shall determine the attribution of the Licence Revenue to the respective Member’s Granted IP Rights and the proportions in which such Royalty Payment shall be apportioned between the Members, applying the Payment Rules.” Emphasis added.

¹⁰³ Emphasis added.

¹⁰⁴ In the 2016 financial year SAMRO’s administration costs amounted to 19.9%. See https://www.samro.org.za/sites/default/files/SAMRO_IR_10070_1Nov_V4e_LN_FinalWebDocument%20%281%29.pdf (date of use: 24 September 2017). For the CISAC recommendations for administration costs see Ficsor *Collective Management* 47 at para 100.

¹⁰⁵ This used to be termed Non-Royalty Income (NRR) but is now termed Grant of Rights Payment (GORP), which is “additional payment ... regardless of whether or not Royalty Payments were paid or allocated to [members] in respect of their Administered Performing Rights ...” See Article 30.3 of the SAMRO MOI.

¹⁰⁶ See Baloyi and Pistorius in Gervais *Collective Management of Copyright* 393.

future administration of their mechanical rights in light of the SARRAL catastrophe. As indicated, SAMRO already had stacks of mechanical rights deeds of assignment that it had procured from members over many years.¹⁰⁷ When the decision to enter the field of mechanical rights was made SAMRO therefore, simply approached its members to inform them of this decision, asking them to confirm if they wanted SAMRO to administer their mechanical (and synchronisation) rights; if they wanted SAMRO to “licence back” certain aspects of the rights or if they wanted to completely “opt out” from SAMRO’s administration of their mechanical rights or aspects thereof (e.g. digital usages).¹⁰⁸ SAMRO also made inroads with regard to concluding reciprocal agreements with foreign mechanical rights societies, with many of them prepared to sever their relationships with SARRAL and to transfer their mandates to SAMRO in the wake of SARRAL’s woes.¹⁰⁹

In spite of being in control of the mechanical rights of many rights-holders SAMRO nevertheless experienced an uphill battle in its attempt to administer mechanical rights. In the first instance SARRAL was angered by SAMRO’s decision to enter the field of mechanical rights, feeling betrayed by a “sister” society that was not interested in its recovery but rather wanted to take advantage of its misfortunes.¹¹⁰ Secondly, SAMRO came into conflict with NORM also, with the latter feeling that by entering into the administration of mechanical rights SAMRO was essentially competing with its own members.¹¹¹ Thirdly, SAMRO had difficulties making inroads into the one area that was indispensable for effective mechanical rights administration in South Africa – namely procuring a blanket licence from the SABC. As a result of SARRAL’s liquidation in 2009 the SABC unilaterally decided to stop any payments in respect of broadcast mechanical rights, which negatively impacted upon NORM’s operations. The SABC then insisted on SAMRO and NORM reaching agreement before it would be willing to conclude a new mechanical rights blanket licence.¹¹²

This hard-line position from the SABC in fact yielded positive results because it compelled SAMRO and NORM, after the demise of SARRAL, to enter into good faith negotiations towards joint licensing of their respective repertoires with the SABC, and ultimately, abandoning their mechanical rights

¹⁰⁷ Whenever a person applied for SAMRO membership they would be presented with three deeds of assignment, namely for performing rights, mechanical rights and synchronisation rights. In principle an applicant could choose whether he or she also wanted to assign his or her mechanical and synchronisation rights to SAMRO (the assignment of performing rights was compulsory). Almost invariably however, many applicants would sign all three deeds of assignment – whether out of ignorance or as a result of a feeling that their rights “were safe” in the custody of SAMRO.

¹⁰⁸ This was based on the model used by APRA-AMCOS. See in this regard <http://apraamcos.com.au/about-us/alternatives-to-apra-amcos/managing-your-rights/amcos-members/> (date of use: 24 September 2017). From this time henceforth SAMRO amended its deeds of assignment, converting them into one deed of assignment which created an option for the applicant to agree to SAMRO’s administration of the applicant’s mechanical rights and / or synchronisation rights (as the administration of performing rights was compulsory). The writer is well aware of this process because he was Legal Manager for SAMRO at the time and was thus integrally involved in the process. With the recent decision by SAMRO to cease its operations in the area of mechanical rights, SAMRO’s current deed only make provision for the assignment of performing rights. See <https://www.samro.org.za/sites/default/files/Deed%20of%20Assignment%2C%20Website%20%281%29.pdf> (date of use: 24 September 2017).

¹⁰⁹ See Baloyi and Pistorius in Gervais *Collective Management of Copyright* 393.

¹¹⁰ To be sure SAMRO did agree to participate in a CISAC-initiated process of trying to find a solution to the SARRAL problem but the proposal offered by SAMRO to SARRAL - essentially to make SARRAL a subsidiary or division of SAMRO – was viewed with contempt by the directors of SARRAL at the time.

¹¹¹ This is because many of NORM’s publisher members were also members of SAMRO in respect of performing rights, and certain Board members of NORM were also Board members of SAMRO, spawning unhealthy relations and a potential situation of conflict of interest.

¹¹² Baloyi and Pistorius in Gervais *Collective Management of Copyright* 393.

operations in order to give way to a new mechanical rights agency. This cause of action was successful in that the SABC started paying for broadcast mechanical rights in August 2011, back-paying both SAMRO and NORM and undertaking to pay a provisional amount of one million rand (R1 000 000.00) on a monthly basis from August 2011 going forward, to be shared equally between SAMRO and NORM. These amounts would be paid pending a referral by the SABC of the licensing schemes of the two collecting societies to the Copyright Tribunal for a final determination with regard to the reasonableness “or otherwise” of the licensing schemes.¹¹³ The decision for mutual cooperation was further boosted by the report of the Copyright Review Commission, which recommended in its report that, following SARRAL’s collapse, there needed to be one collecting society per a set of rights and that SAMRO and NORM needed to merge their mechanical rights operations within two years of the publication of the report (i.e. between 2011 and 2013).¹¹⁴

The above developments paved a way for the advent of CAPASSO, the “mechanical rights hub” of South Africa today,¹¹⁵ formed and coming into operation in 2014. With the formation of CAPASSO SAMRO ceased its operations in respect of the administration of mechanical rights and NORM ceased its existence, being replaced by the Music Publishers Association of South Africa (MPASA).¹¹⁶ When a person applies for CAPASSO membership, he or she agrees to abide by CAPASSO’s Membership Rules if admitted to membership, and further declares that he or she is not a member of any other mechanical rights organisation in South Africa.¹¹⁷ This would suggest that CAPASSO membership is exclusive; nevertheless, Rule 1.5.1 of the CAPASSO Membership Rules¹¹⁸ provides that CAPASSO administers mechanical rights “on a non-exclusive basis”, except in respect of “the Mechanical Rights included in blanket broadcast and digital licences, which shall be administered on an exclusive basis.” This means that a CAPASSO member may personally administer phono-mechanicals, transactional broadcast mechanicals, transactional digital mechanicals and any other reproductions of such member’s works, as long as such administration does not amount to a blanket broadcast or digital licence. Rule 1.5 makes it explicit that CAPASSO “is an agency, operating on Mandate from its Members and does not take assignment of its Members’ copyright.”¹¹⁹

The formation and coming into operation of CAPASSO has arguably ushered in a new era of effective mechanical rights administration in South Africa. Along with the demise of SARRAL, a new chapter seems to have been opened and the combatting parties seem to have now buried the past. One can only hope that the missed opportunities of the past, which arose from the rivalry between

¹¹³ Copyright Review Commission Report supra n 94, at 22 para 3.2.16.

¹¹⁴ See Copyright Review Commission Report *id* at 46 para 6.3.4.

¹¹⁵ See the opening page of CAPASSO’s website at <http://www.capasso.co.za/> (date of use: 25 September 2017).

¹¹⁶ See <http://mpasaonline.co.za/>; also <https://www.musicinafrica.net/directory/music-publishers%E2%80%99-association-south-africa-mpa-sa> and <https://portal.samro.org.za/en-US/About.htm> (date of use: 25 September 2017).

¹¹⁷ See the CAPASSO composer application form available at <http://www.capasso.co.za/index.php/forms.html> (date of use: 25 September 2017).

¹¹⁸ Available at <http://www.capasso.co.za/index.php/company-documents.html?download=23:capasso-membership-rules-2015> (date of use: 26 September 2017).

¹¹⁹ See also Rule 1.2 which states that CAPASSO is “a mechanical rights licensing agency”. A similar provision exists in Rule 1.5.15 of the Membership Rules.

SARRAL and NORM and later, the scramble for the mechanical rights cake between NORM, the struggling SARRAL and SAMRO, will be compensated for through effective administration in the future. Indeed it appears that the formation of CAPASSO has already been yielding positive results. With Ms Nothando Migogo (who later joined SAMRO as CEO) at the helm, it has been observed that CAPASSO has achieved “triple digit revenue growth and crucial licensing breakthroughs”.¹²⁰ The formation of CAPASSO has also been hailed for the integration of rights holders in the field of mechanical rights administration (i.e. composers and publishers) “following years of fragmented administration”; and also hailed for “the licensing of digital music platforms in South Africa.”¹²¹

Apart from the collecting societies mentioned above there are other collecting societies administering copyright and related rights in South Africa. A discussion of such collecting societies is however, outside the scope of this work, which is only concerned with musical works. It suffices to mention the fact that there are societies in the field of “needle-time” rights,¹²² namely SAMPRA¹²³ and IMPRA,¹²⁴ societies in the field of audio-visual,¹²⁴ rights, or specifically, music videos, namely IMPRA and RAV,¹²⁵ and a society in the field of reprographic rights,¹²⁶ namely DALRO.¹²⁷ Under the proposed new regulatory system for collecting societies in South Africa all these organisations shall be subject to the new regulations and shall be required to comply with them.

¹²⁰ See <http://www.samro.org.za/news/articles/samro-and-capasso-welcome-appointment-new-samro-ceo> (date of use: 26 September 2017).

¹²¹ Ibid.

¹²² Needle-time rights are rights in respect of the broadcasting, transmission in a diffusion service and communication to the public of sound recordings and the performances embodied in them, as contemplated in Section 9(c) – (e) of the Copyright Act and Section 5(1)(b) of the Performers Protection Act. In essence they are the “performing right in sound recordings”.

¹²³ The South African Music Performance Rights Organisation. SAMPRA was originally constituted as a collecting society representing the interests of owners of copyright in sound recording (i.e. record labels generally), in terms of Regulation 3(1)(a) of the Regulations on the Establishment of Collecting Societies in the Music Industry (the “Collecting Society Regulations”) GG No. 28894, GN No. 517 of 1 June 2006 (Collecting Society Regulations). Around the same time SAMRO was accredited as a collecting society representing performers in terms of Regulation 3(1)(b) of the Collecting Society Regulations, and the Performers Organisation of South Africa (POSA) Trust was formed to carry out SAMRO’s needle-time operations. After concerted negotiations bolstered by the CRC Report’s recommendation for a “one society one right” regime, the old SAMPRA and SAMRO resolved to cease their needle-time rights operations and SAMPRA was reconstituted as a collecting society representing both owners of copyright in sound recordings and performers in terms of Regulation 3(1)(c) of the Collecting Society Regulations, with two chambers representing the two groups. See in this regard <https://www.sampra.org.za/home> (date of use: 27 September 2017).

¹²⁴ The Independent Music Performance Rights Association. See <https://www.impra.co.za/> (date of use: 27 September 2017). IMPRA is the latest needle-time collecting society to be accredited. It was accredited as a collecting society representing both owners of copyright and performers under Regulation 3(1)(c) of the Collecting Society Regulations on 7 August 2015 (the old SAMPRA was accredited in 2007 and SAMRO was accredited in 2008). See GG No. 39066 GN No. 680 of 7 August 2015, available at <http://www.gpwonline.co.za/Search/Pages/gazetteresults.aspx?k=39066> (date of use: 27 September 2017). The accreditation of IMPRA as a collecting society in respect of needle-time rights is controversial in that this goes against the CRC Report’s recommendation for a “one society one right” regime in South Africa. The controversy is made graver by the fact that IMPRA was accredited just a few days after the Copyright Amendment Bill 2015 was published for comments in the government gazette. Clause 10 of this bill sought to implement the recommendation of the CRC Report by providing in the proposed Section 9B(1) for “one Collecting Society per copyright and per set of rights with regard to all music rights”. For the Bill see GG No. 39028 GN No. 646, available at https://www.gov.za/sites/default/files/39028_gon646c.pdf (date of use: 27 September 2017). Both the 2016 and the 2017 version of the Bill (the latter being the version that was presented in Parliament) contained a similar provision.

¹²⁵ RAV is RiSA Audio Visual, an entity formed by the Recording Industry of South Africa (RiSA) in 2000. See <http://www.rav.org.za/home> (date of use: 27 September 2017). Both RiSA and the audio-visual function of IMPRA are concerned with the licensing of usages relating to music videos.

¹²⁶ Reprography is the reproduction of a literary work on paper or a similar medium (e.g. through the use of a photocopying machine or a similar process). See in this regard <https://www.ifro.org/content/introduction-reprography-copyright-legislation> (date of use: 27 September 2017).

¹²⁷ The Dramatic, Artistic and Literary Rights Organisation, a subsidiary of SAMRO. See <http://www.dalro.co.za/> (date of use: 27 September 2017).

6.6 The Anatomy of an African Collecting Society: The Case of the Southern African Music Rights Organisation (SAMRO)

6.6.1 Overview

As hinted to above, SAMRO is the largest and most developed collecting society in the whole of Africa,¹²⁸ both in terms of size and financial position. SAMRO has also influenced and provided assistance to the formation of several other societies in Southern African, just as it has, itself, been influenced and assisted by the PRS in the United Kingdom. Accordingly it is appropriate to use SAMRO as a prototype of a fairly-established collecting society in Africa. Having indicated this, it is fair to state that SAMRO has been far from being a shining example of what constitutes an ethically-administered CMO.¹²⁹ Over the years allegations of maladministration of the royalties of authors have been levelled against SAMRO.¹³⁰ It is submitted however that many of these allegations are based on mistaken perceptions rather than reality, mainly owing to the complex nature of the system of collective management and the mystery that seems to surround it.¹³¹ Because of this complexity an impression is often given to the outsider, including oftentimes, government officials, that the operations of CMOs are intentionally, maliciously or rather cryptically shrouded in secrecy.¹³² It is

¹²⁸ See also in this regard Billboard 16 May 2009, at 23.

¹²⁹ See for example Band and Butler 2013 *Michigan State International Law Review* 703, who, warning about “some cautionary tales about collective licensing” worldwide, remark about governance failures among South African CMOs with reliance on the findings of the Copyright Review Commission of 2011, mentioning among such failures, “lack of independent directors, lack of internal audits, limited disclosure of executive director’s remuneration, lack of annual reports, and outdated constitutive documents”. The authors refer to other “cautionary tales” about CMO internationally, including corruption, mismanagement, excessive overhead, unfair distribution, lack of transparency and choice, slowness in adapting to new technologies, monopolistic conduct and aggressive actions.

¹³⁰ Many of these allegations have been driven by one Graeme Gilfillan, a “copyright lawyer”. The phrase “copyright lawyer” is in inverted commas because there is no evidence that Gilfillan is in fact a lawyer, let alone a copyright lawyer. For some of the serious allegations levelled over the years by Gilfillan against SAMRO in particular, and collecting societies in general see <http://www.nisaonline.com/index.php/documents> (date of use: 01 June 2018). It is, nevertheless, noteworthy that Gilfillan was at the helm of SARRAL, as one of its non-executive directors, when the South Gauteng High Court issued an order for the liquidation of SARRAL on the ground that its “directors and controllers” had wrongly appropriated “royalties which properly belong to members”, and that “[s]uch conduct can properly be characterised as a systematic mismanagement of the affairs of [SARRAL]”; further observing that “the controllers of the company have wrongly dealt with moneys in the form of royalties that properly belong to its members and have kept the majority of members in ignorance of its parlous financial position.” See *Shapiro and Galeta v South African Recording Rights* unreported case no: 14698/04 (06 November 2009) South Gauteng High Court, at 33 and 42. See for further information on the background to this case, <http://colinshapiro.co.za/truthaboutsarral/> (date of use: 01 June 2018).

¹³¹ As to the complex nature of the system of collective management see Simpson <http://simpsons.com.au/wp-content/uploads/role-of-collecting-societies.pdf> (date of use: 01 June 2018), observing at paragraph 3, “When talking about collecting societies, very few people on the outside realise how complex the operations are.” The author further observes: “The procedures by which collecting societies operate are necessarily very complex. ... It is little wonder that there is much ignorance and misunderstanding about the purpose and operation of copyright collecting societies. Not only do they operate in an area of law that is little understood even by lawyers, they deal in rights, not things ...” Simpson <https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/05/R00506-the-simpson-report-1995.pdf> at 5 and 8 (date of use: 01 June 2018). This observation is echoed by an EU-commissioned study on collective management, where it is observed: “The issue of rights management is extremely complex. It requires a basic understanding of the nature of copyright and its exercise.” European Affairs 2006 http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/study-collective-management-rights-study-collective-management-rights-en.pdf (date of use: 01 June 2018), at 8.

¹³² Thus the statement that “... Collecting societies have been operating in a private, unregulated and *secret* environment outside of the scrutiny of government ...” – see Billboard 2 October 2010 at 15, emphasis added – is, in the writer’s view, misleading. It is indeed true that the collecting societies have existed as private entities and not specifically regulated, but to suggest that this implies that they maliciously acted in secret is a rather overreaching argument. In this regard it is obvious that the correct explanation is the fact that “[t]here are many different models of collective management of copyright and related rights worldwide, each of them with distinct characteristics”, depending on the legal rules applicable in the country concerned, as Liu 2012 *J Intellect Prop Rights* 46, who has studied the different models, has observed. It is

also noteworthy that virtually none of the headline-grabbing allegations of SAMRO depriving certain well-known South African musicians of “millions” of rands, which have surfaced in the past twenty years or so, have been proven to be true.¹³³ The allegations have thus remained merely of a sensational nature but they have, unfortunately, contributed to the dented image that SAMRO has experienced in the public eye. One of the more scathing, yet unfounded recent allegations emerged in the City Press, in which it is alleged that SAMRO pays over eighty percent of royalties arising from the use of out-of-copyright arrangements ‘to a mysterious composer called “DP”, thus depriving the arrangers of the royalties due to them.¹³⁴

Dubbed “the biggest music rights scam in South African music history”, the allegation is in fact, merely sensational, because first, the acronym “DP” stands for “domaine publique”, meaning “public domain”, and is not a reference to “a mysterious composer”.¹³⁵ Secondly, it is trite fact that the

trite fact that South Africa has, until more recently, only made provision for a private system of collective management and this does not mean that the collecting societies have been operating secretly.

¹³³ A number of allegations were made over the years against SAMRO by Graeme Gilfillan, alleging that SAMRO had deprived high-profile musicians like the late Hugh Masekela, Oliver Mtukudzi and more topically, the late Brenda Fassie. Through the writer’s previous association with SAMRO (as Head of Legal and Company Secretary) the writer can confirm that none of these allegations were proven to be true. In the case of Hugh Masekela it was shown that Masekela, having been away from South Africa for many years, was a member of a foreign collecting society and had in fact not been a member of SAMRO and thus SAMRO could not have owed him millions; the same position applied in respect of Oliver Mtukudzi, who is a Zimbabwean national and was not a member of SAMRO at the time. In the case of Brenda Fassie two independent forensic auditors were allowed to peruse SAMRO’s books over a period of approximately one year, and all came to the conclusion that SAMRO did not owe Fassie any moneys. In a related matter, in which the executor of the deceased estate of Fassie instituted proceedings against her former record company and publishing company, it was shown that while Fassie was a great singer, she only, of her own initiative, composed four original songs, the rest of the 157 songs in which she had featured being songs in which she had “collaborated with others to compose them”. *Feldman NO v EMI Music (Pty) Ltd / EMI Music Publishing SA (Pty) Ltd 2010 (1) SA 1 (SCA)*, at para 2. Royalties in respect of each of these songs had to be shared among various music publishers and “collaborators” and thus Fassie could not have been owed “millions” in respect of these works of joint-authorship, as if she was the sole copyright owner. The most recent news-grabbing allegation levelled by Gilfillan against SAMRO relates to “the biggest music rights scam in South African history”, where it is alleged that 83.3% of royalties relating to arrangements of works that are out of copyright (i.e. works in the public domain) are ‘paid to a mysterious composer called “DP”’. City Press, April 1 2018, at 1 and 2. In the same article it is sensationally alleged that the category of SAMRO members termed “candidate members” (now in fact termed “ordinary members”), established in 1963, “had no right to vote or attend meetings”. This however, could not be further from the truth. Candidate membership in fact arose as a practical solution to the question of who should be eligible for the “pre-allocation scheme” set up by the SAMRO Board in 1963, which was based on eighty percent (80%) of SAMRO’s non-licence revenue (i.e. investment income arising from the investment of licence fees pending distribution). In terms of this a certain pre-determined amount would be allocated to members, pending the distribution of royalties. The pre-allocation scheme was created to prevent a situation where there was a delay in distributing royalties as a result of users failing to submit reports relating to the usage of music, or submitting inaccurate reports. The concern was that it would be unfair for members whose works did not earn any royalties to also share in this pre-allocation and thus a rule was established to the effect that only members “who had produced a reasonable number of works of such a standard that some of them were performed in public” would qualify for participating in this scheme. This led to the formation of a third category of membership, namely the candidate-member category, “a probationary membership for a period of two years, during which time the board would ascertain whether the member’s music was in fact being used.” If the candidate member’s music was used then the membership would become an associate member and be eligible to share in the pre-allocation. If not, the membership would lapse unless extended by the board. There was no consideration of race regarding this type of membership and in fact both whites and blacks became candidate members throughout the years. Furthermore, the status of candidate member was never revoked by the board (in spite of the works of the member concerned not having been actively used) – probably upon recognition that revoking this status would deprive many budding authors and composers from the potential of earning performing rights royalties – and a practice evolved where after every two years the board passed a general resolution to extend the SAMRO membership of candidate members. Furthermore these members were eligible to attend meetings of SAMRO and to vote accordingly. See further in this regard Baloyi JJ and Pistorius T, “Collective Management in Africa”, in Gervais *Collective Management of Copyright* (2016) 385 – 386. The further statement in the City Press article that, because many publisher members of SAMRO are full members, they “obtain shares of Samro income that candidate members *cannot*” (emphasis added), is also misleading. The true position is that payment of royalties is based on the usage of a members’ works and if, during any period, more usage of a candidate member’s works takes place than that of a full member, the candidate member concerned would earn more royalties than the full member.

¹³⁴ Ibid.

¹³⁵ This is clarified in a response article by SAMRO in the Sunday Times, April 29 2018, at 8.

allocation of a limited royalty share to arrangements of a public domain work is not unique to SAMRO but is a prevalent practice internationally.¹³⁶ For example, in the case of ASCAP in the USA the royalty payable in respect of arrangements of public domain works depend upon such considerations as (i) whether the work contains public domain text as well as original music, in which case it may receive from between fifty percent (50%) to a hundred percent (100%) “of the Otherwise Applicable Credit depending on the extent and treatment of the public domain text within the context of the entire work”; or (ii) whether it is a separately-published or separately “copyrighted” work, in which case it receives ten percent (10%) and sometimes two percent (2%) of the Otherwise Applicable Credit, where “Otherwise Applicable Credit” is defined as the full credit for a single performance (or so-called “Use Credit”).¹³⁷ On the other hand BMI has a standard rate of twenty percent (20%) for all arrangements of works in the public, but does not pay royalties in respect of live performances of classical works.¹³⁸ In Canada SOCAN uses various ranges, depending on whether the work is published or not, whether new original lyrics are included etc. but generally gives the arranger twenty-five percent (25%), and the author of new lyrics fifty percent (50%), with the rest of the percentages being designated as “non-controlled”.¹³⁹

The SAMRO rate of 16.7% is akin to the PRS capped rate of 16.667% applicable generally for performances of works arranged with the permission of the copyright holder.¹⁴⁰ SAMRO uses the same rate of 16.7% in respect of arrangements of public domain works, asserting that internationally, “the percentage apportioned to the arranger is pegged between 12.5% - 25%, depending on the country.”¹⁴¹ In the SAMRO situation “[t]he balance 83% [sic] of the royalty share that would have accrued to the rest of the arrangement had the DP portion been in copyright is held back and distributed to all the active musical works belonging to SAMRO members in proportion to the use of their music during the period under review.”¹⁴² The money has thus not piled up to now amount to R1.2 billion “deducted in DP’s name over 55 years” as alleged in the City Press article.¹⁴³ This does not mean that SAMRO could not improve upon the current situation by amending its distribution rules to, for example, align with the Canadian practice where SOCAN accords twenty-

¹³⁶ In this respect see Baskerville and Baskerville *Music Business Handbook* 91, who note: “In respect of performance income, ASCAP, BMI, and SESAC are accustomed to paying (often reduced) royalties to authors and publishers of arrangements based on works in the public domain.” See also Kohn and Kohn *Music Licensing* 790.

¹³⁷ See ASCAP’s Survey and Distribution System 2015 <https://www.ascap.com/-/media/files/pdf/members/payment/drd.pdf> (date of use: 27 June 2018).

¹³⁸ https://www.bmi.com/creators/royalty/general_information (date of use: 27 June 2018).

¹³⁹ See SOCAN Distribution Rules 2016 <https://www.socan.ca/pdf/en/mem/DistributionRules.pdf> (date of use: 27 June 2018).

¹⁴⁰ See the PRS Distribution Policy Rules at <https://www.prsformusic.com/-/media/files/prs-for-music/membership/membership-policies/full-document-prs-dist-policy.pdf> (date of use: 27 June 2018).

¹⁴¹ Sunday Times, April 29 2018, at 8. For SAMRO’s distribution rules see <http://www.samro.org.za/sites/default/files/SAMRO%20Performing%20Rights%20Royalty%20Distribution%20Rules.pdf> (date of use: 27 June 2018). In this regard it needs to be observed that, while at one stage royalties for arrangements of works in the public domain “[varied] from 1/1 to 1/24” depending on the level of originality of the arrangement, the present PRS position is that the arranger is treated “as if he / she was the composer of an original composition”, thus with the potential of according to such arranger the full copyright value to such an arrangement, often after assessment by a copyright panel. See Rothenberg *Public Performance of Music* 109 at n 12; PRS Distribution Policy Rules at <https://www.prsformusic.com/-/media/files/prs-for-music/membership/membership-policies/full-document-prs-dist-policy.pdf> (date of use: 27 June 2018); Gammons *Art of Music Publishing* 135.

¹⁴² Sunday Times, April 29 2018, at 8.

¹⁴³ City Press, April 1 2018, at 2.

five percent (25%) to arrangers. There is a real need for SAMRO to do so and this is accentuated by the fact that SAMRO operates in the developing world and further, in a country beset with past injustices. SAMRO has itself recognised the need to amend its rules accordingly, and has stated that it has, since 2017, been in a process to do so.¹⁴⁴

Having indicated the above, SAMRO's practices cannot be defended at all cost and where these display lack of transparency or fall short of exemplary conduct, they need to be pointed out. This is important because the system of collective management of copyright needs to work and to be seen to work in Africa. As a leading CMO many African CMOs are looking up to SAMRO as a model of what constitutes efficient collective management of copyright in an African context. Moreover, it is important for SAMRO to function both effectively and ethically because the livelihoods of many a creator – some of whom have no other means of accessing copyright economic markets – are dependent on this. In this regard the observation made in the EU Collective Management Directive is apt:

... Collective management organizations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public.¹⁴⁵

Against this backdrop the recent media reports about SAMRO having lost almost forty million rand (R40 million) after “investing” the money in a Dubai entity are a matter of great concern and do not bode well for SAMRO's role as a model for efficient collective management of copyright in Africa.¹⁴⁶ The account states that SAMRO had, without the consent of members, invested the money in an entity that was a subsidiary of the Arab Emirates Music Rights Organisation (AEMRO), and that some of the money had been used to cover operational expenses.¹⁴⁷ It is reported that SAMRO had invested the money in line with its strategic growth priorities, “hoping to become a leading organisation in Africa and globally”, and had identified “a potential return on investment of more than R1bn (\$71m)”.¹⁴⁸ It is stated that “although [SAMRO was] aware that the South African music industry was not leading in Dubai, Samro's business model believed it would receive a negotiated administration fee on all collections and contributions directly to the South African company's revenue.”¹⁴⁹

¹⁴⁴ Sunday Times, April 29 2018, at 8.

¹⁴⁵ Recital 3, Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0026> (date of use: 28 June 2018).

¹⁴⁶ See <https://www.channel24.co.za/Music/News/south-african-musicians-have-lost-more-than-r40m-due-to-bad-investment-20171029> for the story. (Date of use: 28 June 2018).

¹⁴⁷ SAMRO itself asserts that members were informed about the strategy. Ibid.

¹⁴⁸ Ibid. Also <https://www.iq-mag.net/2017/11/samro-loses-3m-aborted-uae-aemro-tieup/#.WzrYP9lzbIU> (date of use: 28 June 2018).

¹⁴⁹ <https://www.channel24.co.za/Music/News/south-african-musicians-have-lost-more-than-r40m-due-to-bad-investment-20171029> (date of use: 28 June 2018).

It appears that the problem arose when CISAC refused to admit AEMRO as a member, on the ground that it did not have a licence to operate as a CMO in the United Arab Emirates.¹⁵⁰ This situation clearly raises certain governance questions and begs the question if proper due diligence was conducted prior to the decision to invest in this entity. In particular this seems to have been a hasty decision on the part of the SAMRO Board because if not, why did the board release the money before AEMRO obtained a licence to operate, and before CISAC had admitted AEMRO as a member? An answer to these questions is crucial, especially in light of the fact that the demise of SARRAL was pinned down to the failure of its governance system.¹⁵¹ It has been indicated that a forensic audit is underway to unravel what happened, and one would have to wait for the outcome of the audit to determine what actually happened.

6.6.2 SAMRO as an example of the Functioning of Collective Management of Copyright in Musical Works in Africa

Because of its mature operations¹⁵² SAMRO remains a model of what an advanced African CMO looks like. In the following analysis the operations of a collecting society shall be critically considered, based on the essential elements that comprise a fully-fledged system of collective management of copyright for musical societies, with SAMRO as a reference point. The essential elements or facets of a developed CMO are as follows: (i) legal and governance structure; (ii) the authority to administer rights; (iii) the mode of licensing; (iv) distribution of royalties and (v) transparency issues.¹⁵³ Since the aim of this analysis is illustrative, to show how SAMRO fares in this regard – and also in order to avoid an expansive chapter – the analysis shall only cover the first two elements referred to here, namely the legal and governance structure and the authority to administer rights. The discussion focuses on what is generally accepted in relation to these elements and how the elements apply in respect of SAMRO.¹⁵⁴ This also serves to illustrate the fact

¹⁵⁰ Ibid.

¹⁵¹ Section 66(1) of the Companies Act 71 of 2008, which determines the affairs of SAMRO as a non-profit company (NPC), requires that “[t]he business and affairs of a company must be managed by and under the direction of its board ...” In this regard it has been observed that “the section places a positive obligation on the directors”, who are no longer merely functionaries (i.e. an organ or agents) of the company. See Delpont, Vorster and Henochsberg *Henochsberg on the Companies Act* 250(2).

¹⁵² In the sense of having all the distinct functional departments essential for the effective operations of a CMO, and having been able to license users and distribute royalties without fail on an annual basis since its inception. The concept of mature operations is also used with reference to compliance with the requirements for being a member (rather than being an “associate” or “provisional”) of CISAC, which, in terms of article 8(c) of the CISAC Statutes, include “[having] at its disposal effective machinery for the collection and distribution of royalties to creators and publishers”; in terms of article 8(i) involves effectively collecting and distributing royalties, and in terms of article 8(j) involves carrying out its activities in accordance with the Professional Rules (in this case the Professional Rules for Musical Societies). In terms of article 15(a)(i) a CISAC member has to comply fully with the Professional Rules and in terms of article 15(a)(iii) the member must file an annual statement of compliance with the said Rules, failing which the member may, in terms of article 22 of the Statutes, be subjected to sanctions which may include a warning, censure, temporary expulsion or permanent expulsion. Seeing that SAMRO remains a member of SAMRO, it can be assumed that CISAC is satisfied with its compliance with its requirements of membership. For the CISAC Statutes see <http://www.cisac.org/What-We-Do/Governance/Statutes> (date of use) 30 June 2018).

¹⁵³ These categorisation are adapted from Gervais *Collective Management of Copyright* (2016) 8 – 12. See also the EU Directive on Collective Management 2014 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN> (date of use: 5 July 2018) under Title II generally.

¹⁵⁴ Further commentary on the system of collective management arising from the provisions of the Copyright Amendment Bill (version B13B-2017), approved by both houses of Parliament and currently awaiting the President’s signature, available at <https://pmg.org.za/bill/705/> (date of use: 13 July 2019), shall be made in Chapter 7 below.

that regulators – especially those in the less developed world – have been overly critical and suspicious of CMOs, and rather than empowering them to fulfil their critical roles, have tended to have a heavy-handed approach to dealing with them. This is to be contrasted with the position in the West where, even though strict regulations are in place, the CMOs are at the same time empowered to effectively and efficiently carry out their responsibilities.

6.6.2.1 Legal and Governance Structure

(a) General

The legal and governance form or structure of a CMO is largely dependent on the legal regime, rules and practices within each jurisdiction.¹⁵⁵ Generally CMOs take the form of a non-profit company or organisation, although in some cases some CMOs have operated as profit companies.¹⁵⁶ In some cases the founders can themselves, choose the form in which the CMO is to be incorporated, while in others the form is specifically determined by law.¹⁵⁷ Thus for example in many Commonwealth countries (including African countries such as Nigeria, Kenya, Malawi and recently Botswana) the British tradition of incorporating CMOs as “companies limited by guarantee” has been prescribed by statute.¹⁵⁸ Other organisational forms such as parastatal, state agencies, foundations, trusts, co-operatives and other non-profit forms have also been used in several jurisdictions.¹⁵⁹ Following the British tradition SAMRO was also originally registered as a company limited by guarantee, although this was not as such required by law.¹⁶⁰ This position remained until 2011, when the Companies Act 71 of 2008 came into force, resulting in SAMRO becoming a non-profit company (NPC) in terms of section 8(1) of that Act, as further deliberated upon below.

As with other incorporated entities, a distinction exists between members of a CMO and its board of directors.¹⁶¹ Members are admitted to membership based on certain criteria, while the board is

¹⁵⁵ See Gervais *id* at 8; Liu 2012 *J Intellect Prop Rights* 46.

¹⁵⁶ An example is SESAC in the United States and DALRO in South Africa, both of which are private companies (in the case of DALRO it is in fact a wholly-owned subsidiary of SAMRO). See for SESAC Gervais *Collective Management* (2016) 324, and for DALRO <https://www.dalro.co.za/index.php/about-us/our-publishers> (date of use: 30 June 2018).

¹⁵⁷ Liu 2012 *J Intellect Prop Rights* 46. Dealing with this matter Ficsor *Collective Management* 136 has observed (at para 366): “In market-economy countries, private organizations dominate (although some of them have a semi-governmental character, others function with government participation, and still others work under fairly close supervision by public authorities). In planned-economy countries, public institutions were in the majority, but some of them were of a mixed nature with author-dominated governing bodies. In developing countries both private bodies and public institutions can be found.” Ficsor then makes an interesting observation, namely that “[i]t is mainly in Africa that public organizations are fairly frequent.” *Ibid*.

¹⁵⁸ Hooijer and Baloyi *Musical Works and Audio-Visual Works* 37.

¹⁵⁹ *Ibid*. Also Gervais *Collective Management of Copyright* (2016) 8.

¹⁶⁰ South African legislation has not, until 2002 when both the Copyright Act and the Performers’ Protection Act were amended, regulated the formation of collecting societies. The 2002 amendments dealt specifically with so-called “needle-time” societies in respect of rights in sound recordings and recorded performances. In the Copyright Amendment Bill, 2017 awaiting the President’s signature and available at <https://pmg.org.za/bill/705/> (date of use: 13 July 2019), comprehensive provisions relating to the formation and regulation of all collecting societies have been introduced in clause 22, following the recommendations of the Copyright Review Commission of 2010 – 2011. The report of the Commission, published in 2012, is available at <https://www.gov.za/documents/copyright-review-commission-report-2011> (date of use: 30 June 2018). An analysis of the provisions relating to the formation and regulation of collecting societies in the Copyright Amendment Bill 2017, is made in Chapter 7 *infra*.

¹⁶¹ The type of board depends on the nature of the jurisdiction. In many common-law jurisdictions a unitary or single board is appointed by members, while in civil law and certain Asiatic jurisdictions a dual board system, comprising of a supervisory board (appointed by members) and a management board (appointed by the supervisory board) applies. See Hooijer and Baloyi *Musical Works and Audio-Visual Works* 38.

appointed by the members. In line with the principles of good governance, a distinction and clarification of roles must also be made between members of the board of directors and members of management. In this regard article 5(g) of the CISAC Professional Rules for Musical Societies, dealing with governance matters, provide that a member of CISAC shall, all times, *inter alia*:

...

g. ensure that the by-laws – and / or internal rules – of [the] Member:

(i) provide for a collegiate body whose role is to supervise the Member's business as carried out by the management body;

(ii) ensure that such collegiate body effectively and independently supervises the management body, by means of setting up specific rules to this effect including, without limitation, the following rules:

(a) rules regarding the distinction and separation of the function of a member of the management body on the one hand and that of a member of the supervisory body on the other hand, or

(b) in the absence of such separation rules, rules prohibiting a member of the management body from having, (merely because of his status as a member of the management body) the right to vote during meetings of the supervisory body, or at the very least, a blocking minority voting right or any right of veto whatsoever, and

(iii) prohibit any improper interference of the supervisory body in decisions falling within the scope of the exclusive powers (if any) of the management body.

The generally-acknowledged essence of a collecting society is that it must be owned or controlled by its members.¹⁶² Essentially this entails that members should be represented in the board of a CMO, but further, as provided for in the EU Directive on Collective Management, that such representation should be fair and balanced, taking into cognisance the different categories of members of a CMO.¹⁶³ Moreover, members must be enabled to participate in the decision-making process of the CMO.¹⁶⁴ Seeing that the governance of a CMO is generally entrusted to its board of directors,¹⁶⁵ a member's rights to participate in decision-making processes of the CMO is limited to

¹⁶² See for example the definition of "collective management organisation" in art 3(a)(i) of the EU Directive on Collective Management 2014 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN> (date of use: 5 July 2018).

¹⁶³ EU Directive *id* at art 9(2).

¹⁶⁴ *Id* at art 3. See also reg 3(3)(c) of the South African Regulations on the Establishment of Collecting Societies in the Music Industry (the "Collecting Society Regulations") GG No. 28894, GN No. 517 of 1 June 2006, applicable in respect of "needle-time" societies, which provides that a person or licensing body applying to become a representative collecting society must demonstrate that its members are afforded "an appropriate right and opportunity to take part in decision making concerning the affairs of the applicant and the administration of the rights in question, as well as the distribution of the royalties to be received."

¹⁶⁵ And in South Africa, *required* to be exercised by the board of directors. See in this regard s 66(1) of the Companies Act 71 of 2008, which provides that "[t]he business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise *all* of the powers and perform *any* of the functions of the company", except as otherwise limited by the Act of the company's MOI. Emphasis added. This of course would only apply to CMOs that are registered in terms of the Act (normally as non-profit companies (NPC)).

certain statutory and other designated matters, generally exercised at the AGM or another general meeting of members.¹⁶⁶ Accurate and transparent reporting by the CMO to its members in relation to these matters is thus crucial.¹⁶⁷

Traditionally, and also in line with the rules of CISAC, members of the Board of a CMO were appointed from qualifying members of the CMO.¹⁶⁸ With recent trends in the field of corporate governance however, where an emphasis is placed on appointing *independent* non-executive directors to the boards of companies and other organisations this issue has also become relevant for the boards of collecting societies.¹⁶⁹ Thus full representation of members in the boards of CMOs may be tampered by the need to also appoint directors that are not in any way related to the CMO. The CISAC Professional Rules for Musical Societies are not, as such, opposed to such a scenario, as a deviation from the normal position is permitted in terms of article 5 of the Rules if such deviation or non-compliance is necessitated by “any national, legal or regulatory provision to which [the society] is subject”. Under such circumstances the CMO has to promptly inform CISAC of such regulatory or legal requirements, “with full particularity, and with appropriate documentary justification”. In South Africa such requirements arose from a new company law regime as well as the provisions of the King Report on Corporate Governance.¹⁷⁰

¹⁶⁶ Under the Companies Act 71 of 2008 such matters are provided for in s 61(8) of the Act, and include, *inter alia*, the presentation of the directors’ reports; the presentation of the audited financial statements for the previous financial year; election of directors; appointment of an auditor; any matters raised by members etc. Other matters relating to the decision-making powers of members of a CMO may be designated by legislation or regulations specifically relating to the operations of CMOs, or the constitution of the CMO concerned. In the EU for example, art 8(5) of the EU Directive on Collective Management 2014 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN> (date of use: 5 July 2018) empowers the general assembly of members to decide on issues such as (a) the general policy on the distribution of amounts due to rights-holders; (b) the general policy on the use of non-distributable amounts; (c) the general investment policy relating to rights revenue; (d) the general policy on deductions from rights revenue and from any income arising from the investment of rights revenue etc. It is submitted that these issues would be covered by the provisions of the Collecting Society Regulations in South Africa, which require needle-time collecting societies to afford their members “an appropriate right and opportunity to take part in decision making concerning ... the distribution of the royalties to be received.” Reg 3(3)(c) of the Regulations on the Establishment of Collecting Societies in the Music Industry (the “Collecting Society Regulations”) GG No. 28894, GN No. 517 of 1 June 2006. Having indicated this, it must be observed that the provision under reg 3(3)(c) of the Collecting Society Regulations that members must be afforded a right and opportunity “to take part in decision making *concerning the affairs*” of the CMO is clearly in conflict with the provisions of s 66(1) of the Companies Act 71 of 2008, which enjoins the board of a company manage or direct the management of the “business *and affairs* of a company”. It is submitted that a resolution to this situation requires that this provision under reg 3(3)(c) of the Collecting Society Regulations has to be interpreted narrowly to permit the application of s 66(1) of the Companies Act. Failing this the only other conclusion is that a needle-time society cannot be registered as a non-profit company under the Companies Act. It would need to be registered in another form, such as registration as a non-profit organisation (NPO) under the Non-Profit Organisations Act 71 of 1997; registration as a trust etc.

¹⁶⁷ See in this regard paragraph 8.2 of the WIPO Good Practice Toolkit 2018 <http://www.wipo.int/copyright/en/management/index.html#cmotoolkit> (date of use: 5 July 2018), at 51, where it is recommended that a CMO provides “a full and transparent picture of its financial performance and operations” in its Annual Reports, and that the reports should be in an accessible format.

¹⁶⁸ See in this regard art 5(d) of the CISAC Professional Rules for Musical Societies, which provides that a CMO shall at all times “maintain a fair balance on its Board between Creators on the one hand and publishers on the other hand”, thus not envisaging that persons who are neither creators nor publishers can be members of the board. This was also the case with SAMRO. Article 38 of the erstwhile Articles of Association of SAMRO (which were replaced by a new Memorandum of Incorporation in 2011, as a result of the coming into force of the Companies Act 71 of 2008) provided that “[n]o person who is *not* a full member shall be appointed to act as a Director”. Emphasis added. Although the same article further provided that “[n]otwithstanding the foregoing there may be appointed as Director any person who, not being a member, has special knowledge and / or experience of copyright law and / or the administration of copyright”, this was not applied in the case of SAMRO in relation to independent directors but rather in relation to executive directors.

¹⁶⁹ The issue featured prominently in the report of the Copyright Review Commission (n 94 supra).

¹⁷⁰ The new company law regime commenced with amendments to the then applicable Companies Act 61 of 1973, which were effected through the Corporate Amendment Act 24 of 2006 and came into force on 14 December 2007. The relevance with regard to the issue of independent directors is that the amendments introduced a new section 269A to the

(b) Application to SAMRO

SAMRO was incorporated on 28 December 1961 as a company limited by guarantee, under the Companies Act 46 of 1926. When the 1926 Act was repealed by the Companies Act 61 of 1973 the corporate form of SAMRO as a company limited by guarantee did not change, as the 1973 Act continued this corporate form. The writer, having been at the centre of SAMRO's governance operations, can, at least until 2011 when the Companies Act 71 of 2008 came into force, vouch for SAMRO's compliance with statutory reporting and governance requirements under the Companies Act 61 of 1973.¹⁷¹ This therefore brings into serious question the curt assertion by the Copyright Review Commission (CRC) that SAMRO was not compliant with principle 6.1 of the King III Report because "[t]he Memorandum of Association has been in conflict with the Companies Act of 1973 for 37 years and it is in conflict with the Companies Act of 2008."¹⁷² This assertion is of course a serious castigation of SAMRO, especially in view of the significance of the CRC Report in the current debate in South Africa relating to copyright reform. It is thus of concern that the assertion is made without providing any detail or supporting information, or at least indicating in what way it is suggested that SAMRO's MOI has been in conflict with the Companies Act.

As indicated above, it is submitted that SAMRO has, in fact, consistently operated in line with the reporting requirements of the Companies Act 61 of 1973 when the Act was in force and that the CRC's assertion, without substantiation or evidence, that it has not, is incorrect and misinformed.

Companies Act, which, in subsection (3) provided that an audit committee had to be comprised of at least two members "and consist only of non-executive directors of the company *who must act independently*." Emphasis added. The Companies Act 71 of 2008, which repealed the 1973 Act, took the matter further by providing, in section 94(2) and (4), that an audit committee must be comprised of at least three directors who must satisfy the requirements of an independent director. Seeing that SAMRO at the time had a Risk and Audit Committee, the need to have directors who would not be members of the organisation began to emerge. (In the end, because of the delay in the process of adopting of a new MOI as a result of delays in the finalisation of the new Companies Act, and the fact that the MOI was necessary to make provision for independent directors, as well as uncertainties regarding SAMRO's corporate form, the Board resolved to convert the Risk and Audit Committee into a Risk Committee that would however, also deal with audit matters). From the perspective of the King Report the requirement for independent directors was introduced in principle 2.18 of the *King Report on Governance for South Africa 2009* (King III Report), which provided that the board of a company was to be comprised of a majority of non-executive directors, the majority of whom "should be independent". Principle 2.16 also introduced the requirement for the Chairperson of a company to be an independent non-executive director. King III operated on an "apply or explain" basis (i.e. the board had to apply the particular principle or recommendation, but where it was not in the best interests of the company to do so, or where it was best to apply the recommendation differently or to apply a different practice, while still achieving the same objective, the board, in providing this explanation, would still have complied.) King III was replaced by the *King IV Report on Corporate Governance for South Africa 2016* (King IV Report), which reiterates the requirement for the board of a company to be comprised of a majority of non-executive directors, "most of whom should be independent" (Part 5.3, Recommended Practice 8, King IV). The provisions relating to the independent non-executive director is dealt with in Part 5.3, Recommended Practice 31. Unlike King III, King IV operates on a "apply and explain" basis, which requires companies to substantiate the claim that good governance is being practiced.

¹⁷¹ The writer was, in the period between 2005 – 2010, the Head of Legal and Company Secretary for SAMRO. Especially in the latter role, the writer was in charge of the governance operations of SAMRO and also had access to the earlier statutory records of SAMRO from its inception in 1961. Some of the information about SAMRO that the writer learned and had access to during this period forms part of the writer's contribution in Baloyi JJ and Pistorius T "Collective Management in Africa" (Chapter 12), in Gervais *Collective Management of Copyright* (2016) 369 – 424. After leaving the employ of SAMRO at the end of 2010 the writer continued to consult for the organisation in 2011, particularly with regard to providing assistance with SAMRO's efforts to comply with the Companies Act 71 of 2008, which came into force on 1 May 2011. After 2011 the writer's relationship with SAMRO has been on an arm's length and thus the writer cannot speak (or rather write) in defence of SAMRO's actions thereafter. Indeed the AEMRO incident (dealt with supra under paragraph 6.6.1) casts aspersions on SAMRO's governance systems, but, as indicated, the complete truth would, as in the Brenda Fassie case, only emerge after the forensic investigation has been completed.

¹⁷² Copyright Review Commission Report 2011 <https://www.gov.za/documents/copyright-review-commission-report-2011>, at 49. (Date of use: 1 July 2018). The expression King III Report is used in this discussion interchangeably with the expression King III Code (the Code having been embodied within the Report).

Evidence can demonstrate that since its establishment SAMRO never failed to conduct annual general meetings (AGMs) of members, after duly sending them notices in this regard within the stipulated time-frames; or to have special general meetings (or what the SAMRO constitutive documents have termed “extraordinary general meetings”) as and when the need arose. Matters forming part of the mandatory reporting requirements of a company (e.g. presentation of annual financial statements and directors’ reports, election of the companies’ directors, appointment of the company’s auditors etc.) have always formed part of the agendas of such meetings. SAMRO also regularly made the necessary filings of required information with CIPRO,¹⁷³ as required by statute. The writer can confirm that this information was in fact submitted to the CRC as part of SAMRO’s submissions during the review process,¹⁷⁴ and if the CRC required further information this could have been provided.

The CRC also made the finding that SAMRO did not comply with principle 2.16 of the King III Report because it did not have an independent Chairperson. In this regard it needs to be mentioned that the King III Report only came into force on 1 March 2010. The CRC commenced its work towards the end of 2010 and finalised its findings in 2011 (although the report itself was only made available in 2012). As indicated above, as soon as the new requirements regarding the need to have independent directors on the boards of companies came to the fore, particularly as a result of the introduction of the King III Report and a review of company law, SAMRO too saw the need to respond to these developments.¹⁷⁵ Accordingly the SAMRO Board, with the assistance of management, commenced a process of identifying persons with skills that would be relevant for SAMRO. The priority was on finding someone who could qualify as an independent Chairperson of SAMRO in line with the requirements of the King III Report, and thereafter to identify other independent non-executive directors for the organisation.

It was at the time however recognised that the erstwhile SAMRO Articles of Association would need to be amended to make it possible for SAMRO to appoint non-member directors. In this regard it was resolved that the amendments would await overall amendments to the Memorandum and Articles of Association in order to adopt a new Memorandum of Incorporation (MOI) under the envisaged new company law regime. Delays in the coming into force of the new company law however also affected the process of amendment for these documents.¹⁷⁶ This situation was recognised at the SAMRO board meeting of 23 March 2010, where the current independent

¹⁷³ The Companies and Intellectual Property Registration Office, now replaced by the Companies and Intellectual Property Commission (CIPC) under the Companies Act 71 of 2008.

¹⁷⁴ The writer prepared SAMRO’s submissions to the CRC, in consultation with external counsel.

¹⁷⁵ At the time, around 2009, the writer wrote to CISAC to highlight the new regulatory environment and to specifically enquire how SAMRO should deal with the requirement to have independent non-executive directors, in light of the fact that this was in conflict with the CISAC requirement that boards of CMOs needed to be comprised of members of the CMO concerned. The response from CISAC was that if the requirement to have non-member board members arose from the provisions of national laws and / or regulation, it would be justifiable for the CMO to comply with such laws.

¹⁷⁶ The first version of the new Companies Bill was published in 2007 and a second version published in 2008, but the new Act, the Companies Act 71 of 2008 only came into force on 1 May 2011. See <http://www.sabinetlaw.co.za/economic-affairs/legislation/companies> (date of use: 1 July 2018).

Chairperson of SAMRO¹⁷⁷ was introduced and it was observed that “he was invited to attend board meetings until such time as the Articles of Association were amended to make provision for the appointment of independent persons to the SAMRO Board of Directors, at which stage he would then join the board as a member.”¹⁷⁸ The CRC was made aware of these developments and in SAMRO’s submission to the Commission the following was stated:

The new Companies Act, as well as the King III Code of Corporate Governance (which applies to all entities), has created the need for SAMRO to also have independent directors. In line with this, SAMRO is in the process of amending its constitution to make provision of the fact that the SAMRO Board shall also be comprised of independent directors.¹⁷⁹

In light of the foregoing it was, it is submitted, rather ingenious for the CRC to find that SAMRO fell short of good corporate governance standards for failing to have an independent Chairperson, considering (i) the historical practice of CMOs in general, and not just SAMRO, in relation to board membership; (ii) the fact that by the time that King III came into force in March 2010 SAMRO had already commenced efforts to comply with its requirements, and (iii) SAMRO’s failure to appoint an independent Chairperson was justifiable in view of the fact that SAMRO first needed to amend its MOI, which, besides the fact that this could not be done overnight, was further precipitated by the delay in finalising the coming into force of the new Companies Act. This delay in the amendment of SAMRO’s MOI would thus be justifiable in terms of the “apply or explain” basis for the application of the King III Code in terms of which “[e]xplaining how the principles and recommendations were applied, *or if not applied, the reasons*, result[ed] in compliance.”¹⁸⁰ In fact when the date for the coming into force of the new Companies Act became clear, SAMRO called an extraordinary general meeting (EGM) of its members on 20 May 2011, in line with stipulated time frames, for purposes of adopting a new MOI.¹⁸¹

¹⁷⁷ Mr Jerry Mnisi. See <http://www.samro.org.za/about> (date of use 1 July 2018).

¹⁷⁸ Minutes of the Board of Directors of SAMRO, 23 March 2010.

¹⁷⁹ Paragraph 13.5 of SAMRO’s submissions to the Copyright Review Commission, 2010 – 2011.

¹⁸⁰ King Report on Governance for South Africa 2009, at p. 7, available at <https://www.iodsa.co.za/general/custom.asp?page=kingIII> (date of use: 01 July 2018). Emphasis added.

¹⁸¹ A new MOI was in fact only adopted at SAMRO’s AGM of November 2011. A matter of grave concern to SAMRO and its operations had arisen as a result of the manner in which the Companies Bill 2008 was originally drafted. In essence the Bill did away with the “company limited by guarantee” form, and replaced it with the new “non-profit company” (NPC), which, in terms of Item 4 of the Memorandum on the Objects of the Companies Bill, 2008, was clearly designated as “the successor to the current Section 21 companies.” The problem with this was that while SAMRO was a company limited by guarantee, and while Section 21 companies (termed “associations not for gain”) were also, in terms of s 21(1) of the Companies Act 61 of 1973, incorporated as companies limited by guarantee, SAMRO was nevertheless not a Section 21 company. SAMRO was incorporated as a company limited by guarantee under the Companies Act 46 of 1926, which also separately recognised the equivalent of a Section 21 company. Under the Companies Act 61 of 1973 SAMRO was recognised as an existing company limited by guarantee in s 19 of that Act, and was thus distinct from the Section 21 company. The main distinction in this regard was that while a Section 21 company was a funding-dependent entity and prohibited from paying or transferring its income and property, or any portion thereof, “whencesoever derived”, and whether “directly or indirectly, by way of dividend, bonus, or otherwise howsoever, to the members of the association” (s 21(1)(d) and (2)(a) of the Companies Act, 1973), SAMRO’s source of income was derived from its trading activities (i.e. the licensing of musical works) and its main undertaking, which it was able to carry out as a company limited by guarantee, was the collecting of licence fees and the distribution of royalties to its members. However, because the new non-profit company (NPC) under the Companies Act 71 of 2008 was seen as a successor of the Section 21 company, it carried provisions similar to s 21(1)(d) and (2)(a) of the Companies Act, 1973 and thus prohibited the new NPC from paying any of its income or a portion thereof to its members. With the involvement of SAMRO (through the writer) two major achievements were attained: (i) Paragraphs (a) - (d) were added to item 3 of Schedule 1 to the Companies Act 71 of 2008, which created exceptions to the general rule that an NPC may not pay its members any of its income or a portion

In view of the foregoing it would seem that the CRC was simply quick to make a finding of non-compliance without fully applying its mind. There are several other observations regarding SAMRO's apparent non-compliance with governance requirements that the CRC made, all based on particular principles of the King III Report, and some of which are valid while others remain questionable. More pertinently, judging SAMRO's adherence to principles of good corporate governance on the basis of a code that had just been newly-introduced, and which many other companies were still grappling with (and also without taking into account steps that SAMRO had already taken to comply with the provisions of the code), was, in the writer's view, rather unfair. It would have been best if the Commission had assessed SAMRO's adherence to good governance practices on the basis of the King II Report which had been in operation until it was replaced by the King III Report on 1 March 2010.

More specifically the report finds fault with SAMRO for not having the head of finance as an executive director on the board, in contravention of principle 2.18 of the King III Report which recommended that at least the Chief Executive Officer (CEO) and the head of finance should be executive directors. While this observation was correct a consideration of the practice hitherto would have confirmed the fact that, until the occurrence of the case under review, the head of finance had in fact, together with the CEO, been the executive directors of SAMRO.¹⁸² Another unnecessary castigation of SAMRO by the CRC relates to the observation made in the CRC Report that SAMRO failed to comply with principle 3.10 of the King III Report, in that the audit committee report did not form part of SAMRO's annual report.¹⁸³ The fact however is that by the time the CRC was appointed (November 2010) SAMRO did not have an audit committee. This information could have been easily verified from SAMRO.

In the past SAMRO had a Risk and Audit committee. However, when the Companies Bill 2008 was published and provided that audit committees had to be comprised of independent non-executive directors it became clear to the SAMRO Board that SAMRO would not, at that stage, comply with

thereof, making it for example possible to do so "as payment in respect of any rights ... to the extent that such rights are administered by the company in order to advance a stated object of the company"; (ii) item 4(1)(d) of Schedule 5 to the Act was introduced, which made it possible for an existing company limited by guarantee to elect to be a profit company within twenty (20) days after the general effective date of the of the Act, failing which the company would be deemed to have amended its MOI as of the general effective date to state that it is a non-profit company. It is for this reason that SAMRO called an EGM on 20 May 2011, after the Act came into force on 1 May 2011. The purpose was to provide members with an opportunity to either adopt an MOI that would convert SAMRO into a profit company (mainly because though the problem of SAMRO not being able to distribute royalties to its members had been resolved through the insertion of paragraphs (a) - (d) of item 3 to Schedule 1, it appeared that as an NPC SAMRO would still not be able to distribute non-royalty revenue to its members), or to adopt an MOI that would maintain SAMRO's position as a non-profit company while ensuring more compliance with the new Act and also introducing the provisions relating to SAMRO's ability to appoint independent non-executive directors. Apparently due to mistrust of the intentions of the board, misinformation or sheer lack of appreciation of the gravity of the situation, the necessary amounts of votes to pass special resolutions in this regard were not obtained and both motions failed, and it was only at SAMRO AGM in November 2011 that a new MOI was adopted. For SAMRO's failed motions at its EGM of 20 May 2011 see <http://www.bizcommunity.com/Article/196/480/67085.html>; and for SAMRO's submission to Parliament regarding outstanding issues of concern in relation to the Companies Bill 61 of 2008 see <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/080813samro.pdf>. (Date of use: 1 July 2018).

¹⁸² Soon after, the Chief Operating Officer (COO), who had been on the board as the second executive director, was appointed as Chief Financial Officer (CFO) and the Finance Manager appointed as the new COO.

¹⁸³ Copyright Review Commission Report 2011 <https://www.gov.za/documents/copyright-review-commission-report-2011>, at 49. (Date of use: 1 July 2018).

that requirement, and that the SAMRO constitutive documents would first need to be amended to make provision for the appointment of independent directors. This process would be carried out as part of SAMRO's compliance with the new Companies Act 71 of 2008 and was also dependent on the corporate form that SAMRO members would chose for SAMRO in terms of Item 4(1)(d) of Schedule 5 to the Act.¹⁸⁴ In light of this, the SAMRO Board resolved, in 2009 – a year before the CRC was constituted – to convert the Risk and Audit committee into a Risk committee, pending the finalisation of the afore-mentioned processes.¹⁸⁵

In view of the foregoing, finding that SAMRO did not comply with good corporate governance requirements because its annual report did not contain the report of the Audit committee, when in fact SAMRO did not have an audit committee was unwarranted. Further to this, it needs to be noted that SAMRO is not required, in terms of the Companies Act 71 of 2008, to have an Audit committee, nor did SAMRO's Articles of Association at the time require it to do so.¹⁸⁶ The CRC further observed that SAMRO did not comply with principle 2.18 of CRC Report because the majority of its non-executive directors were not independent. What was said above with regard to the appointment of an independent non-executive Chairperson would apply equally in relation to the issue of independent non-executive directors in general.¹⁸⁷

The CRC Report made a valid observation with regard to the potential for SAMRO's inability to comply with the requirements of Principle 2.18 of the King III Code with respect to have the correct

¹⁸⁴ Members could only make this choice once the Companies Act had come into force (i.e. within 20 days after the general effective date of the Act, in accordance with Item 4(1)(d) of Schedule 5 to the Companies Act 71 of 2008).

¹⁸⁵ It was resolved that the new Risk Committee would also deal with audit matters.

¹⁸⁶ In terms of s 94(2) of the Companies Act an Audit committee is only required for "a public company, state-owned company or other company that is required only by its Memorandum of Incorporation to have an audit committee". Neither SAMRO's erstwhile Articles of Association, nor its current MOI (see art 13 of the MOI) require[d] SAMRO to have an Audit committee.

¹⁸⁷ Having indicated this it is of concern that SAMRO has, up to now, apart from complying with the requirement of appointing an independent non-executive chairperson, has no other independent non-executive directors on its Board. See for the current composition of the Board of Directors of SAMRO <http://www.samro.org.za/about> (date of use: 01 July 2018). It is also questionable whether SAMRO's current MOI makes it possible to comply with King IV's requirement that the majority of a company's non-executive directors must be independent non-executive directors. Although art 16.2.3 of SAMRO's MOI (and probably also art 16.2.2) makes it possible for SAMRO to appoint an independent director, (i) it does not make it mandatory, and (ii) there is no provision that the majority of members of the SAMRO non-executive directors must be independent. It is nevertheless acknowledged that it is difficult for non-profit companies to comply with the requirement of having the majority of their non-executive directors to be independent members, and this is more so for CMOs with their history of having boards that are fully-representative of their members. The Sector Supplement for Non-profit Organisation of the King IV Report recognises the difficulty for CMOs to comply with this requirement and while affirming that the principles of the King IV Code apply to all non-profit organisations, it provides that *proportionality considerations* may be made, where the practices are adapted "according to where the organisation is in its growth cycle and its size, resources and the complexity of strategic objectives and nature of operations. ..." King IV Sector Supplement for Non-Profit Organisations https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/King_IV/sector_supplements/NPO_supplement.pdf at 2 (date of use: 1 July 2018). It also appears that the Sector Supplement recognises that the main concern, where there is a requirement for members of the governing body of a non-profit organisation to be representative of certain constituencies, is to ensure that the required knowledge, experience and skills is represented on the board (see page 6 of the Sector Supplement). In this regard art 16.2.2 of the SAMRO MOI, which provides that "there may be appointed as Director any person who, not being a Member, has special knowledge, skills and / or experience relevant to performing the role and functions of a Director." Although this provision is couched in a manner similar to art 38 of SAMRO's erstwhile Articles of Association, which as observed earlier (n 236) was used for purposes of appointing executive directors to the SAMRO Board, there is no reason why the same provision could not be used to appoint non-executive directors who are not members. Having indicated this, the point must still be made that SAMRO has not fully complied with these provisions in its MOI. It would have been best if, using proportionality considerations, SAMRO had at least appointed at least two other independent non-executive directors in addition to the appointment of the independent Chairperson.

balance of skills within the organisation.¹⁸⁸ The CRC report also noted correctly that there was no internal audit function in place at SAMRO, as required by Principle 2.10 of the King III Code, but that it was in the process of being established. Furthermore the report observed the fact the provision in SAMRO's erstwhile Articles of Association¹⁸⁹ whereby the Board was empowered to unilaterally terminate the membership of any member did not conform to the requirements of Principle 8.1 of the King III Report, which provided that a company had to ensure equitable treatment of its members. In fact this issue was concerned with *transparency* concerns, in line with the further observation in the report, made validly, that "objective criteria" with regard to issues of membership needed to be clearly articulated in the organisation's constitutive documents.

The point relating to equitable treatment in terms of Principle 8.1 of the King III Report could have been made (but was not made) in relation to the provision in article 11 of SAMRO's erstwhile Articles of Association, which, while providing that the Board could terminate the membership of a member "at any time", only entitled a *full member* to refer the matter for the determination of members at a special general meeting of the members, with members who were not full members not afforded this opportunity. This provision clearly did not conform to the transparency principle that formed part of the ethical values of the King III Code.¹⁹⁰ Another valid observation made in the CRC Report related to the fact that the SAMRO annual reports did not disclose the remuneration of individual directors as required by Principle 2.26 of the King III Report.¹⁹¹ In the same breath the report noted that the remuneration paid to non-executive directors was "much less than that for similar size organisations", while casting aspersions on the high salaries paid to the two executive directors.¹⁹² On a more positive note the CRC concluded its assessment of SAMRO's governance profile by observing that SAMRO was in "[f]ull compliance" with the requirement to issue audited financial statements within six months of the end of its financial year.

The foregoing has shown that while, in certain instances, there have indeed been lapses in good corporate governance on the part of SAMRO, in many other cases the perception of poor governance on the part of SAMRO has been exaggerated and / or biased. In particular, the bald statement made by the CRC that "[t]he Memorandum of Association [of SAMRO] has been in conflict with the Companies Act of 1973 for 37 years" left much to be desired and bordered on recklessness. It appears to have stemmed from the general attitude of suspicion or mistrust over the functioning of collecting societies, displayed by many governments and / or regulators in the developing world, rather than seeing them as playing "an important role as promoters of the diversity

¹⁸⁸ See CRC Report at 50, where the CRC observed that while the SAMRO Board had broad skills, because the Board was only drawn from the membership, "if there is a skills shortage within the membership, the search does not go wider than the current membership."

¹⁸⁹ The report inadvertently refers to SAMRO's Memorandum of Association. The matter was in fact dealt with in art 11 of SAMRO's erstwhile Articles of Association.

¹⁹⁰ Under the Companies Act 71 of 2008 the right of a director to make representations before he or she may be removed from office is provided for in s 71 of the Act. This right is now also provided for in art 17.2.4 of SAMRO's current MOI.

¹⁹¹ SAMRO has since ensured compliance with this requirement in its annual reports. See <http://www.samro.org.za/about> (date of use: 01 July 2018).

¹⁹² Copyright Review Commission Report 2011 <https://www.gov.za/documents/copyright-review-commission-report-2011>, at 51 - 52. (Date of use: 1 July 2018).

of cultural expression”, as affirmed by the EU Collective Management Directive.¹⁹³ This, it is submitted, is the reason why “[i]t is mainly in Africa that public organizations are fairly frequent” as collecting societies – because African governments feel the need to control the affairs of collecting societies arising from their suspicion of the operations of CMO.

The result of the foregoing is that, in spite of this heavy-handed government control of CMOs, collective management in Africa is rarely effective, with South Africa and Algeria being the notable exceptions, and with global collections amounting to a meagre 0.7% in 2016.¹⁹⁴ Heavy-handed regulatory interventions have also stymied the development of collective management in parts of Africa. In contrast collective management thrives in Western economies, where CMOs are left to function with slight government intervention, and where rules of competition and self-regulatory codes are often used as means to keep CMOs with the contours of good governance.¹⁹⁵

6.6.2.2 The authority to administer rights

(a) General

The basis upon which a CMO administers the rights of its members and other rights-holders is important and must be clearly defined to avoid uncertainties. Broadly speaking this is either based on a full transfer of the copyright (i.e. an assignment of rights) or an agency relationship.¹⁹⁶ An exclusive licence may also be granted by a member instead of an assignment, but, as is well recognised, the effect of such an exclusive licence is largely similar to that of an assignment, especially with regard to the exclusive licensee’s right to institute infringement proceedings in his own name.¹⁹⁷ In certain cases, though limiting to the CMO, the authority to administer members’ rights has been based on a non-exclusive licence (either coupled with an agency relationship or not).¹⁹⁸ An example in this regard is the United States, where, as a result of anti-trust measures, including the adoption of so-called “consent decrees”, the initial practice of ASCAP and BMI

¹⁹³ See Recital 3, Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0026> (date of use: 01 July 2018).

¹⁹⁴ CISAC Global Collections Report 2017 <http://www.cisac.org/Media/Studies-and-Reports/Publications/Royalty-Reports/Publications/Royalty-Reports/2017-Global-Collections-Report-EN> (date of use: 02 July 2018). There has clearly been not much growth since 2012, when the Africa’s global contribution was 1.6%. See Gervais *Collective Management* (2016) 370

¹⁹⁵ The US and the EU are good examples of jurisdictions where rules of competition or anti-trust are used to rein in the activities of CMOs. In other jurisdictions such as Australia and the United Kingdom self-regulatory codes of good governance for CMOs have been adopted. See for Australia see ACCC Code of Conduct for Copyright Collecting Societies <https://www.accc.gov.au/system/files/public-registers/documents/D09%2B171037.pdf> and for the UK see BCC Principles of Collective Management Organisations’ Codes of Conduct http://www.britishcopyright.org/files/9714/1312/6511/BCCPGP_Policy_Framework_250512.pdf (date of use: 02 July 2018). The Australian code of conduct is currently under review. See in this regard <https://www.communications.gov.au/have-your-say/reviewing-code-conduct-copyright-collecting-societies> (date of use: 02 July 2018).

¹⁹⁶ See the *infra* at paragraph 6.5 the discussion regarding the administration of copyright by SAMRO vis-à-vis the administration of copyright by the now defunct SARRAL. See also Gervais *Collective Management* (2016) 9.

¹⁹⁷ See for example Dworkin and Taylor *Blackstone’s Guide* 84; Dean & Dyer *Introduction to Intellectual Property* 31.

¹⁹⁸ The Canadian regime is an example of a jurisdiction where the broad spectrum of the system of voluntary collective management of copyright is provided for, as stipulated in s 2 of the Canadian Copyright Act 1985 (as amended), which provides that a “collective society” is an entity that carries on the business of collective administration of copyright “for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf ...”

administering the rights of their members on the basis of an assignment of rights was changed to a non-exclusive licensing basis.¹⁹⁹ In terms of these consent decrees any CMO member could directly issue licences to users, thus theoretically permitting competition among members of the society, and permitting the member to receive licensing revenue directly from the user.²⁰⁰ It has, nevertheless that although songwriters do not have to use ASCAP and BMI²⁰¹ to license their rights, “in practice, most do because it’s the simplest way to collect royalties.”²⁰²

The above-mentioned mode or model of administration of rights by CMOs forms part of the system of *voluntary collective licensing* and constitutes the next step from what Dusollier and Colin have termed “the key paradigm”, where authorisation for exploitation of copyright works is given by the rights-holder individually, who “should decide whether or not to authorize use of her work and upon what conditions her work may be used.”²⁰³ At the basic level voluntary collective licensing entails the right of a rights-holder to choose the entity that will administer his or her rights. Beyond this however the system of collective management moves in a continuum that includes variedly regulated forms of collective licensing, entailing a legislatively-determined system that ranges from being more voluntary at first (by for example providing for opt-out provisions) to being less voluntary further along the continuum.²⁰⁴ We consider below variants of the more voluntary systems, and thereafter consider the non-voluntary systems.²⁰⁵

(i) Legislation-based Voluntary Licensing

1. Implied Licensing

The *implied licensing* system relates to the indemnification, by statutory provision, of the user, from liability for infringement of copyright in respect of certain works considered to be part of the licence issued to the user. An example is section 136 of the UK Copyright, Designs and Patents Act 1988, which provides that, where a work falls within the “apparent scope” of the licence issued to a user, the user is indemnified from liability arising from any claim of infringement in respect of such work.²⁰⁶

2. Legal Presumption

¹⁹⁹ See Gervais *Collective Management* (2016) 329 – 332 for a historical analysis of this development. See also as an example the current ASCAP Writer agreement, which clearly shows that the right granted to ASCAP is a non-exclusive right. Nevertheless the author still grants ASCAP (in this case contractually), “[a]ll the rights and remedies for enforcing the copyright or copyrights of such musical works” (clause 1(a) of the agreement), available at <https://www.ascap.com/about/join/membership-agreement> (date of use: 03 July 2018).

²⁰⁰ Gervais *Collective Management* (2016) 331 – 332.

²⁰¹ SESAC has not been subjected to the consent decrees. *Id* at 324.

²⁰² <http://fortune.com/2016/06/30/ascap-consent-decrees/> (date of use: 03 July 2018). Attempts by ASCAP and BMI to have the consent decrees abolished have been unsuccessful. *Ibid*.

²⁰³ Dusollier and Colin 2011 *Columbia Journal of Law & the Arts* 817. See also PWC 2011 https://www.alrc.gov.au/sites/default/files/subs/766.org_attachment_2_2011_pwc_final_report.pdf (date of use: 03 July 2018), at 37.

²⁰⁴ Dusollier and Colin *id* at 817 - 818.

²⁰⁵ The continuum is dealt with here based on a consolidation of Dusollier and Colin (*ibid*)’s analysis, and that of Liu 2012 *J Intellect Prop Rights* 48 – 49.

²⁰⁶ See *id* at 48.

The technique of *legal presumption* is mainly used in Germany, where it is presumed that a CMO seeking for information or remuneration from a user administers the rights of all rights-holders unless the user can prove otherwise.²⁰⁷ It has in this regard however been observed that “this leaves little room for right holders to choose whether to assign the CMO the task of representing them or not, and limits their freedom to opt out.”²⁰⁸

3. *Extended Collective Licensing*

The system of *extended collective licensing* (ECL) has largely been used in the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), and in Canada.²⁰⁹ It enables non-member rights-holders to be treated in the same way as members of the CMO in that the licensing of the works by a CMO representing a *substantial* number of rights-holders in a particular field is deemed to include the licensing of the works of non-members in that field.²¹⁰ Furthermore, unlike the legal presumption system, the ECL system permits rights-holders to opt out of the system and to administer the rights themselves, thus “mitigat[ing] the mandatory imposition of the collective agreement on authors who have chosen to stay outside of the CMO”.²¹¹ In this regard the system has been hailed for “its comprehensive mechanism that combines a legal extension and freedom of opting out with a voluntary.”²¹² It has nevertheless been further observed the ECL system would work best in countries with mature CMO operations, namely where rights-holders are well organised; where the CMO indeed represents a substantial number of rights-holders in the field concerned and where the CMO “has strong capabilities of management and coordination.”²¹³

Apart from the above other sui-generis systems, which may be a combination of any of the above-mentioned systems, exist in other jurisdictions.²¹⁴

(ii) **Legislation-based Non-Voluntary Licensing**

1. *Mandatory Licensing*

The first obvious form of legislatively-determined non-voluntary licensing of collective management is the system of *mandatory licensing*. In terms of this system “all right owners in a given field are

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ See Liu 2012 *J Intellect Prop Rights* 48. See also generally for collective management in the Nordic countries Koskinen-Olsson T and Sigurdardóttir V “Collective Management in the Nordic Countries”, in Gervais *Collective Management* (2016) 243 – 262.

²¹⁰ See Van Gompel *Formalities in Copyright Law* 209.

²¹¹ Dusollier and Colin 2011 *Columbia Journal of Law & the Arts* 818 – 819.

²¹² Liu *ibid.* See however Dusollier and Colin *id* at 819, who observe that “the ability to opt out is not an essential trait of ECLs” and that in this regard “the model ... abrogates the principle of individual exercise.” This contention however ignores the fact that “there is no single model of the “extended collective licensing”, with some permitting opt-outs and others not foreseeing the ability to opt out and with other sui-generis systems in existence (as in Canada). Bulayenko 2016 *Jipitec* 62; Liu 2012 *J Intellect Prop Rights* 48

. See also Van Gompel *Formalities in Copyright Law* 209, refuting the argument that such systems constitute an unpermitted formality in terms of art. 5(2) of the Berne Convention.

²¹³ Liu 2012 *J Intellect Prop Rights* 48. It is submitted that SAMRO satisfies these considerations. See *supra* under 6.6.2 where the case is made for SAMRO having mature operations.

²¹⁴ Liu 2012 *J Intellect Prop Rights* 48 mentions the example of Canada in this regard.

collectively represented by one or more CMOs.”²¹⁵ An example in this regard is the administration of cable retransmission rights in the European Union.²¹⁶ It has been observed - it is believed correctly - that the system of mandatory licensing weakens contractual freedom, as authors and other rights owners “have no choice but to commit the exercise of their rights to CMOs.”²¹⁷ The further effect of the use of this system of collective management has been expressed as follows:

If owners do not expressly enlist with any organization, the law presumes that the most representative CMO in the sector represents them. Therefore, the copyright owner has no alternative to collective management and it is unlikely that a CMO could refuse licensing in such a legally imposed scenario.²¹⁸

Furthermore, while it is generally recognised that the system of mandatory licensing would be suitable for remuneration rights and cases of exclusive rights in respect of which exceptions and limitations are permissible in international law, others have cast aspersions on the permissibility of such a system in respect of exclusive rights in all other cases, and whether this constitutes an exception or limitation to these rights.²¹⁹ More emphatic in this regard is Ficsor, who asserts:

... [I]t can be deduced that, in general, mandatory collective management of exclusive rights may only be prescribed practically in the same cases as non-voluntary licenses (which result in mere rights to remuneration) or where the possible application of exceptions to or limitation of such rights is left directly to the application of the three-step test ...²²⁰

In relation to this it needs to be mentioned that earlier versions of the Copyright Amendment Bill purported to introduce a system of mandatory collective management in South Africa. However, version B13B-2017, approved by both houses of Parliament and awaiting the President’s signature, does not contain such a provision.²²¹

2. Compulsory Licensing

A compulsory licence is a type of legal non-voluntary licence which occurs where the exclusive right of the copyright owner is reduced to a remuneration right, although, unlike in the case of a *statutory licence*, the amount of remuneration is determined by a negotiation between the copyright owner and the user, or where no agreement can be reached, by a competent authority.²²² Both cases however entail a limitation of the exclusive right of the copyright owner, who cannot prevent or

²¹⁵ Van Gompel *Formalities in Copyright Law* 208.

²¹⁶ See in this regard Bulayenko 2016 *Jipitec* 60, at n 94.

²¹⁷ Dusollier and Colin 2011 *Columbia Journal of Law & the Arts* 818.

²¹⁸ *Ibid.*

²¹⁹ Bulayenko 2016 *Jipitec* 60 and the sources cited in n 95.

²²⁰ Ficsor M “Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU ‘Acquis’”, in Gervais *Collective Management* (2016) 51. See however Van Gompel *Formalities in Copyright Law* 208, who argues that the fact “that copyright owners are unable to individually exercise their rights is by itself not enough to qualify these licensing systems as prohibited formalities”, and that “it seems consistent with Article 5(2) of the Berne Convention to subject the exercise of rights to a system of ... mandatory collective licensing.”

²²¹ Copyright Amendment Bill 2017, version B-13B-2017, available at <https://pmg.org.za/bill/705/> (date of use: 13 July 2019). Further to this, the proposed s 22C(1)(b) under clause 25 of the Bill provides that a copyright owner may withdraw an authorisation given to a collecting society.

²²² Liu and Hilty *Remuneration of Copyright Owners* 294.

control the use of their works, provided however that the user pays for the use of the works concerned.²²³ Often in a system of compulsory licensing (but not always) the rights must of necessity be administered by a designated CMO, although the rights-holder may not be required to be a member of such CMO.²²⁴ The underlying model of collective management in a compulsory licensing system may therefore be any of the models referred to above. In South Africa the compulsory licensing system applies in respect of so-called needle-time rights.²²⁵ In the South African system rights-holders may, theoretically, directly collect royalties without the mechanism of a collecting society,²²⁶ although in practice it may not be easy to do so.

3. Statutory Licensing

A statutory licence is another type of legal non-voluntary licence. The difference between a statutory licence and a compulsory licence is that whereas in the latter case the rights-holder is able to negotiate the amount of royalty payable, in the case of a statutory licence the amount of royalty is determined by statute or an administrative body.²²⁷ A notable example of a statutory licence is the US statutory mechanical licence provided for in section 115 of the US Copyright Act.²²⁸ The statutory mechanical licence, also termed a statutory recording licence,²²⁹ permits a manufacturer or any other person to make records of musical works which have previously been distributed to the public (so-called *cover records* or “sound-alikes”²³⁰) without the authority or consent of the copyright owner; provided notice in this regard is given to the copyright owner and the manufacturer pays the stipulated royalty. The statutory mechanical licence was first introduced in the United States Copyright Act of 1909, following the *Apollo* case,²³¹ with the United Kingdom following suit in the 1911 Copyright Act.²³² In South Africa the statutory mechanical licence is provided for in section 14 of the Copyright Act 1978 and the regulations promulgated thereunder.²³³ Collecting societies have

²²³ Dusollier and Colin 2011 *Columbia Journal of Law & the Arts* 819; Liu and Hilty *ibid*; Liu 2012 *J Intellect Prop Rights* 48.

²²⁴ An example is Canada’s private copy levy system, which gives rise to a remuneration right to rights-holders (s 81 of the Canadian Copyright Act). Section 83(11) of the Act provides that “[a]n eligible author ... who does not authorize a collective society to file a proposed tariff ... is entitled ... to be paid by the collective society that is designated by the Board, of the Board’s own motion or on application, the remuneration referred to in section 81 ... subject to the same conditions as those to which a person who has so authorized that collective society is subject.”

²²⁵ I.e. the rights of remuneration in respect of the broadcast, transmission in a diffusion service and communication to the public of a sound recording, due to owners of copyright in sound recordings and performers whose performances are embodied in such sound recordings, in terms of s 9(c) – (e) and s 9A of the Copyright Act 1978, as read together with s 5 of the Performers Protection Act 1967.

²²⁶ See for example s 9A(1)(b) of the Copyright Act 1978, which provides: “The amount of any royalty contemplated in paragraph (a) shall be determined by an agreement between the user of the sound recording, the performer and the owner of the copyright, or between their representative collecting societies.”

²²⁷ See Dusollier and Colin 2011 *Columbia Journal of Law & the Arts* 819; Liu and Hilty *Remuneration of Copyright Owners* 294; Garnett, Davies and Harbottle *Copinger and Skone James* 1851.

²²⁸ The licence is nevertheless termed a compulsory licence in the statute. This, it is submitted, is due to the fact that the statutory regime does not preclude private negotiations with the rights-holder. In this regard it has been observed: “Despite the existence of the compulsory mechanical license, it is rarely used because its requirements are very strict and a bit impractical. ... [However, even] though the compulsory license provision is rarely used, many of its terms are used in negotiated licenses. ...” Moser and Slay *Music Copyright Law* 80. It has furthermore been observed that the distinction between compulsory licences and statutory licences is not always maintained in national legislation and the two are often equated to each other. See Liu and Hilty *ibid*.

²²⁹ See Garnett, Davies and Harbottle *Copinger and Skone James* 1853.

²³⁰ See Krasilovsky and Shemel *This Business of Music* (2007) 139.

²³¹ *White-Smith Music Publishing Company v Apollo Company* 209 U.S. 1 (1908), discussed in Chapter 3 *supra*.

²³² The statutory mechanical licence was abolished in the United Kingdom with the passing of the 1988 Act.

²³³ See further in this regard Chapter 7 *infra*.

often played a major role in the administration of statutory mechanical licences on behalf of rights-holders, where users approach the collecting society rather than the user for the processing of such licences.²³⁴

4. Fair Dealing and other Copyright Exceptions

Copyright exceptions are at the extreme end of the continuum depicting the exercise of authors' rights from a more voluntary to a less voluntary basis, as dealt with by Dusollier and Colin.²³⁵ As in the case of compulsory licensing and statutory licensing, the essence of copyright exceptions is that they result in the loss of the exclusive right of control over copyright works by the rights-holder.²³⁶ It has nevertheless been observed that, while in the case of compulsory licensing and statutory licensing the loss is accompanied by compensation, in the case of copyright exceptions no compensation is available.²³⁷ This however is not an accurate description in every case. An example is the case of private copy levies. Private copy levies are a form of remuneration due to rights-holders arising from the private use exception, which limits the copyright owner's exclusive right of reproduction by permitting users to make copies of copyright works for private purposes. The collection of this levy and its payment to rights-holders is often carried out by collecting societies.²³⁸ In this regard it needs to be noted that often the payment of compensation to rights-holders arising from the limitation of their rights (as in the case of the private copy levy system) is subjected to a system of mandatory licensing, as is the case in Canada.

(b) Application to SAMRO

SAMRO has, since its inception, administered rights on the basis of assignment of copyright. In South Africa it would seem that the use of assignments as the basis for the administration of rights by CMOs is viewed with suspicion and in a scandalous manner.²³⁹ In this regard it has been

²³⁴ An example is the Harry Fox Agency in the United States. In South Africa the regime for statutory mechanical licences seems to be less understood, as the impression is created that the permission of the rights-holder is required to make cover records. See in this regard the CAPASSO website, where it is stated: "If you have an album of cover versions and you now wish to make multiple CDS or DVDs, you are required in terms of the Copyright Act to obtain permission (a licence) from the copyright owner. We can assist you by providing you with such a licence." See <https://www.capasso.co.za/music-licensing> (date of use: 03 August 2018). Emphasis added. In reality however, s 14 of the Copyright Act 98 of 1978 does not enjoin a user to obtain permission, but merely requires him or her to give the prescribed notice to the copyright owner of his intention to manufacture cover versions and to pay the prescribed royalties to the copyright owner (see in particular s 14(b) and (d)).

²³⁵ Dusollier and Colin 2011 *Columbia Journal of Law & the Arts* generally.

²³⁶ See Dusollier and Colin *id* at 819 – 820.

²³⁷ *Id* at 820.

²³⁸ An example of a jurisdiction that makes provision for a private copy levy system is Canada. Section 80(1) of the Canadian Copyright Act 1985 (as amended) provides that the act of reproducing all or a substantial part of a musical work embodied in a sound recording; a performer's performance of a musical work embodied in a sound recording or a sound recording in which a musical work or a performer's performance of a musical work is embodied, for private use, does not infringe the copyright in these works (it being noted that Canadian copyright law accords copyright protection to a performer's performance. See in this regard s 15 of the Canadian Copyright Act). Section 81 then accords to eligible authors, performers and makers of sound recordings a right to receive remuneration from manufacturers and importers of blank audio recording media in respect of such private use reproduction. Section 82 enjoins the manufacturer or importer of such blank audio recording media to pay the levy to a collecting society ("collecting body"), which in turn pays same to eligible rights-holders.

²³⁹ See for example a presentation of the Department of Trade and Industry (DTI) on the Regulation of Collecting Societies, addressed to the Trade and Industry Portfolio Committee at the point of deliberating upon the Copyright Amendment Bill 2017, where it is stated (at 8): "[W]hen Collecting Societies act as agents for copyright holders, it is proposed that the rights of copyright holders remain with them and copyright holders should receive royalties from whoever

observed, more vociferously that “[a]n assignment is a loss of ownership and there is nothing good about this, or helpful to the interests of authors or the country.”²⁴⁰ These assertions are made without indicating in what way the grant of an assignment to a CMO is not “helpful to the interests of authors or the country.” As indicated, most performing rights societies administer copyright on the basis of assignment, so this is not a uniquely South African situation. What is essential is that a CMO must enable a rights-holder to terminate his or her membership of the CMO when he or she chooses to do so, and upon termination of the membership the rights assigned to the CMO must revert to the rights-holder.²⁴¹

In relation to the foregoing it can be argued that, in administering the rights of their members on the basis of an assignment, performing rights societies in fact act as the “preservers” of these rights from “exploiting businesses who have an own interest in acquiring and exercising certain author’s rights.”²⁴² This is so for example where prevailing modes of exploitation of copyright works “make it difficult or impossible for authors to control their creations on an individualized basis”.²⁴³ In this regard it is to be noted that “exploiting businesses” such as music publishers would be (and are invariably) interested in acquiring, by assignment, all copyrights belonging to the author (including the performing right), often in exploitative conditions.²⁴⁴ In this regard Von Lewinski’s summation is apt:

Therefore, not surprisingly, exploiting businesses tend to argue in front of the legislator in favor of exclusive rights ... which they would exercise ... instead of remuneration rights (exercised by collecting societies), and to exercise pressure on authors to revoke rights from the collecting society in order to assign them to the exploiting businesses.²⁴⁵

It is trite fact that such an assignment to music publishers is often non-reversionary and is often irrespective of whether the publisher actively exploits the work (for the benefit of the author) or not. On the other hand, the relationship that exists between a rights-holder and a collecting society where the rights-holder has assigned his or her rights to the collecting society can best be understood within the regime of *equitable ownership* that exists in common law jurisdictions such as the United Kingdom, Australia, Hong Kong²⁴⁶ as well as the United States.²⁴⁷ In such a regime a distinction is made between the legal owner of the rights (in this case the CMO), who has legal title,

exploits their rights.” See https://www.thedti.gov.za/parliament/2018/SubCommittee_Copyright.pdf (date of use: 3 August 2018). It is clear that there is a misconception that all CMOs act as agents. As highlighted above, in the majority of case performing rights societies (PROs) have administered rights on the basis of an assignment of copyright and it is in the area of mechanical rights where the agency system has been used, largely.

²⁴⁰ Gilfillan 2010 http://www.nisaonline.com/images/files/collecting_societies_in_south_africa_as_of_13_sep_2010_-_d.pdf at 9 (date of use: 3 August 2018).

²⁴¹ This is in fact what is recommended in the WIPO Good Practice Toolkit 2018, at paragraph 2.5, available at <http://www.wipo.int/copyright/en/management/index.html#cmotoolkit> (date of use: 03 August 2018).

²⁴² Von Lewinski 2004 http://portal.unesco.org/culture/en/files/19552/11515904771_svl_e.pdf/svl_e.pdf 1.

²⁴³ See Helfer LR “Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited”, in Gervais *Collective Management of Copyright* (2016) 93.

²⁴⁴ See generally in this regard Baloyi 2012 *SA Merc LJ* and Baloyi 2014 *PELJ*.

²⁴⁵ Von Lewinski 2004 http://portal.unesco.org/culture/en/files/19552/11515904771_svl_e.pdf/svl_e.pdf 1, at n 5.

²⁴⁶ See in this regard Tomkowicz 2013 *C.I.P.R.* 75 – 98. Also Garnett, Davies and Harbottle *Copinger and Skone James* 335 – 336.

²⁴⁷ For the historical issues faced in relation to this in the United States see “Standing to Sue in Copyright Infringement Suits” 1961 *The University of Chicago Law Review*.

and the beneficial owner (the assignor author), who has equitable title.²⁴⁸ This can be either as a result of agreement between the parties or “as a consequence of some fiduciary or trust relationship that exists between them.”²⁴⁹ In this regard it has been observed that “[a]lthough legal title to the copyright rests in one person ...it may be shown that he holds the title as trustee for a third party having the beneficial ownership”,²⁵⁰ and that as a consequence of this, “the legal owner must transfer the legal title if called upon to do so.”²⁵¹

It is submitted that the foregoing describes the true nature of the assignment of the performing right to SAMRO by its members. It is submitted that this is evident from the provisions of clause 2(c) of the SAMRO Deed of Assignment, which provides the following:

It is understood that the ORGANISATION shall hold the assigned rights for the purpose of empowering itself to exclusively exercise and enforce the said rights in its own name *on the behalf of and for the benefit of the ASSIGNOR* during the residue of the terms for which the said rights shall respectively subsist, or during such time as the said rights remain vested in or controlled by the ORGANISATION in accordance with the provisions of its Memorandum of Incorporation for the time being in force.²⁵²

In this regard it is trite that a normal music publishing agreement, in which an author assigns his or her copyright to the music publisher, would not contain the phrase “on the behalf of and for the benefit of”, because that is not the intention of such an agreement. In a normal author-publisher agreement it suffices to simply provide that “the assignor hereby assigns, transfers and makes over to the assignee the rights of copyright”²⁵³ – in regard of which it has been observed:

An assignment of copyright divests the assignor entirely of the right or rights concerned and these become the property of the assignee. The assignor thereafter no longer has any claim to such rights and is in fact no longer able to perform the acts covered by those rights himself without the authority of the assignee.²⁵⁴

²⁴⁸ South African law does not, as such, know a concept of beneficial ownership, but certain developments, such as the use of the expression “beneficial interest” in the Companies Act 71 of 2008 (see for example the definition of the expression in s 1 of the Act); and developments in the financial sector may point towards steps to recognise such a concept. See for the latter example https://www.transparency.org/files/content/publication/2015_BOCountryReport_South_Africa.pdf (date of use: 4 August 2018).

²⁴⁹ Garnett, Davies and Harbottle *Copinger and Skone James* 335.

²⁵⁰ “Standing to Sue in Copyright Infringement Suits” 1961 *The University of Chicago Law Review* at 208.

²⁵¹ Garnett, Davies and Harbottle *Copinger and Skone James* 336.

²⁵² See the SAMRO Deed of Assignment for music creators, available at <http://www.samro.org.za/forms> (date of use: 05 August 2018). Emphasis added. A similar provision exists in respect of the assignment of rights to SAMRO by music publishers.

²⁵³ Many however, “for the avoidance of doubt” deem it necessary to have a more elaborate assignment clause. A typical clause in this regard would state: “You hereby irrevocably and absolutely assign, convey and set over unto us an undivided one hundred (100%) percent interest in all worldwide right, title, interest, and ownership of every nature, kind and description in and to the Compositions, including, without limitation, all copyrights therein and all rights to and under the copyright for the full term of the copyright and any extensions, renewals and revised terms thereof throughout the world; all versions and derivative works of the Compositions and all copyrights in such other versions or derivative works; all causes of action for infringement of the same, past present and future; all proprietary rights; and all other rights (existing, contingent, expectant or otherwise,) whether now or hereafter known with respect thereto; and all the results and proceeds from the foregoing accrued and unpaid and hereafter accruing.

²⁵⁴ Dean and Karjiker *Handbook of Copyright Law* (2015) at 5-2, n 10.

From the foregoing it is clear that while SAMRO attains legal title to the rights assigned to it in terms of the SAMRO deed of assignment “for the purpose of empowering itself to exclusively exercise and enforce the said rights”, the author retains the beneficial title to the rights. Furthermore, the SAMRO assignment clause provides that the assignment is for “the residue of the terms for which the said rights shall respectively subsist, *or during such time as the said rights remain vested in or controlled by the organization in accordance with the provisions of its Memorandum of Incorporation for the time being in force.*”²⁵⁵ The first part of this phrase clearly refers to the term in which copyright subsists under the Copyright Act, namely the life of the author and fifty years after his or her death,²⁵⁶ and this has been the source of the objection to SAMRO administering rights on the basis of assignment. The second part of the phrase no doubt alludes to the provisions in the SAMRO MOI relating to what can be termed the “holding over” of the rights of a member for a period of time after the member has given notice of termination of membership (provided for in articles 8.2 and 8.3 of the MOI, read together with article 8.21 thereof).²⁵⁷

The holding-over provisions of the SAMRO MOI are reasonable and consistent with international practice. In this regard items 18 – 20 of the WIPO Good Practice Toolkit for CMOs provide the following:

18. A CMO should permit each member to terminate ... his / her mandate, upon a reasonable notice period.

19. In circumstances described in its Statute, a CMO may require that a rightholder’s rights continue to be included, for a reasonable period of time, in licensees granted to Licensee [sic] prior to termination.

20. Notwithstanding the termination of a mandate, a rightholder should be entitled to his / her full share in the Rights Revenue collected.²⁵⁸

²⁵⁵ Emphasis added.

²⁵⁶ See s 3(2)(a) of the Copyright Act 1978.

²⁵⁷ In terms of art 8.2 of the SAMRO MOI a member must give written notice of termination of membership of not less than three (3) calendar months prior to 30 April of any year, and if such notice is duly received by the company, the member’s membership shall terminate “with effect from 30 April of the following year”. Article 8.3 provides that the board may, at its discretion and with the supply of a written notice and reasons, resolve that the termination of the membership shall only take place with effect from 30 June (instead of 30 April) of the following year, or with effect from a period earlier than 30 April of the following year. Furthermore, in terms of art 8.21 of the MOI, if there are pending legal proceedings relating to the rights assigned by the member to SAMRO at the time when the member ceases to be a member of SAMRO, SAMRO shall retain control over the rights until the legal proceedings have been disposed of. See for the SAMRO MOI <http://www.samro.org.za/sites/default/files/MOI%202016.pdf> (date of use: 05 August 2018).

²⁵⁸ WIPO Good Practice Toolkit 2018 <http://www.wipo.int/copyright/en/management/index.html#cmotoolkit> paragraph 2.5 at items 18 – 20. (Date of use: 05 August 2018). This is also consistent with art 5(4) of the EU Collective Management Directive, which provides that “[r]ightholders shall have the right to terminate the authorisation to manage rights ... granted by them to a collective management organisation or to withdraw from a collective management organisation any of the rights ... upon serving reasonable notice not exceeding six months. *The collective management organisation may decide that such termination or withdrawal is to take effect only at the end of the financial year.*” EU Directive on Collective Management 2014 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN> (date of use: 5 July 2018), emphasis added. Similarly clause 5(c) of the CISAC Professional Rules for Musical Societies provide that each member (i.e. a CMO) shall at all times “permit a creator and a publisher to terminate his affiliation agreement with such member, provided that such member *may impose reasonable conditions* in relation to the termination of such agreement.” www.cisac.org/What-We-Do/Governance/Professional-Rules (date of use: 05 August 2018). Emphasis added. The IFPI Code of Conduct provides that a music licensing company (MLC), i.e. a collecting society, may provide that termination of membership shall only take effect “at the end of the financial year during which the notice of termination was given”, provided that the period of holding over the rights should not exceed twelve (12) months. Clause I(2) of the IFPI Code of Conduct for Music Licensing Companies 2014

There are two possible reasons why a CMO may wish to hold over the rights of a member who has given notice of termination of membership: one, provided for in article 8.21 of the SAMRO MOI relates to a case where there may be pending legal proceedings that relate to the rights of the member filing notice of termination of membership. Although it is not practically possible for a CMO to institute infringement proceedings against every user that is infringing the works of its members - simply as a result of the sheer numbers involved in many cases - CMOs often carefully select matters that they can pursue, e.g. where such matters would set a legal precedent in cases where uncertainty prevails; or where in a particular industry a culture of flagrant infringement and / or disregard of the rights of copyright owners prevails.²⁵⁹

The second instance relates to cases where it may be necessary or expedient for the CMO to retain control over the rights of the member in relation to a licence or licences granted to a user / users prior to the notice of termination.²⁶⁰ This may be so where for example, the rights-holder concerned, such as a major music publisher, may have a large “catalogue” of works that he / it may be withdrawing. Under such circumstances although performing rights societies generally conclude blanket licences (as opposed to transactional licences) with users, users may insist (as they are entitled to) or renegotiating the licence and claiming a reduced licence fee, based on the reduction of the repertoire of works controlled by the CMO. In this regard it needs to be noted that blanket licences are often durable for yearly periods (renewable, with the licence fee adjusted based on such considerations as the consumer price index), and the payment of the licence fee may be spread over the year period.²⁶¹ A renegotiation of a blanket licence as a result of a member’s withdrawal of membership may affect the CMO’s annual distribution plan and its ability to pay rights-holders affected by the withdrawal of an existing blanket licence. The process of renegotiation itself may become protracted, and this would not be in the best interest of rights-holders.

As indicated above, the effect of termination of a member’s mandate is that henceforth the copyright assigned to the CMO for purposes of administration reverts to the member terminating the mandate. In this regard it cannot be argued that the assignment of copyright by rights-holders to CMOs is to their detriment. It is crucial that the grant of rights of administration to CMOs by rights-holders should empower and enable them to effectively administer the rights, including enforcing the rights against

<http://www.upfr.ro/download/IFPI%20MLC%20Code%20of%20Conduct%20-%20April%202014.pdf> (date of use: 05 August 2018). In this regard this is consistent with the period provided for in the SAMRO MOI.

²⁵⁹ Taking into consideration the provisions of s 24(3) of the Copyright Act 1978, where a court is empowered to award “additional” or exemplary / punitive damages to a rights-holder where the infringement was flagrant and the defendant benefitted from such infringement.

²⁶⁰ See in this regard clause 1(2) of the IFPI Code of Conduct for Music Licensing Companies 2014 <http://www.upfr.ro/download/IFPI%20MLC%20Code%20of%20Conduct%20-%20April%202014.pdf> (date of use: 05 August 2018), which provides the following: “... In appropriate circumstances the MLC [Music Licensing Company, similar to CMO] may require that right holders’ rights continue to be included in licenses granted to users prior to the date of the receipt of the notice of termination for a reasonable period of time, however, such a period shall not exceed 12 months.”

²⁶¹ The licence agreement itself may be construed as being durable “for an indefinite period”, until terminated by either party, as is the case with most of SAMRO’s licence agreements. See <http://www.samro.org.za/music-user-application> (date of use: 05 August 2018) for a list of SAMRO’s licence agreements. However, the payment is itself an annual payment. In the case of licence agreements involving smaller fees (e.g. a mobile disco or small shop licence) an upfront fee is often charged. In the case however, of a licence agreement involving larger amounts, such as a broadcasting licence, the licence fee is often payable in monthly instalments over the year period.

infringing acts. In this regard an assignment of rights no doubt provides the most effective means of achieving this. A non-exclusive licence or mere agency relationship would be limiting on the CMO's ability to fully enforce the protection of authors' rights – especially where it becomes necessary, as it often is, to institute legal proceedings against infringers or defaulting licensees.²⁶²

The question may be asked as to why the grant of an exclusive licence should not be sufficient to enable the CMO to administer the rights without impediments, seeing that an exclusive licensee has the same rights of action and is entitled to the same remedies "as if the licence were an assignment".²⁶³ In this regard however it needs to be noted that such rights and remedies are "concurrent with the rights and remedies of the owner of the copyright".²⁶⁴ More specifically section 25(2) of the Copyright Act requires the exclusive licensee to give written notice to the copyright owner before instituting any infringement proceedings, who "may intervene in such proceedings and recover any damages he or she may have suffered as a result of the infringement concerned or a reasonable royalty to which he or she may be entitled." This may have a negative impact in the CMO's ability to speedily conduct litigation in respect of the infringement of works forming part of the exclusive licence.²⁶⁵ It stands to reason therefore that that collecting societies should be permitted to administer rights on the basis of an assignment of copyright with a reversionary interest in favour of the author assignor. This is more so in the case of performing rights societies like SAMRO, where the usage of works is generally based on a blanket licence.²⁶⁶

Having highlighted the above it is submitted that the introduction of an extended collective licensing (ECL) system, as discussed above, would be a viable alternative in South Africa. As indicated, the ECL system enables non-member rights-holders to be treated in the same way as members of the CMO, since the licensing of the works by a CMO representing a *substantial* number of rights-holders in a particular field is deemed to include the licensing of the works of non-members in that field.²⁶⁷

²⁶² To surmount this difficulty SARRAL, which operated as an agency, inserted a clause in its agreement with its members which provided that "[w]here necessary to protect, enforce and or collect mechanical royalties due to the owner, the owner shall cede, transfer and assign his copyright to SARRAL for the sole purpose of instituting action for the necessary legal relief in SARRAL's or its nominee's name. ... After the action referred to has been entirely disposed of, SARRAL shall cede, transfer and assign all and any rights it might have received in terms of this clause to the owner." See *Shapiro and Galeta v South African Recording Rights [Limited]*, unreported case no: 14698/04 (06 November 2009) South Gauteng High Court at 25 – 26. Such an arrangement is however, cumbersome in that it necessitates that every time the CMO wishes to institute infringement proceedings it needs to conclude an agreement with the rights-holder for the cession of the copyright. There may be difficulties in doing so where for example the rights-holder is unavailable (e.g. where he or she is travelling); unwilling or unable (e.g. as a result of a critical sickness).

²⁶³ Section 25(1) of the Copyright Act 98 of 1978.

²⁶⁴ *Ibid.*

²⁶⁵ This restrictive nature of an exclusive licence as compared to an assignment was highlighted in the UK case of *R. Griggs Group Ltd v Evans* [2003] EWHC (Ch) 2914, at para 58; upheld on appeal in *R. Griggs Group Ltd v Evans* [2005] EWCA Civ 11.

²⁶⁶ Two scenarios where a complication would arise if the rights are administered on the basis of an exclusive licence rather than an assignment are conceivable, where the rights-holder elects to intervene in copyright litigation as contemplated in s 25(2) of the Copyright Act. First, seeing that the licence used is a blanket licence, it is conceivable that several rights-holders might want to avail themselves of their right to intervene in the copyright litigation. It would be difficult to manage the litigation under such circumstances, as the different rights-holders may seek different remedies in the litigation. This could lead to drawn-out litigation that would not be in the interest of the CMO's general membership (e.g. resulting in escalating litigation costs and also resulting in an unfavourable outcome). Secondly, where the CMO deems the best remedy to be in the form of an interdict rather than an action for damages and / or the payment of a reasonable royalty, the rights-holder/s might want to intervene in terms of s 25(2) by seeking to recover damages and / or a reasonable royalty, thus resulting in the proceedings taking longer to finalise.

²⁶⁷ See Van Gompel *Formalities in Copyright Law* 209.

Another admirable feature of this system is that it permits rights-holders to opt out of the system and to administer the rights themselves. In this regard the system is a much better system than the legal presumption and mandatory licensing systems, which, as it was observed, limit rights-holders' contractual freedom. Unlike earlier versions of the Copyright Amendment Bill, which sought to introduce a system of mandatory licensing, the version approved by both houses of Parliament and awaiting the President's signature²⁶⁸ does not have a provision of that nature.²⁶⁹ In the Bill it is clear that while it will be illegal to purport to act as a collecting society without having received accreditation to do so, the member of an accredited collecting society may withdraw the authorisation given to a collecting society to administer his or her rights – thus implying that such former member may then administer the rights on his or her own.²⁷⁰

However the current provisions of the Bill do not resolve an issue that has often been raised with regard to the system of collective management applicable in South Africa, namely the notion that collecting societies, in particular SAMRO, license the rights of non-members.²⁷¹ To say that collecting societies license the rights of non-members and thus collect licence fees on behalf of such non-members is however, not entirely accurate. This, it is submitted, arises from a misunderstanding of what the blanket licence, the predominant form of licence used particularly by performing rights societies such as SAMRO, entails. For example, in the CRC report it appears that a distinction is made between the licences that performing rights societies issue to users, and a blanket licence, it being observed that the licences issued by collecting societies to users are "limited to [the CMO]'s repertoire", yet "they operate as if they have blanket agreements with their respective users", which is conceived to mean that the licensing extends to the repertoire of non-members.²⁷² In fact it is the essence of a blanket licence that the works licensed are limited to works forming part of the CMO's repertoire. The user is, in this regard, permitted to use any of the works forming part of the CMO's repertoire, at any time, without the need to first obtain permission.²⁷³ In this regard the blanket licence is to be distinguished from a transactional or per-use licence.

The use of a blanket licence clearly does not entail the licensing of the works of non-members. In this regard it is also useful, in understanding the nature of a blanket licence, to note that a blanket licence does not also imply that a user *shall* use all the works forming part of the CMO's repertoire within the period covered by the blanket licence. It simply means that the user *may* do so.²⁷⁴ The

²⁶⁸ Namely, version [B13B—2017], available at <https://pmg.org.za/bill/705/> (date of use: 13 July 2019).

²⁶⁹ Except where specifically indicated all references to the Copyright Amendment Bill in this thesis shall be a reference to version B13B-2017 *ibid*, currently awaiting the President's signature.

²⁷⁰ See the proposed ss 22B(8) and 22C(1)(b) in clause 25 of the Bill.

²⁷¹ In this regard it has been contended that collecting societies must "collect only for their registered members". See the presentation of the Department of Trade and Industry (DTI) on the Copyright Amendment Bill at <https://www.thedti.gov.za/parliament/2017/Copyright.pdf> (date of use: 02 October 2018). This issue was also raised as one of the issues to be considered in the terms of reference of the Copyright Review Commission (CRC). See the CRC Report on page 8, available at ²⁷¹ Copyright Review Commission Report 2011 <https://www.gov.za/documents/copyright-review-commission-report-2011>, at 49. (Date of use: 02 October 2018).

²⁷² CRC Report *id* at 212 and 216.

²⁷³ See in this regard Kohn and Kohn *Music Licensing* 1264.

²⁷⁴ See in this regard clause 2.2 of the SAMRO BR & BTV licence, used for radio and television broadcasting, which provides the following: "The licence is a 'blanket licence'. The Licensee is therefore *entitled* to, ... during the period that the Agreement is in force, broadcast *any* of the works of music in SAMRO's Repertoire. The licence fee is payable irrespective

ostensible inclusion of non-members within the blanket licensing regime is generally a result of the indemnity provision often demanded by large users, such as broadcasters, when concluding blanket licences. In terms of the indemnity clause the CMO indemnifies the user in respect of any claims of copyright infringement from copyright owners relating to the user's exploitation of the works of such copyright owners for purposes covered by the blanket licence. Where a CMO is a *de facto* monopoly in a territory, it is generally assumed that the CMO would represent all rights-holders in the particular territory. In this regard the ECL system would be a more viable legal instrument for ensuring that CMOs can legally represent all rights-holders, unless the rights-holder concerned specifically signals to the CMO that he or she does not wish to be represented by the CMO concerned. This system would also bring much certainty to users with regard to the repertoire represented by the CMO's blanket licence, and would be a more legally-sound mechanism than the indemnity clause currently in use.

6.7 Conclusion

This Chapter was concerned with the elucidation of the important system of collective management of copyright, with a focus on the collective management of musical works. The importance of the system of collective management was highlighted. The Chapter also deal with the important role played by SAMRO in respect of Collective management in South Africa. In this regard it must be noted that SAMRO has, year-on-year, distributed royalties in line with its constitutive documents, since its inception. This is a notable observation because many African CMOs have struggled with distributing royalties to members and affiliated societies on a regular basis, and some have also failed to hold regular members' meetings. This is not to vouch for the accuracy of SAMRO's distribution of royalties. It is also acknowledged that, there have, over the years, been claims by some of non-payment of royalties due to them (including the famous Brenda Fassie matter). These are matters that have to be dealt with on a case-by-case basis. The situation is also not unique to SAMRO as there have been issues in this regard even among the more developed CMOs. This in fact owes to the very nature of the system of collective management, where accurate distribution of royalties is dependent on receiving accurate information on the usage of music from users, so that it has been acknowledged that the processing of royalties by CMOs is not an exact science but rather "rough justice".²⁷⁵

of whether the Licensee elects to broadcast SAMRO's Repertoire or not." Emphasis added. Available at <http://www.samro.org.za/forms#music-user-forms> (date of use: 02 October 2018).

²⁷⁵ See in this regard Ficsor *Collective Management* 149; Parker *Music Business* 198 – 200.

Chapter 7: The Protection of Musical Works under the Copyright Act 98 of 1978

“Unfortunately ... drafters ... have tended to acquire Cyclopean tendencies. ... Whether or not he is otherwise Cyclopean, the drafter must always put in the forefront of his mind the need for legal effectiveness. He must ensure, so far as he is able that the text of his Bill is apt to carry out the intentions of the government in promoting the legislation. ... - FAR Bennion¹

¹ Bennion *Statute Law* 36.

7.1 Introduction

The purpose of this section is to highlight those provisions of the Copyright Act that have specific relevance to music copyright, in order to determine how and how effectively the Act provides protection to musical works. In particular the section does what has not been attempted before, namely providing a section-by-section analysis of the Copyright Act with a focus on those aspects that have a bearing on the protection of musical works. This will greatly contribute to the body of knowledge in this regard, as it will provide a contextual understanding of how those specific provisions of the Act are to be applied in practice. Music copyright is still a matter of copyright law and so from this perspective many of the provisions in the Copyright Act will apply to music copyright. The objective however is to highlight the more pertinent provisions in order to create a more vivid distinction of music copyright and to depict this area of copyright law as one capable of distinct consideration. In doing so the writer also makes a closer consideration of certain provisions of the Copyright Amendment Bill 2017 which have a bearing on the subject-matter under consideration. In this regard it is important to observe that the Bill was passed by both houses of Parliament and now awaits the signature of the President.² The Bill, which has been long in the making, has proven very controversial and has perhaps received some of the fiercest criticisms of any legislation in the post-1994 period.³ Further commentary on the Bill is made in Chapter 9 below, where specific recommendations are given.

With regard to the foregoing it needs to be mentioned that there are however, those that have hailed the Bill as being “historic” and for introducing “new, fair and practical limitations and exceptions”, amongst other laudations.⁴ Recreate South Africa particularly lauds the Bill for introducing what they label as “three key rights”, namely (i) *the right to create*, by which is meant the conviction that the introduction of a fair use exception shall “permit digital and other uses necessary to make original work and to exercise ... freedom of expression; (ii) *the right to own*, which is a clear reference to clause 22 of the Bill, which relaxes the commissioning provisions provided for in section 21 of the Copyright Act;⁵ and (iii) *the right to earn*, which lauds the provisions that seek to regulate copyright contracts and collecting societies, to prevent “abuse and exploitation”.⁶ While the writer is in support of Recreate South Africa’s concept of “the right to own”, the writer only cautiously supports the idea of regulated contracts and the regulation of collecting societies. With regard to the so-called “right to

² Version B13B-2017m available at <https://pmg.org.za/bill/705/> (date of use: 10 July 2019).

³ Some of the most scathing criticism of the Bill came from Professor Owen Dean, recognised by many, including the judiciary as the foremost authority on copyright law in South Africa. In very strong language Dean alleges a “department capture” – a mindset inimical to intellectual property that has been imposed on the department [of Trade and Industry – the department responsible for intellectual property legislation] and the parliamentary portfolio committee, in the same nature as the “state capture” phenomenon that has been widely reported in the news. Dean alleges that “[t]his mindset is out to undermine and emasculate a well-established functional legal regime”, and particularly points out the fact that the Bill introduces wide-ranging exceptions to the exclusive rights of copyright owners “that those rights are seriously undermined.” See Dean Sunday Times, November 25 2018. See also for a comment on an earlier version of the Bill Dean <http://blogs.sun.ac.za/iplaw/2015/08/05/dti-dishes-up-a-hopeless-curates-egg/> (date of use: 21 January 2019).

⁴ See <http://infojustice.org/archives/40692> (date of use: 21 January 2019).

⁵ See the discussion further below.

⁶ <http://infojustice.org/archives/40692> (date of use: 21 January 2019).

create”, the writer argues that this is based on a convoluted and nihilistic conception of copyright as a system of law, depicting what Dean has termed “a mindset inimical to intellectual property”.⁷

As highlighted in Chapter 5 above, the essence of copyright is that it is an *exclusive* right granted over a *defined* period, during which the copyright owner has the power to restrict others from using his work. Only once the period of protection has lapsed is the work released to the public domain to satisfy the public interest requirement of copyright law. What the likes of Recreate South Africa are demanding is in fact an early bite at the cake. Such a demand finds no support in the *current* international copyright system as undergirded by the WTO regime. The ensuing analysis shall, alongside considering provisions of the Copyright Act that have a bearing on music copyright, also consider those aspects of the Copyright Amendment Bill that would likewise, if passed into law, have an impact on music copyright.

One of the idiosyncrasies of the Bill which commentators neglect to highlight however, is the fact that the Bill proposes to introduce elements of American copyright law into our law on a number of instances. Three notable instances in this regard are (i) the introduction of the US merger doctrine, which is associated with the idea / expression dichotomy;⁸ (ii) the introduction of the fair use doctrine⁹ and (iii) the introduction of the “first-sale” doctrine.¹⁰ This Americanisation of South African copyright law is inimical to the sentiments made by Berger J in *Moneyweb v Media24*,¹¹ who, having noted earlier that English copyright law was “no different from of own” concerning the questions being considered,¹² observed (as also pointed out in Chapter 1):

... I understand that foreign authorities are referred to for guidance only. I also accept that I must be cautious in considering foreign law *because each jurisdiction has its particular history* and, in many cases, is bound and influenced by domestic statutory precepts. *I therefore intend, for historical reasons, to focus on English authority.*¹³

In light of the introduction of American doctrines to our law through the Copyright Amendment Bill it appears that our courts will (if the Bill ultimately becomes law), be compelled to constantly refer to American copyright law when adjudicating matters touching on these doctrines. This, it is submitted, will bring about a minefield in the adjudication of copyright cases because of the complexity and uniqueness of the American legal system. For this reason, although this thesis has not followed a pure comparative approach but rather a historical and contextual approach, the writer deems it necessary to provide a bird’s eye view of the American legal system prior to considering the relevant provisions of the Copyright Act and the Copyright Amendment Bill, 2017. This is to give a sense of the hurdles that are to be expected when referring to American authority in adjudicating copyright cases under the new regime. Furthermore, it is necessary to do so from the point of view that

⁷ Dean Sunday Times, November 25 2018.

⁸ See the proposed s 2A(4)(a)(i) in clause 2 of the Bill and the discussion on this section below.

⁹ The proposed s 12A in clause 13 of the Bill and the discussion on this section below.

¹⁰ The proposed s12B(6) in clause 13 of the Bill and the discussion on the section below.

¹¹ *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81.

¹² *Id* at para 84.

¹³ *Id* at para 103.

although “there is a presumption that the court must accept that foreign law is the same as South African law ... a party relying on a foreign statute, and more particularly a foreign copyright statute, should generally speaking prove it before the court.”¹⁴

7.2 An Overview of the United States Legal System

7.2.1 Sources of Law and their Hierarchy

Like South African law, American law follows the common-law tradition and has its roots “undeniably” in English law.¹⁵ Thus English law (“buttressed” by such sources as the US Constitution, court cases, statutes, decrees, etc.), forms an integral part of American law.¹⁶ After independence the new American states adopted statutes and constitutional provisions that followed the English common law to the extent that they did not conflict with the state and federal constitutions, with other states incorporating the common law through judicial decisions.¹⁷ The only exception is the State of Louisiana, which adopted a Napoleonic Code which, nevertheless, follows the doctrine of *stare decisis*.¹⁸ Furthermore, in the tradition of the English courts, American courts act as both courts of law and courts of equity, and with regard to the later, are enjoined to “fashion remedies as necessary to accomplish a just result.”¹⁹ The Blackstone Commentaries on the Law of England also played an important role in the reception of English law into American law.²⁰

It has been observed that it would be best to see the United States as comprised of “multiple sovereignties” with “one federal government and the more than fifty state and territorial governments, each of which has its own set of laws and its own court system”, giving the United States legal system “much of its richness, diversity, complexity, and conceptual challenge.”²¹ America is in essence, comprised of “fifty-one legal systems”.²² This is important from a South African perspective when consideration has to be made as to which court’s law to use when seeking guidance with regard to copyright disputes arising from the American legal doctrines incorporated into our law. Will South African courts be free to choose which Circuit rulings to use, or will only decisions of the US Supreme Court be considered conclusive? It is for example trite that US courts “have applied the fair use defense inconsistently over the years.”²³ In view of this a clear rule needs to be established as to how to apply US copyright law as a source of foreign law in South Africa.

¹⁴ Dean and Karjiker *Handbook of Copyright Law* 1-181.

¹⁵ Hay *Law of the United States* 1 and 5.

¹⁶ See Kim *American Law* 11.

¹⁷ Scheb and Scheb II *The American Legal System* 16.

¹⁸ Hay *Law of the United States* 6.

¹⁹ Johns and Perschbacher *The United States Legal System* 121 – 123.

²⁰ See in this regard Morrison *Fundamentals of American Law* 12 – 13; Scheb and Scheb II *The American Legal System* 16 – 17 and Hay *Law of the United States* 5

²¹ Johns and Perschbacher *id* at 84.

²² Scheb and Scheb II *The American Legal System* 32 – 33.

²³ Moser and Slay *Music Copyright Law* 208. For example Greenleaf and Lindsay *Public Rights* 368, noting such inconsistencies, have highlighted how the US Eleventh Circuit court gave a ruling on a fair use case which was different from that given by the Ninth Circuit, although the facts were similar. Galavis 2013 *B.U.J.SCI. & Tech. L.* highlights how the Ninth Circuit and the Second Circuit – which are the main jurisdictions for dealing with entertainment law cases and which

In terms of the hierarchy of legal sources federal legal sources of law have primacy over state legal sources.²⁴ Federal legal sources, in order of primacy, are the US Constitution, Acts of Congress and treaties, Federal Common law and equity, and the remaining State hierarchy of laws (i.e. all other laws). On the other hand, state legal sources are the State's Constitution, State statutes, Common law and equity²⁵ and Contracts.²⁶ Thus a federal supremacy rule applies, with the US Constitution constituting the supreme law of the United States.²⁷ In terms of the enumerated powers doctrine, federal government has only those powers conferred upon it by the US Constitution in terms of Article 1, section 8 of the Constitution, thus giving states a certain level of discretion to determine laws that are best suited to their own circumstances.²⁸ The United States is thus a federalist country following a dualist system of law, in which state law functions alongside federal law subject to the primacy of federal law in certain matters.

In view of the foregoing it has been noted that “[t]he federal courts cannot be given authority beyond that conferred by the Constitution.”²⁹ Thus, although states may make use of their own laws in a number of matters, in those matters in which the federal government has primacy under the Constitution, state law has to give way to federal law. This observation is important for our purposes because, as highlighted under 7.2.3 below, copyright law in the United States is a matter of federal law rather than state law. It is thus the federal law system that is applicable in respect of copyright matters.

7.2.2 *The Hierarchy of the Courts in the United States*

Related to the federal-state law hierarchy system is a federal-state court hierarchy system. Just as there are two sets of legal sources, with federal legal sources taking precedence over state legal sources in those matters in which the federal government has jurisdiction, so there is a dual court hierarchy system comprising of federal and state courts, in which federal courts rank higher than state courts.³⁰ Both the federal and state court systems provide for three levels of courts, namely *trial court*, *intermediate appellate court* and *final appellate court*.³¹ It must be highlighted here that those cases falling within the ambit of federal rather than state law (as is the case with copyright matters) are dealt with through the federal court system and not through the state court system. Federal courts are said to comprise a “separate and independent system of courts” in that (apart from the US Supreme Court), they do not fulfil the function of appellate or superior courts for the

South African courts should therefore be relying upon for an elucidation of applicable US copyright law – have also differed on the interpretation of copyright concepts.

²⁴ See Kim *American Law* 14. As Hay notes, “... federal law overrides inconsistent state law.” Hay *Law of the United States* 7.

²⁵ Except the State of Louisiana, which follows a French civil law code system. See Hay *id* at 6.

²⁶ See Van Dervort *American Law and the Legal System* 52.

²⁷ See Kim *American Law* 14.

²⁸ *Ibid.*

²⁹ Wright and Kane *Law of Federal Courts* 1.

³⁰ Kim *American Law* 15.

³¹ See further in this regard Johns and Perschbacher *The United States Legal System* 93 – 100.

state courts.³² Instead, federal courts and state courts operate in a parallel manner, with the US Supreme Court functioning as the highest appeal court for both systems of courts.³³

It should also be noted that in certain circumstances (as in cases involving “supplemental jurisdiction”³⁴), federal courts may hear matters relating to state law (provided that they apply state law to such cases);³⁵ conversely, state courts can also hear matters arising from federal law except in the limited instances in which federal courts have exclusive jurisdiction to hear such matters, and provided that they apply federal law to such cases.³⁶ In this regard it needs to be noted that Congress has given exclusive jurisdiction in respect of copyright (and other intellectual property) matters to the federal courts.³⁷ Federal court jurisdiction generally relates to *federal question jurisdiction* (where the subject-matter dealt with arises from federal law), and *diversity of citizenship jurisdiction*, dealing solely with civil suits where the parties are from different states and the matter involves a controversy exceeding \$75 000, whether or not the matter gives rise to a federal question.³⁸

The federal court system is comprised of *district courts*, which are interspersed across all fifty US states and are courts of first instance / trial courts.³⁹ District courts have been termed “the general court[s] of original jurisdiction”.⁴⁰ Appeals from district courts are lodged at the *circuit courts* (termed the US Courts of Appeal), totalling thirteen (13) and covering all US states (including Hawaii and the district of Washington D.C. (District of Columbia), which is deemed to be a federal territory and not a US state). The thirteenth circuit court is the United States Court of Appeals for the Federal Circuit, a circuit court with nationwide jurisdiction in respect of certain specialised matters.⁴¹ Circuit courts also act as courts of first instance in relation to orders made by certain federal agencies.⁴² The last and highest court in the United States is the *US Supreme Court*, which is primarily an appeal court involved with petitions for a *writ of certiorari*,⁴³ except in very rare cases where it can act as a court

³² Hay *Law of the United States* 48.

³³ See Johns and Perschbacher *The United States Legal System* 112 – 113. Dealing with this matter (of parallel systems) Morrison *Fundamentals of American Law* 60 observes: “Most cases in the federal court ... could also be maintained in state courts, with the party filing the case having the initial choice. ... Once a case is in the federal system, it may be transferred to another federal trial court for the convenience of parties and witnesses ... Because federal courts have limited jurisdiction, very few state cases could ever be heard in a federal court. ...”.

³⁴ That is, the addition of a claim based on state law to claims involving a federal question.

³⁵ This is in line with the so-called *Erie-doctrine*, where it was held that the limited legislative competence of the federal government meant that federal courts are not permitted to create federal case law that would apply concurrently with or pre-empt state law. Hay *Law of the United States* 93.

³⁶ Hay *Law of the United States* 49 – 50; 52. Justice Brandeis summed up the applicable position through these words: “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.” *Erie Railroad v Tompkins* 304 U.S. 64, 78 (1938).

³⁷ See in this regard 28 U.S. Code § 1338.

³⁸ Scheb and Scheb II *The American Legal System* 37.

³⁹ Kim *American Law* 15 – 16.

⁴⁰ See Wright and Kane *Law of Federal Courts* 8.

⁴¹ In particular it hears appeals from the Court of Claims, the Court of Customs and in respect of Patent Appeals. Hay *Law of the United States* 49.

⁴² Kim *American Law* 16.

⁴³ A petition for a writ of certiorari involves a request by the unsuccessful party to legal proceedings, filed with the US Supreme Court for a “review” of the decision of the lower court. In this regard it needs to be noted that the term “review” is not a reference to a *judicial review* as is understood in South Africa but is in fact an appeal. United States law appears to use the rubric “judicial review” as a catch-all phrase to mean both what is termed an appellate review (what we normally

of first instance.⁴⁴ The US Supreme Court is also the last arbiter of disputes arising from state law referred from the state supreme courts.⁴⁵

America (just like the United Kingdom and South Africa) follows the principle of *stare decisis*.⁴⁶ Edlin⁴⁷ distinguishes between what he terms *vertical stare decisis*, as dealing with “hierarchical judicial systems that require lower courts to obey the decisions of higher courts”, and *horizontal stare decisis* as the aspect of the doctrine which binds a court to its own previous decisions. Under the *stare decisis* principle “precedent cases” of a higher court are binding on a lower court, thus fostering such values as predictability, reliability, equality, expediency, adjudicative integrity (i.e. warding against arbitrary discretion), judicial efficiency, fairness to the parties etc.⁴⁸ As Justice Cardozo has noted, adherence to precedent should be the rule and not the exception, as the labour of judges would be increased if a judge could not “lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him”.⁴⁹ While it is possible to highlight certain similarities between the US system of *stare decisis* and that of its South African counterpart, notable differences are evident also. In particular, the South African system can accurately be portrayed as simple and straightforward compared to the complex US system.⁵⁰

What would make the US system of legal precedent intriguing to the curious South African mind is its “application of varying *stare decisis* standards to different types of cases”, using somewhat of a

understand as an appeal) and a judicial review proper, seen as a controversial doctrine in the United States. See Johns and Perschbacher *The United States Legal System* 101 – 105.

⁴⁴ Kim *American Law* 16. Kim refers to the case of *Bush v Gore* 531 U.S. (98) 2000, which the U.S. Supreme Court dealt with as a court of first instance on the basis of urgency, as the outcome of the 2000 U.S. presidential elections was under dispute. See also Scheb and Scheb II *The American Legal System* 36 – 41; Burnham *Law and Legal System* 175 – 186, and Wright and Kane *Law of Federal Courts*, generally, on the US court system.

⁴⁵ As already indicated, the state court system is not relevant for present purposes as copyright is protected under federal law. Suffice it to say that the system is comprised of state trial courts, intermediate appellate courts and state supreme courts. See Kim *American Law* 15.

⁴⁶ The other fundamental element of the U.S. legal system is the doctrine of legislative supremacy, which imposes an obligation on judges to apply the law contained in statutes, and arises from Article VI of the U.S. Constitution which provides that the Constitution, and the Laws of the United States made pursuant thereto and all Treaties made under the authority of the United States “shall be the Supreme Law of the land” (the so-called “supremacy clause”). See further in this regard Edlin *Judges and Unjust Laws* 41 – 46.

⁴⁷ Edlin *id* at 33.

⁴⁸ Edlin *id* at 38; Kim *American Law* 11.

⁴⁹ Cardozo *The Nature of Judicial Process* 149.

⁵⁰ Van Niekerk 2013 *Fundamina* 106 refers, it is believed correctly, to the “somewhat watered down and flexible version” of the doctrine of *stare decisis* in South Africa. In simple terms, the South African doctrine of *stare decisis* provides that a previous decision of the Supreme Court of Appeals, being the highest court in the land in respect of all matters except constitutional matters, is binding upon all other courts in the land (see *Collett v Priest* 1931 AD 290 at 297 - 298). It is also binding upon the Supreme Court of Appeals itself unless the decision was wrong due to a manifest oversight or misunderstanding or due to a “palpable” mistake (*R v Nxumalo* 1939 AD 580 at 232; *Bloemfontein Town Council v Richter* 1938 AD 195 at 232). A Provincial division of the High Court is bound by its previous decisions unless a clear mistake was made (*R v Manasewitz* 1933 AD 165 at 170; *R v Philips Dairy (Pty) Ltd* 1955 (4) SA 120 (T) at 122), and those decisions are binding upon a local division or a single judge within the provincial court’s jurisdiction (*Hughes v Savvas* 1931 WLD 237; *SA Farmers Representatives v Bonthuys* 1930 CPD 132 at 135). Local divisions have concurrent jurisdiction with the provincial divisions within which they exist, but only provincial divisions have appellate and review jurisdiction. Provincial divisions are not bound by the decisions of another provincial division, and neither is a single judge bound by the decision of a full bench in another provincial division (*Lobley v Lobley* 1940 CPD 420 at 434; *Levitt v Schwartz* 1938 CPD 47. In the latter case the decision of the full bench would have “strong persuasive value”. See *MV Heavy Metal Palm Base Maritime SDN BHD v Dahlia Maritime Ltd* 1998 (4) SA 479 (CPD) at 486B and *S v Jafra* 2005 (1) SA 108 (ECD) at 131B–C). Inferior courts (e.g. Magistrates’ Courts) are bound by the decisions of any division of the High Court, beginning with the decision of the High Court in the province in which the court operates, and where no court in the said province has set a precedent on the matter concerned, a decision of a court in another province would be applicable.

sliding scale.⁵¹ This sliding scale considers such factors as (i) the nature of the case involved (i.e. whether it is a constitutional, common law or statutory matter); (ii) whether the court that issued the precedent was a trial, appellate or high court and (iii) whether the court reviewing the precedent is a trial, appellate or high court.⁵² Under such circumstances, “the bindingness of precedent is directly proportional to the justification a court must proffer to deviate from the previous decision”, and for the first two factors mentioned above, “the precedential force of the previous case and its attendant binding weight on the deciding court increases as one moves up the scale”, while, with regard to the third factor, it decreases.⁵³

Another idiosyncrasy of the US *stare decisis* system is the fact that the system is “more stringently” applied in cases involving *judicial statutory interpretation* than it does in constitutional cases.⁵⁴ Perhaps of more interesting comparative value is the consideration, as a factor used to determine the applicability of *stare decisis* in the US court system, of the question whether the precedent case was ruled on by a court recognized as a leading court in the relevant subject-matter.⁵⁵ This brings in the issue of “forum shopping” in the United States, a practice which, while of less relevance in the South African context due to its simple court structure, is more prevalent in the United States. “Forum shopping” is simply defined as “the act of seeking the most advantageous venue in which to try a case.”⁵⁶ Although often seen as a somewhat unethical practice and frowned upon by some, Algero argues that forum shopping is in fact, “an intrinsic part of the American judicial system” necessitated largely by the complex US court system in which federal courts and state courts operate parallel to, and independent of each other – and in which the jurisdiction of the courts may overlap.⁵⁷

The issue of the parallel existence of federal and state courts is of course not relevant in respect of copyright cases because, as already hinted to, copyright is a federal question and therefore only federal courts may hear copyright cases. This however means in essence that any of the ninety-four (94) federal district courts of the United States may hear copyright matters and any of the thirteen (13) intermediate appellate courts (i.e. circuit courts) may hear appellate (and judicial) reviews of such cases. What is required under these circumstances is summed up in the words of Chief Justice Stone, when he remarked:

[D]ue process requires only that in order to subject the defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”⁵⁸

⁵¹ Edlin *Judges and Unjust Laws* 34.

⁵² Edlin *id* at 34 – 35.

⁵³ Edlin *id* at 35.

⁵⁴ Edlin *id* at 34.

⁵⁵ See Kim *American Law* 12.

⁵⁶ Algero 1999 *Neb. L. Rev.* 79.

⁵⁷ Algero *id* at 80 – 82.

⁵⁸ Quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

This involves questions of both jurisdiction and venue selection, and is influenced by questions of choice of law. Jurisdiction generally relates to the subject-matter of the case (*subject-matter jurisdiction*) and the personal circumstances of the defendant relating to his contact with the forum in which the court sits (*personal jurisdiction*). As indicated earlier, federal courts have subject-matter jurisdiction only if a matter either gives rise to a federal question (as in copyright matters); or in the case of *diversity jurisdiction* (i.e. where the amount in question exceeds \$75 000 and no plaintiff shares a state of citizenship with the defendant). As Subrin and Woo have observed, “In the United States, states vie with other states and with the federal government on jurisdiction and choice of law questions”, and in view of this “[c]lasses of litigants in this power battle have tried both to shape and use jurisdictional choices to enhance their overall strategic advantage in the litigation.”⁵⁹ In this regard the authors refer to the four squares “that must be appropriately filled” in order to succeed in the “game” of litigation in the United States, namely *personal jurisdiction*, *notice* (through service of process), *subject-matter jurisdiction* and *venue* (i.e. “which of the courts with subject matter and personal jurisdiction bears the most sensible relationship to the claims asserted or to the parties, and hence, should hear the claim”).⁶⁰

All federal district courts spread all over the United States would have subject-matter jurisdiction in respect of copyright matters.⁶¹ The important question to consider when instituting copyright proceedings in the United States would therefore be whether the court in which the plaintiff intends to institute proceedings has personal jurisdiction over the defendant (i.e. whether the defendant is resident in the state concerned – i.e. a citizen of the said state or domiciled in the state; has property in such a state or has entered into a relationship that gives rise to legal status, e.g. marriage, adoption, guardianship).⁶² It would of course be difficult to determine beforehand where infringement of copyright or other disputes relating to copyright is likely to arise in respect of the copyright owner’s works. Nevertheless, it is also true that the US is a vast market for music usage and therefore infringement is likely to occur in many parts of the United States.⁶³

A music company would nevertheless wish that where copyright infringement takes place, it does so in a jurisdiction which is more favourable to its form of business. In this regard the music company may elect to set up its headquarters or at least maintain an office in a favourable jurisdiction, “even if those offices are not their primary headquarters.”⁶⁴ In relation to this Nathan and Morgan state that “California’s laws and courts are commonly regarded as more favorable to artists and entertainers, while New York’s are regarded as more favorable to record companies and other large

⁵⁹ Subrin and Woo *Litigating in America* 72.

⁶⁰ Subrin and Woo *ibid.*

⁶¹ In view of the fact that copyright is a federal question and further that any federal court has diversity jurisdiction where the amount of controversy exceeds \$75 000 and no plaintiff is a citizen of the same state as the defendant.

⁶² See Subrin and Woo *Litigating in America* 73 - 74.

⁶³ A recent study has shown that some twenty-five (25) U.S. cities – from Nashville, New York, Los Angeles to San Antonio - have “vibrant music scenes”. See <http://www.citylab.com/design/2012/08/geography-americas-music-scenes/2709/> (date of use: 09 June 2015).

⁶⁴ See Nathan and Morgan *The Essentials* 261.

businesses.”⁶⁵ Nevertheless, wishing that copyright disputes will only arise in favourable jurisdictions does not mean that this will in fact be the case. In practice, and exacerbated by digital technologies, copyright infringement may occur anywhere in the country or the world. In view of this, unless the defendant has consented to the jurisdiction of what the plaintiff may see as a favourable jurisdiction, personal jurisdiction will have to be determined in line with the rules governing personal jurisdiction in federal cases (i.e. only the district court where the defendant has physical presence or is domiciled can be a “forum state”⁶⁶).

Federal requirements for personal jurisdiction are subject to the constitutional requirement of “due process”, which requires that where the defendant is not present within the territory of the forum, the forum court may only subject him “to a judgement *in personam*” if the defendant “ha[s] certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”, as held in the *International Shoe Co.* case.⁶⁷ This is often also dealt with within the concept of the “long-arm statutes”, such as Rule 4(k)(2) of the Federal Rules of Civil Procedure, in terms of which

[e]ven if a copyright owner is unable to demonstrate the purposeful direction of defendant’s activities to a particular state, it may ... establish jurisdiction for purposes of its copyright claim *if the defendant purposefully directed its activity at the United States.*⁶⁸

In relation to this the following has been observed:

Washington Shoe is a high water mark in the extension of personal jurisdiction for copyright infringement, effectively requiring alleged infringers everywhere to be prepared to defend in the copyright owner’s home jurisdiction, however distant, and however removed from alleged infringement’s presence in the stream of commerce. ...⁶⁹

7.2.3 The Protection of Copyright in the United States

7.2.3.1 The Constitutional Basis of U.S. Copyright Law

Unlike in South Africa, where the constitutional basis of intellectual property rights has been a debatable issue,⁷⁰ there has never been such uncertainty in United States law. In what is generally

⁶⁵ Ibid. See also Krasilovsky and Shemel *This Business of Music* 14, who state that “[m]ost recording contracts s

⁶⁶ I.e. the state in which the copyright dispute is heard. See in this regard Goldstein *Goldstein On Copyright* 15:1 – 15:2.

⁶⁷ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). See also Goldstein *id* at 15:2 – 15:3.

⁶⁸ Goldstein *id* at 15.4.1. In this regard the plaintiff must prove that the exercise of jurisdiction conforms to due process; that the claim arises under federal law and that the defendant is not subject to the personal jurisdiction of any state court of general jurisdiction. Goldstein *ibid*. See also for the concept of the “long arm statutes” *Thomas Jackson Publ., Inc. v Buckner*, 625 F. Supp. 1044 (D. Neb. 1985); *Troma Entertainment, Inc. V Centennial Pictures Inc.*, 729 F.3d 215 (2d Cir. 2013); *Ham v. La Cienega Music Co.*, 4 F.3d 413, 416 (5 th Cir. 1993); *Bridgeport Music, Inc. v. Still N the Water Publ.*, 327 F.3d 472, 483 (6th Cir. 2003); *Marvel Characters Inc. v. Kirby* 726 F.3d 119, 107 (2d Cir. 2013).

⁶⁹ Goldsteid at 15.8.

⁷⁰ This was the case until the *Laugh it Off* case. See *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC). See also the earlier ruling of the Supreme Court of Appeals in the same matter, *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2005 (2) SA 46 (SCA), at paras 10 – 11. Earlier, when the Constitutional Court was called upon to determine whether intellectual property rights were to be treated as fundamental rights under the

known as “the Copyright Clause”⁷¹, the Constitution of the United States of America empowers Congress

to promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries.⁷²

In this regard it was observed in *Eldred v. Ashcroft*⁷³ that “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” As Nimmer and Nimmer have noted, Congress was acting upon this power when it enacted the first US Copyright Act in 1790, in this way “[beginning] federal copyright protection”.⁷⁴ Thus Abrams has likewise noted: “American copyright law is rooted in the Constitution and given form by Congress.”⁷⁵ This form is expressed in the federal copyright legislation,⁷⁶ and provides the “structure and dimensions of copyright”.⁷⁷ In this sense therefore American copyright law is (as is South African copyright law and the copyright laws of many other countries), “a creature of statute”.⁷⁸ Commenting on this, Abrams reasons that “[t]his focuses the attention of courts and lawyers on the Copyright Clause of the Constitution and the Copyright Act as the foundation from which analysis of copyright cases and copyright problems must proceed.”⁷⁹ This has given rise to the recognition of the so-called *incentive theory* as underpinning the rationale for intellectual property (and in this case, copyright) protection in the United States.⁸⁰

Constitution that court in essence avoided dealing with the situation by holding that intellectual property rights were not universally recognised as fundamental rights. See *Ex Parte Chairperson of the National Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (C), at 799. Rulings subsequent to the *Laugh it Off* case have confirmed that intellectual property is a Constitutionally-protected right. See *National Soccer League v Gidani (Pty) Ltd* [2014] 2 All SA 461 (GJ); *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81.

⁷¹ Sometimes termed the “Copyright-Patent Clause” because of the fact that it in fact, deals with intellectual property in general, and more particularly copyright and patents. See Abrams *Law of Copyright* 1-2.

⁷² US Constitution, Art. I, § 8, Cl. 8.

⁷³ 537 U.S. 186, 212 (2003).

⁷⁴ Nimmer and Nimmer *Nimmer on Copyright* OV-1.

⁷⁵ Abrams *Law of Copyright* 1-2.

⁷⁶ Currently the Copyright Act of 1976, cited as 17 U.S.C. § 101 according to its placement in the United States Code.

⁷⁷ Abrams *Law of Copyright* 1-3. It needs to be noted however that the full contour of current U.S. Copyright law encompasses not only the 1976 Copyright Act but several pieces of legislation, including the Copyright Act of 1909, “which continues to govern pre-1978 causes of action as well as certain rights under the current Act”; the Sound Recording Amendment Act of 1971, which first accorded federal statutory protection to sound recordings under the 1909 Act; the current Copyright Act of 1976; The Berne Convention Implementation Act of 1988, which modified the 1976 Act in order to harmonise it with the requirements of the Berne Convention (and entered into force on March 1, 1989); the Uruguay Round Agreements Act of 1994, “which furthered the process of Berne harmonization but also injected entirely new elements into the copyright equation”, and a whole number of other amendments to the current Copyright Act (including the Computer Software Act of 1980, the Record Rental Amendment Act of 1984, the Audio Home Recording Act of 1992 etc. See Nimmer and Nimmer *Nimmer on Copyright* OV-1 – OV-2. Thus the U.S. copyright universe is a much broader area than current South African copyright legislation, which can only be traced to three legislations starting with the Imperial Copyright Act of 1911, the Copyright Act of 1965 and the current Copyright Act. See in this regard the discussion under Chapter 4 *supra* and Dean and Karjiker’s observations on this. Dean *Handbook of Copyright Law* 3-1 – 3-2.

⁷⁸ In this regard Abrams *Law of Copyright* 1-19, has noted: “Ever since *Wheaton v Peters*, one of the most basic premises of American copyright law is that copyright is strictly a creature of statute. ...”

⁷⁹ Abrams *id* at 1-19 – 1-20.

⁸⁰ This rationale is explained well captured by Landes and Posner *Intellectual Property Law* (at 13): “The dynamic benefit of a property right is the incentive that possession of such a right imparts to invest in the creation or improvement of a resource in period 1 (for example, planting a crop), given that no one else can appropriate the resource in period 2 (harvest time). It enables people to reap where they have sown. Without that prospect the incentive to sow is diminished. To take an example from intellectual property, a firm is less likely to expend resources on developing a new product if competing firms that have not borne the expense of development can duplicate the product and produce it at the same marginal cost as the innovator...”; and further (at 20): “... Unless there is power to exclude, the incentive to create intellectual property in the first place may be impaired. *Socially desirable investments (investments that yield social benefits in excess of their social costs) may be deterred if the creators of intellectual property cannot recoup their sunk costs. ... That is the dynamic benefit of property rights, and the result is the “access versus incentives” tradeoff: charging a*

7.2.3.2 The History and Uniqueness of U.S. Copyright Law

Having highlighted the foregoing, it is important to consider more closely the historical “parallel tracks” of copyright law in the United States, in the form of federal (statutory) copyright law and state (common law) copyright.⁸¹ State copyright law developed “as an outgrowth of their common law patrimony” and exists “[a]longside, but wholly apart from” the provisions of the US Constitution and Copyright Act.⁸² Prior to 1978 common-law copyright automatically vested in a work from the moment of its creation and for perpetuity, if the work remained unpublished. However, as soon as the work was published, it forfeited state copyright protection and would then attain federal copyright protection for a limited duration, if the statutory formalities for attaining federal copyright protection were satisfied at the time of publication.⁸³

However, as observed, from January 1 1978 “these parallel tracks converged” through the system of federal pre-emption of state copyright laws, “effectively ending a dichotomy in United States copyright that had received judicial approval for a century and a half”.⁸⁴ From that point it has been observed that “[t]he Copyright Act ... is the sole reference point for the granting and regulation of copyright ... [and the] various states and state courts play no significant role.”⁸⁵ Writing on the nature of the federal pre-emption of state common law copyright Halpern, Ward and Port state:

The 1976 Act ... replaced the existing dual federal/state scheme with a unitary and virtually completely federal structure. Abolishing the “common law” or state law copyright, the Act (and the power of Congress) completely preempts any state-created rights that are equivalent to any of the exclusive rights of a copyright owner provided by the Act “in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.” The preemption provisions specifically do not apply to state action as to “subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works ... not fixed in any tangible

price for a public good reduces access to it (a social cost), making it artificially scarce ... but increases the incentive to create it in the first place, which is a possibly offsetting social benefit.” First emphasis mine. This position has also been applied in respect of copyright. Thus Balganesch observes: “[Copyright’s] purpose lies solely in encouraging creativity ... [T]he incentive provided by copyright’s promise of exclusivity is also thought to correlate directly with the overall production of creative expression” Balganesch 2009 *Harv. L. Rev.* 1579. The US courts have endorsed this position. Thus it was observed in *Eldred v. Ashcroft*, 537 U.S. 186 (2003) at 212 n. 18: that “copyright law serves public ends by providing individuals with an incentive to pursue private ones.” See also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) at 558; *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) at 156. Our courts have not, as such adopted the incentive theory to justify copyright protection, nor have they for that matter, developed a theory in this regard. The courts have merely affirmed the fact that copyright is “a creature of statute”. See *Feldman NO v EMI Music Publishing SA (Pty) Limited*, *Feldman NO v EMI Music (Pty) Limited* [2007] ZAGPHC 294, at para 5; *King v South African Weather Services* 2009 (3) SA 13 (SCA), at para 6. However, in *Beecham Group Plc v Biotech Laboratories (Pty) Ltd* 738 JOC (T), at 748 - 749 Swart J, relying on Dean *Handbook of Copyright Law*, seemed to endorse the incentive theory as constituting the philosophy of South African copyright law. However, on appeal in *Biotech Laboratories (Pty) Ltd v Beecham Group PLC* 786 JOC (A); 2002 (4) SA 249 (SCA) at paras 11 – 12 Harms JA, after recounting the historical development of copyright from England, cast aspersions on the existence of a philosophical underpinning for the law of copyright, curtly observing (at para 12): “One ... does not have to be a cynic in order to be sceptical about the philosophical premise.” What has now become clear however, is that modern South African intellectual property law, and by extension copyright law, must “be understood through the prism of the Constitution”. See *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC), at para 43; *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81, at para 70.

⁸¹ See Nimmer and Nimmer *Nimmer on Copyright* OV-2.1.

⁸² Nimmer and Nimmer *id* at OV-2 - OV-2.1.

⁸³ *Id* at Ov-2.1.

⁸⁴ *Ibid*.

⁸⁵ Halpern, Nard and Port *United States Intellectual Property Law* 2.

medium of expression [or] activities violating legal or equitable rights that are not equivalent to any of the exclusive rights ... as specified by section 106.” ...⁸⁶

The regime for the pre-emption of state copyright has however, led to complicated questions as to what rights are “equivalent” to the exclusive rights provided for under the federal Copyright Act, and what comes within the meaning the subject-matter of copyright as provided for the federal legislation.⁸⁷ In this regard the US courts have held that pre-emption applies both “with respect to uncopyrightable as well as copyrightable elements”, if the matter is generally within the subject matter of copyright; that the expression “subject matter of copyright” includes “all works of a type covered by sections 102 and 103, even if federal law does not afford protection to them”; it being observed that “the scope of the Copyright Act’s subject matter is broader than the scope of the Act’s protections”.⁸⁸

Nimmer and Nimmer highlight another complexity in American copyright law, namely the changes brought about by the enactment of the Berne Convention Implementation Act of 1988 (the BCIA), enacted to align American law with the Berne Convention after the United States resolved to join the Berne Convention from March 1, 1989.⁸⁹ The authors opine that when introducing the BCIA the USA followed a minimalist approach (“the spirit of minimalism”), namely ensuring that the law was only amended ‘where absolutely necessary to comply with “Berne strictures”, primarily in relation to observance of copyright formalities and change of certain definitions and adjustments of compulsory licences.’⁹⁰ The authors then refer to “the Berne era”, which “started minimally in 1989, gained steam from 1990 through 1993, and received full expression in its Uruguayan phase at the end of 1994”, after the enactment of the Uruguay Round Agreements Act of 1994 – resulting in the abandonment of the minimalist approach.⁹¹

Just as is the case with South African copyright law, as highlighted in Chapter 4 above, there are distinct periods in American copyright law history.⁹² The treatment of American copyright law during these periods however increases in complexity as a result of various considerations that have to be made, including considerations relating to the era of the dual application of federal and state copyright laws. This would cause consternation to the minds of many a South African judge being called upon to adjudicate cases arising from the introduction of American elements in our law⁹³ –

⁸⁶ Halpern, Nard and Port *ibid*. See also in this regard the discussion under Chapter 5 *supra*, where reference is made to the copyright protection of unfixed (i.e. live) performances of musical works under the California Civil Code.

⁸⁷ Halpern, Nard and Port *id* at 3.

⁸⁸ *National Basketball Association v. Motorola*, 105 F.3d 841 (2d Cir. 1997); *ProCD, Inc., v Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); and *Wrench LLC v. Taco Bell Corp.* 256 F.3d 446 (6th 2001), *cert. denied*, 534 U.S. 1114 (2002), respectively. See also Halpern, Nard and Port *ibid*.

⁸⁹ Nimmer and Nimmer *Nimmer on Copyright* OV-2.1 – OV-3.

⁹⁰ *Id* at OV-4.

⁹¹ *Id* at OV-4 – OV-6.

⁹² Nimmer and Nimmer *id* at OV-5 – OV-6 refer to four ages of American copyright law, namely (a) the period before July 1 1909, “which is now primarily of antiquarian interest”; (b) the period from July 1, 1909 until January 1, 1978, where the US 1909 Act was in force; (c) the “decennial period” - referenced by such phrases as “decennial publications”, “decennial works”, “decennial infringements” etc - namely the period from January 1 1978 until March 1, 1989, when the BCIA came into force; and (d) the “Berne era”, namely the period from March 1 1989 to the present.

⁹³ As introduced by the Copyright Amendment Bill 2017, for which see the discussion under paragraph 7.3 below.

especially in respect of an area of law already described as both “technical” and “arcane”.⁹⁴ In highlighting this complexity Nimmer and Nimmer have observed:

In determining the corpus of law that governs a particular situation, the guiding principle should be to apply the law in effect when the infringement (or other activity), upon which suit is based, arises. ... Thus the dividing line for applying the Copyright Act of 1976 is its effective date, January 1, 1978 – prior law continues to govern pre-existing causes of action, whereas the new law is effective as to subsequently arising undertakings. The same logic should govern amendments to the current Act. ... Finally the Berne Convention Implementation Act of 1988 should apply only to causes of action arising after March 1, 1989. ...⁹⁵

In light of this, it is submitted that it was a mistake to introduce elements of American law into South African copyright law through the Copyright American Bill 2017, especially without showing evidence of having carried out a proper assessment of the impact that doing so would have on the protection of copyright in South Africa. This is more so in light of the observations of Harms ADP in *King v South African Weather Services*, where the learned judge, having placed reliance on English law in seeking to understand the scope and historical development of copyright made in the scope of a person’s employment, distinguished American law and its doctrine of a “work made for hire”. In this regard the learned judge observed that “[c]opyright law in the USA is somewhat different”, further noting that “policy considerations must differ.”⁹⁶

These observations are also consonant with the observations of Berger J in *Moneyweb v Media24*,⁹⁷ dealt with above, who highlighted the need for caution in placing reliance on foreign law, observing that “each jurisdiction has its particular history and, in many cases, is bound and influenced by domestic statutory precepts” and resolving for such historical reasons, “to focus on English authority.”⁹⁸ Accordingly it needs to be highlighted that reliance on US law is likely to create many complexities and create a situation where judges will be prone to make mistakes in correctly interpreting US law.⁹⁹

7.3 A Consideration of Provisions of the Copyright Act 1978 and the Copyright Amendment Bill 2017 having an Impact on the Copyright Protection of Musical Works

⁹⁴ See Harms ADP in *King v South African Weather Services* 2009 (3) SA 13 (SCA) at paras 5 and 16.

⁹⁵ Nimmer and Nimmer *Nimmer on Copyright* OV-7.

⁹⁶ *King v South African Weather Services* 2009 (3) SA 13 (SCA) at para 16. In this case the court showed that, though the American cases which the respondents had relied heavily upon were “hardly distinguishable” from the case on hand, the policy considerations were different in that the American doctrine of “work made for hire” was developed from the incorporation of common law agency principles into the copyright statute, within the context of tort law (i.e. delict). This was the case in respect of the tests relating to vicarious liability, which too were developed within the context of tort law.

⁹⁷ *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81.

⁹⁸ *Id* at para 103.

⁹⁹ It would also have been useful if the Copyright Amendment Bill provided direction with regard to the law that our courts should rely upon – e.g. providing that they can only apply US Supreme Court decisions passed after March 1 1989 when the USA became fully compliant with the provisions of the Berne Convention, because that is in fact the period from which USA law became more aligned with our law. *List of research project topics and materials*

7.3.1 Definitions – section 1(1)

7.3.1.1 Definition of “adaptation” in relation to a musical work – Copyright Act

Adaptation in relation to a musical work **“includes any *arrangement or transcription of the work, if such arrangement or transcription has an original creative character*”**.¹⁰⁰

The arrangement of musical works is very common in the music industry. This definition needs to be understood within the context of the right of adaptation of the work which is one of the bundle of rights available to the copyright owner in terms of section 6(f) – (g). In other words, the right of making an adaptation of a musical work in which copyright subsists is, and must be seen as being one of the exclusive rights of the copyright owner in relation to the musical work.

The need to instil this understanding arises from the fact that often in the music industry confusion exists in relation to the role of the person termed an “arranger”. In this regard a distinction should be made between what we can term the “studio or producer arranger” and the “composer arranger”, i.e. the act of arrangement carried out by the *studio / producer arranger* needs to be distinguished from that carried out by the *composer arranger*. While the *composer arranger’s* act of arrangement would be an exercise of the exclusive right of adaptation provided for in section 6(f),¹⁰¹ the arranger popularly known in the music industry, i.e. the *studio / producer arranger* is generally the person who works in a music studio in order to assist a recording artist or a band to make a different version of an existing musical work, under direction from another to do so. The person giving this direction is usually a record company, which would do so after obtaining authorisation from the copyright owner to do so (seeing that the right to do the arrangement is an exclusive right of the copyright owner). In this sense the studio arranger is essentially a “hired gun” – an independent contractor who is occasionally engaged to arrange songs for recording artists.¹⁰²

The studio arranger, or anyone for that matter, may, with the authorisation of the copyright owner, arrange songs in which copyright subsists, or he may create new arrangements of songs that are in the public domain, as dealt with in Chapter 5 above. In this sense an arranger can be defined as the person who creates a new version of a work in which copyright subsists or a work that is in the public domain, under such circumstances that the new work satisfies the requirements of originality and thus becomes a new copyright work. The copyright owner of the parent work may, himself, make the arrangement or he may *authorise* or issue a licence for the making of a new arrangement of the work in line with the request and specifications of another (such as a record label). In all these instances, unless the copyright owner has agreed that the person authorised to make the

¹⁰⁰ Emphasis added.

¹⁰¹ This is assuming that the composer arranger in this case is also the copyright owner. Where he is not the copyright owner he too would need permission from the copyright owner to make the arrangement.

¹⁰² Unless employed specifically for this purpose by the recording studio or record label.

arrangement shall own the copyright in such arrangement or in a part of such arrangement, he will, for copyright purposes, remain the owner of the copyright in the arrangement of the work in line with section 6(f) – (g). This is because no other person can make an arrangement of the work, or have ownership of the copyright in such arrangement, pursuant to section 6(f) – (g), as this is the exclusive right of the copyright owner – unless the copyright owner would have specifically, in writing, assigned this right to such other person. This is so even if the original work was merely comprised of a basic melody and chord structure and the new arranged work displays greater musical skill.¹⁰³

The foregoing becomes clearer when one considers the fact that section 23(1) of the Copyright Act provides that infringement of copyright occurs when “any person, not being the owner of the copyright ... [and] without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner of the copyright has the exclusive right to do or to authorize.” No one can, without the authorisation of the person owning copyright in certain musical works, purport to have the right to publish such musical works as contemplated in section 6(b) (i.e. to be such person’s music publisher). Such act of publication would, in terms of section 23(1), amount to copyright infringement. In the same manner, no one can, without the authorisation of the copyright owner in respect of certain musical works, purport to be the *de iure* arranger of such musical works pursuant to section 6(f) – in spite of the fact that such person is the *de facto* arranger of the works. The fact that the works so arranged without authorisation meet the originality requirements of a work as contemplated in section 2(3) of the Act does not set aside the application of the provisions of section 23(1).

Having dealt with the meaning of “arranger” and “arrangement” it is also important to deal with the meaning of the term “transcription”. Section 1(1) of the Act defines an adaptation as including “any arrangement or *transcription*” of the work. A transcription is simply “an arrangement of a piece of music for a different instrument, voice, or group of these”.¹⁰⁴ This often happens, particularly in the

¹⁰³ This does not derogate from the provisions of s 2(3) of the Copyright Act, which provides that “[a] work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.” The essence of the contention made here is that any title of ownership to any such work would be a contested title because the owner of the copyright in the work from which the infringing work is derived would be entitled to file suit in terms of s 23(1), read with s 24(1), either to interdict the maker of the infringing work from using the work; or to claim damages; to claim delivery of infringing copies or to claim a reasonable royalty in terms of s 24(1A). See also Dean and Karjiker *Handbook of Copyright Law* 1-81 who explain the position as follows: “...[T]he owner of the copyright in work A could restrain uses of works B and C if he or his predecessors in title have not given a currently valid authorisation for the making and / or exploitation of works B and C. In effect, a derivative work is a dependent work as *rights in and to it are subject to the rights in and to the source work(s)*. ...” Emphasis mine. This means that the arranger’s ability to deal with the arranged work is at the behest of owner of the copyright in the original work. In practice also, the arrangement of a song presupposes prior agreement with the copyright owner / composer, to the extent that the name of an arranger is generally always mentioned besides the name of the composer of the original work in the authorship information of an arrangement. In this regard the normal practice, where the copyright owner has authorised the making of the arrangement, is for the copyright in the arranged work to be owned equally between the arranger and the copyright owner.

¹⁰⁴ <http://www.oxforddictionaries.com/definition/english/transcription> (definition 2). (Date of use: 23 September 2013).

field of “serious music”¹⁰⁵, where a musical work originally written for one instrument (e.g. violin) or a group of instruments (such as orchestral music) or for one voice (e.g. soprano) is then transcribed for another instrument (e.g. cello) or another set of instruments (e.g. a jazz ensemble), or for another voice (e.g. tenor).¹⁰⁶ The expression can however, refer to the notation of music that was previously not notated (such as improvised jazz music or traditional oral folk music), or the transcription of instrumental music into sheet music.¹⁰⁷ What is important however is that a transcription is still an arrangement in the sense discussed above. The copyright owner and not the “transcriber”, becomes the owner of the copyright in the transcribed works, unless he has, by assignment, transferred ownership to the “transcriber”. It is in this regard also important to observe that there is a distinction between the *transcription right* dealt with in Chapter 3 above,¹⁰⁸ which is a genre of the reproduction right, and the right to make a transcription dealt with here, which is a genre of the adaptation right. This signifies the confusion that can often arise as a result of the indiscriminate use of terms which are understood within a particular context in the music business. Just as in the case of the term “arrangement” it is important to probe closely to determine the meaning intended in each case.

It needs to be also recalled that a work is not ineligible for copyright by reason only that the creator of the work infringed copyright in an existing work when making the work or doing anything in relation to the work.¹⁰⁹ Thus where a person, without the authorisation of the copyright owner, makes an adaptation of the work, copyright will subsist in the new work if it satisfies the requirements for the subsistence of copyright and the improvement is substantial and not superficial.¹¹⁰ However, the copyright owner shall be entitled to the remedies available to a copyright owner in respect of unlawful infringement. It is not clear why the legislator felt that it was necessary to emphasise that an arrangement or transcription has to be of an ‘original *creative* character’ for copyright to subsist in it. The requirement for copyright to subsist in a work in our law is simply that the work has to be original or of an original character. Referring to original creative character might suggest that, in respect of adaptations, there is a need for the work to display some “creative spark” as is required in US copyright law, rather than simply satisfying the requirement of judgment and skill applicable to our law.¹¹¹

¹⁰⁵ The expression “serious music”, also termed “art music”, is used in respect of music that is aligned to classical music, in respect of musical traditions that are seen to entail advanced structural and theoretical considerations and a written musical tradition. See in this regard Arnold (gen. ed) *Companion to Music* 111.

¹⁰⁶ A famous transcription is that of Franz Liszt’s piano transcription of Beethoven’s original full symphony orchestra.

¹⁰⁷ An example here is in the so-called “Blurred Lines” case (*Williams v Gaye* No. 15-56880 (9th Cir. 2018)), where it was submitted that because Marvin Gaye could not write “or fluently read” sheet music, the copy of the sheet music deposited with the US Copyright Office in respect of his song, “Got to Give it Up”, was notated by an undescribed transcriber after Marvin Gaye had already recorded the song.

¹⁰⁸ See also the discussion under section 6 of the Copyright Act below.

¹⁰⁹ Section 2(3) of the Copyright Act.

¹¹⁰ See *Haupt v Brewers Marketing Intelligence (Pty) Ltd* 908 JOC (A), at para 24.

¹¹¹ In this regard see however *Haupt v Brewers Marketing Intelligence (Pty) Ltd* *id* at para 35 where the court held that the requirement of “a minimal degree of creativity” as applicable to the United States of America in line with the case of *Feist Publications Inc v Rural Telephone Service Co Inc* 449 US 340 (1991) does not form part of our law. However, as suggested in Chapter 5, it may be that the Legislator expected a different standard in respect of arrangements and transcriptions, because of the proneness to otherwise ascribe copyright protection to arrangements that cannot be clearly distinguished from existing works.

7.3.1.2 Definition of author in relation to a literary and a musical work – Copyright Act

An author, in relation to a literary and musical work “means the person who first makes or creates the work”¹¹²

This definition should be self-explanatory. However, what was said before regarding the fact that a person would still be considered to be the author of a work even where another similar work exists or where two similar works are made simultaneously would have application here.¹¹³ What is required is that the author must satisfy the requirements of originality and that the work must emanate from him and must have been created independently of the other work.¹¹⁴

Further to the foregoing, it would be relevant to indicate that, unlike in the literary publishing industry, the word “author” is not generally used in everyday language within the music industry. The more commonly-used expressions are “composer” and “songwriter”. The composer is the person who first creates the musical work (i.e. the “work consisting of music”), i.e. the person who first reduces an original musical work into material form, or rather the person who expresses musical sounds in a tangible form. In the past composers “wrote” music, i.e. they used some or other form of recognised music notation system, such as the *staff notation* or *tonic solfa* systems to express original musical sounds into a material form.

In today’s world although the expression “write music” is still used, the advent of technology, especially recording technology means that a musical work does not need to be *written* down using a notation system any longer. The musical work can be reduced into material form by means of recording the musical sounds, previously through analog but increasingly now through digital recording mechanisms (e.g. MP3 or MP4 recording). The composer can in this regard, record himself playing a musical instrument, sing into the recording system or even hum or whistle the musical “tune” into the recording system. The use of computer software has also greatly assisted the process of musical composition (see paragraph 7.3.1.3 below).

The expression “songwriter” on the other hand is used to refer to either a composer or the person who writes the words to be sung with a musical work (i.e. the lyricist), or both.¹¹⁵ It could best be seen as a general term to refer to the “author of music”, without specifying whether this is a reference to the composer or to the lyricist.¹¹⁶ The expression “lyricist” is itself not commonly used

¹¹² The significance of including literary works here relates to the fact that a musical work often always includes *lyrics* (which are protected as literary works).

¹¹³ See Chapter 5 *supra*.

¹¹⁴ See further the discussion in Chapter 5 *supra*.

¹¹⁵ See <https://www.collinsdictionary.com/dictionary/english/songwriter> (date of use: 12 July 2019).

¹¹⁶ This delineation is not always evident in the case law, as can be seen from the *Feldman* cases dealing with the role of the late popular musician, Brenda Fassie, as both lyricist and composer in respect of certain works. In the High Court

and “songwriter” is used instead, with the explanation given where required, that in the particular context the reference is to the lyricist. Whenever the expression “songwriter” is used therefore, it needs to be determined if this is a reference to the composer or lyricist or if it is a reference to a composer who is also a lyricist.

7.3.1.3 Definition of author in relation to a computer-generated literary and musical work

Author, in relation to a computer-generated literary or musical work “means the person by whom the arrangements necessary for the creation of the work were undertaken”

In the *Haupt* case¹¹⁷ the court defined a *computer-generated* work as a work “created by a computer in circumstances where there is no human author of the work.” Where there is a human author the work is *computer assisted*, with the computer merely used as a tool. It is submitted that the test used by the court in this case with regard to the distinction between computer-generated and computer assisted literary works and computer programs can assist in determining this question in respect of musical works. A lot of music in the modern age is created digitally. In the *Haupt* case, Streicher JA, in explaining how the computer was used in the creation of databases (which are protected as literary works), observed:

The structures for the various databases were created by Coetzee. Although he made use of the computer program Delphi to do so they were not generated by a computer: the computer merely assisted him in creating them. *It is he who decided on the number of columns, their width and the field names.* The creation of such a table is no different from the creation of a document by utilising a word processor. ...¹¹⁸

Thus where a composer makes use of notes and other musical elements contained in a music software program, and arranges them into an original song, then the work should be treated as a *computer assisted* rather than computer-generated work. Another has expressed it in this manner:

judgment of Jajbhay J, for example, he refers to Brenda Fassie as being “co-author and / or co-composer” of the works in question, as if, in her capacity as co-composer she was not a co-author. See *Feldman NO v EMI Music Publishing SA (Pty) Limited, Feldman NO v EMI Music (Pty) Limited* [2007] ZAGPHC 294, at paras 9 and 26. The reference to co-author here was to her capacity as lyricist but she was of course, also co-author in respect of the musical works. The case itself was about the question of joint- or co-authorship. This lack of clear distinction is also evident on appeal in the judgment of Hurt AJA, where it is observed that “the works listed (being music and lyrics for so-called ‘pop songs’) are works in which the late Ms Fassie collaborated with others *to compose them*.” Emphasis added. See *Feldman NO v Emi Music SA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA), at para 2. The honourable judge most likely used the word “compose” here loosely, without seriously considering the fact that music is composed, but lyrics are written (although music can be written also, as in the case of sheet music). See Grove (ed) *Dictionary of Music* (I) 332 where it is observed: “Composition ... is now almost exclusively applied to the invention of music – a novelist or a poet being never spoken of as a composer except by way of analogy”.

¹¹⁷ *Haupt v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (A) (at 918, paras 31 – 32).

¹¹⁸ Emphasis added.

In the case of an algorithm that creates music by randomly analysing what is listened on the Web, it is very unlikely that in the computer-generated [i.e. computer assisted] song there will be code pertaining to the creator program. A song is composed by musical notes, which can be expressed in digital form, but still are representations of notes. Since the song has been created by analysing the Web, that is that there were no notes or segments of songs, or anything else written on the creator program, then there is nothing copied from the latter into the former.¹¹⁹

A computer-generated literary and musical work is clearly distinguished from a “normal” literary and musical work *in relation to its authorship*. Thus whereas the author of a “normal” literary and musical work is the person who first makes or creates the work, the author of a computer-generated literary and musical work is the person “by whom the arrangements necessary for the creation of the work were undertaken”. The phrase “by whom the arrangements necessary for the creation of the work were undertaken” deserves further attention. This phrase, or its equivalent, is used in the Copyright Act in respect of the authorship of copyright in other works, in particular sound recordings and cinematograph films.¹²⁰ These are cases where generally the person recognised as the author of the work concerned is a juristic rather than natural person, as contemplated in section 3(1)(b) of the Copyright Act, e.g. a company that pays for the making of the work. Seeing that the first owner of copyright is the author thereof,¹²¹ the juristic persons who make these arrangements then become the owners of copyright in such works, unless and until they transfer ownership to another in terms of Section 22.

¹¹⁹ Perry and Margoni 2010 *LP Paper* at para 4(a). The writer has inserted the expression “computer assisted” in square brackets after the phrase “computer-generated” because this is how the phrase should be used within the South African context in light of the *Haupt* judgment.

¹²⁰ See paragraphs (c) and (d) of the definition of “author” in s 1(1) of the Copyright Act. In this regard it needs to be highlighted however that there are slight differences between the expression used in respect of the authorship of copyright in sound recordings and cinematograph films, and that used in respect of the authorship of copyright in computer-generated work. Thus while the author of copyright in a computer-generated work is “the person by whom the arrangements *necessary for the creation* of the work were *undertaken*”; the author of copyright in a sound recording and a cinematograph film is “the person by whom the arrangements for the making of the [work] were *made*”. The definition in respect of sound recordings and films thus excludes the word “necessary”, refers to the “creation” rather than the *making* of the work and refers to the arrangements being “made” rather than being “undertaken”. It is submitted that not much turns on the differentiated use of these words. *Making* should be seen as meaning essentially the same thing as “creation”. The use of the additional phrases “necessary” and “undertaken” in the case of computer-generated works should also not present difficulties, except perhaps in so far as the expression “undertaken” brings to more light the fact that “it is the person directly responsible for such arrangements, particularly in the financial sense, who is the author”, as Garnett, Davis and Harbottle *Copinger and Skone James* 249 have observed. In this regard it may be instructive to note that the language employed in the South African Act with regard to the authorship of computer-generated works is, *mutatis mutandis*, exactly the same as that used in the UK Act in respect of sound recordings, where in that Act, the author of copyright in a sound recording is the producer, who is “the person by whom the arrangements *necessary* for the making of the recording were *undertaken*” (Sections 9(2)(aa) and 178 of the UK Act. Emphasis added). The usage in English law could therefore be said to have been employed for purposes of adding emphasis. This can be borne out by the fact that the objective that this phraseology seeks to achieve in English law, as per Garnett, Davis and Harbottle, namely to make it explicit that the person who makes arrangements in this regard is “the person directly responsible for such arrangements, particularly *in the financial sense*”, is under South African copyright law, generally also achieved through the commissioning provisions of s 21(1)(c) of the South African Copyright Act. See Dean and Karjiker *Handbook of Copyright Law* 1-39, who asserts that the commissioner under such circumstances has an obligation “to pay for making of the work”. This aligns with the position of Garnett, Davis and Harbottle *Copinger and Skone James* 275 – 277. The UK phraseology in relation to the “arrangement provisions” may in this regard, have been necessitated by the fact that, while the 1956 UK Copyright Act contained “commissioning provisions” similar to those contained in s 21(1)(c) of our Act, these were done away with and replaced by the “arrangement provisions” under the 1988 UK Act. See in this regard Garnett, Davis and Harbottle *Copinger and Skone James* 280 – 281. This is instructive also from the point of view that the “arrangement provisions” in relation to computer-generated works, which as indicated, mimic the usage in English law, were enacted in 1992 – see Dean and Karjiker *Handbook of Copyright Law* 4-126, at n 15 – ostensibly to align with developments in English law where these provisions were introduced with the enactment of the English legislation in 1988.

¹²¹ Section 21(1)(a) of the Copyright Act.

This scenario however gives rise to a complication in respect of computer-generated works: For one thing it has been recognised that only a natural person (and not a juristic person), can be the author of a literary work, a musical work and an artistic work.¹²² The rationale for this contention is the fact that the term of copyright in respect of these works is reckoned from the death of the author, and that this is so required under the Berne Convention.¹²³ Dean and Karjiker argue at some length in support of this position, rounding it out with the contention that

[i]f it had been intended that juristic persons could be authors of literary, artistic and musical works it would have been necessary to change the method of determining the term of copyright of those types of works ... [which] ... change would have been at variance with the Berne Convention.'

However, this laudable argument is not consistent with the position regarding computer-generated literary, dramatic, musical and artistic works, which, in the *Haupt* case¹²⁴ were held to be works "created by a computer in circumstances where *there is no human author of the work*".¹²⁵ This position creates confusion seeing that, although there may not be a "human *author*", the person by whom the arrangements necessary for the creation of the work are undertaken can be a human (i.e. it does not have to be a juristic person, just as the author of a sound recording is usually - but *not always* - a juristic person).¹²⁶ In this case the human author would not be the person who *created* but the person who *undertook the necessary arrangements*. The fact remains however that a juristic person can, in this instance, be considered to be the author of a literary, musical or artistic work (albeit only where such works are computer-generated). What needs to be accepted, sombrely, is the fact that 'the use ... of the term "author" in relation to these classes of works [i.e. where the author may be a juristic person] is not generally a happy one, and has been [rightly] the subject of criticism.'¹²⁷

It however, seems plausible to conclude that in all *other* respects a computer-generated literary or musical work, once it has satisfied the requirements of authorship, is protected in terms of all the other provisions relating to a "normal" literary and musical work (including the provisions relating to the scope of protection, infringement, and exceptions and limitation). Thus for example - to be simplistic - the provisions of section 27(3) in respect of the liability of a person who causes a literary or musical work to be performed in public while knowing that copyright subsists in the work and that performance constitutes infringement of copyright, would be equally applicable to computer-generated literary and musical works and an argument to the contrary should not be possible.

7.3.1.4 Definition of "broadcast" – Copyright Act

¹²² See Dean and Karjiker *Handbook of Copyright Law* 1-34 – 1-35 referring to the court's remarks in this regard in *Accesso CC v Allforms (Pty) Ltd* 677 JOC (T) (Case no II) in relation to literary works, where the learned authors opine that this position should be extended to musical works and artistic works.

¹²³ Dean and Karjiker *id* at 1-35.

¹²⁴ *Haupt v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (A) at 918 paras 31 – 32.

¹²⁵ Emphasis added.

¹²⁶ Garnett, Davis and Harbottle *Copinger and Skone James* 234 – 235; 248 – 249 are supportive of this argument.

¹²⁷ Garnett, Davis and Harbottle *id* at 248.

Broadcast, “when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs or signals which—

- (a) takes place by means of electromagnetic waves of frequencies of lower than 3000 GHz transmitted in space without an artificial conductor; and**
- (b) is intended for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite, and, when used as a verb, shall be construed accordingly.**

The definition of “broadcast” plays a crucial part in the copyright administration of musical works, seeing that the act of broadcasting provides one of the most significant and reliable sources of royalty income for authors, composers and music publishers.¹²⁸ The right of broadcasting a musical (and literary) work is one of the important exclusive rights of copyright owners under the Copyright Act,¹²⁹ and forms part, together with the right of performing the work in public and the right of transmission in a diffusion service, of the so-called *performing right*.¹³⁰

What is clear from the above definition of broadcast is that it is comprised of both a *technical* component and a *normative* component. The technical component of the definition is phrased in a technology-neutral manner,¹³¹ and it would seem that from this perspective, all forms of broadcasting currently known would be covered by the definition.¹³² This would include forms of broadcasting such as “narrowcasting”, “podcasting”, the transmission of ringtones as well as streaming (including retransmission by way of streaming).¹³³ In this regard the definition includes the emitting of a programme-carrying signal to a satellite.¹³⁴ What would be more critical in determining whether an act of broadcast has taken place therefore is whether the act falls within the ambit of the

¹²⁸ As an illustration, in 2018 broadcasting income constituted 68% of SAMRO’s total licensing income, of which 38% related to income from television broadcasting and 30% related to income from radio broadcasting. See the SAMRO 2018 Integrated Report, available at <http://www.samro.org.za/sites/default/files/SAMRO%202018%20Integrated%20Report.pdf> (date of use: 15 February 2019).

¹²⁹ The right is provided for in s 6(d) of the Act, and has, over the years, become the most important with regard to the bundle of rights constituting the rights-holders’ *performing right*.

¹³⁰ For a discussion of the historical development of the performing right see Chapter 2 supra. For the essence of the modern performing right see Chapter 3 supra, in particular paragraph 3.2.2.

¹³¹ The argument in support of the submission that the definition of “broadcast” in the Act was intended to be technology neutral arises from the fact that the original definition of the expression “broadcast” was linked to the definition of the term in s 1 of the Broadcasting Act, 1976 (Act 73 of 1976), which was a technical definition. See Dean and Karjiker *Handbook of Copyright Law* 4-126 at n 15A.

¹³² In this regard it has been observed that AM radio carrier frequencies are on average in the frequency range of 535 – 1605 kHz, while FM radio band is from 88 to 108 MHz. VHF high and UHF frequencies for television range up to 806 MHz. See <http://hyperphysics.phy-astr.gsu.edu/hbase/Audio/radio.html> (date of use: 15 February 2019). Both frequencies are much lower than 3000 GHz and are thus covered by the technical element of the definition.

¹³³ See in respect to the inclusion of narrowcasts within the definition of a broadcast Dean and Karjiker *Handbook of Copyright Law* 1-15 – 1-17, who also rely on the Australian decision of *Australasian Performing Right Association v Telstra Corp Ltd* (1997) 38 IPR 294 (HC of A). In respect of the transmission of ringtones see the Canadian decision of *Canadian Wireless Telecommunications Association v Society of Composers, Authors and Music Publishers of Canada*, (2008 FCA 6) where it was held that the unauthorised transmission of ringtones amounted to a communication to the public of a musical work “by telecommunication”; and in respect of streaming see the ECJ decision of *ITV Broadcasting Ltd and others v TV Catchup Ltd*, C-607/11.

¹³⁴ See also Dean and Karjiker *Handbook of Copyright Law* 1-15, who state that “[t]he ‘up-leg’ of a programme-carrying signal to a satellite is ... a broadcast.”

normative description of a broadcast, namely the fact that it must be “intended for reception by the public or a section of the public”. The meaning of the expressions “public” or “section of the public” was dealt with at length above.¹³⁵ The fact that an act of transmission constitutes a broadcast if it is “intended” for reception by the public or a section of the public means that not only free-to-air broadcasts are covered by the definition but also subscription-based programming which is limited only to the subscribers (e.g. pay television like MNET). If the broadcasters of such services thus broadcast programmes embodying musical works without the authorisation of the copyright owner, this would constitute copyright infringement.

On the same note however, if a broadcast meant for a section of the public (as in the case of subscription-based programming) is intercepted or decrypted without authorisation by persons who are not subscribed to the channel concerned, then it can be argued that the broadcaster in this case would not be liable for copyright infringement in respect of the works embodied in the broadcast, because the broadcast was not intended for that section of the public. Intricate questions relating to the applicable legal position in the case of cross-border transmissions of broadcasts (whether intended or unintended) arise, in light of the territorial nature of copyright (i.e. which copyright law applies in such cases – is it the law of the country from which the signal is emitted, or is it the law of the country in which the signal is received?).¹³⁶ Such considerations are outside the scope of this work.

7.3.1.5 Definition of “collecting society” – Copyright Act

A collecting society is simply defined as “**a collecting society established under this Act.**” In this regard it needs to be noted that this definition was inserted in the 2002 amendment to the Copyright Act in order to introduce the regime of public-play or “needle-time” rights.¹³⁷ It should thus be noted that the usage of the expression “collecting society” in the current Act is thus limited to those collecting societies that are involved in the administration of the needle-time rights and to which the 2006 “Needle-time Regulations” apply¹³⁸. It does not apply in respect of the traditional authors’

¹³⁵ See Chapter 3 supra, at paragraph 3.2.2.

¹³⁶ Various theories are used in an attempt to deal with this situation, such as the so-called emission theory, Bogsch theory and effect theory. See in this regard Matulionyte *Law Applicable to Copyright* 87 – 98 and generally.

¹³⁷ Namely the rights of public performance in respect of sound recordings. For a helpful explanation of these rights see Chapter 3 supra, at paragraph 3.1.4.2.

¹³⁸ The Regulations on the Establishment of Collecting Societies in the Music Industry GN 517 in GG 28894 of 1 June 2006 (the Needle-time Regulations). Ramsden appears to confuse these regulations with the original regulations in respect of the reproduction of musical works through the manufacturing of records as provided for in s 14 of the Act, namely the Copyright Regulations, 1978 GN R2530 in GG 6252 of 22 December 1978 (as amended). See Ramsden *A Guide to Intellectual Property* 36, where after inserting the provisions of s 9A of the Copyright Act (which deal with royalties in respect of needle-time rights), the author then states: “See s 14 for the regulations relating to royalties for sound recordings.” See further at 43 where the author refers to “the determination and payment of sound recording royalties.” In fact s 14 does not deal with “royalties for sound recordings” but rather royalties for usage of musical works through the manufacture of records (which process entails embodiment of the musical work in a sound recording). The royalties payable are due to the owner of the copyright in the musical work and not to the owner of copyright in the sound recording.

societies.¹³⁹ In the past these societies were defined as “licensing bodies” in both the current Copyright Act and the 1965 Copyright Act. The definition of “licensing body” was however, along with the definition of “licence”, repealed in a 1992 amendment,¹⁴⁰ apparently to avoid limiting the scope of the meaning of “licence” to those instances provided for in the definition.¹⁴¹

While the deletion of the expression “licence” is commendable and would indeed remove the ambiguity that would arise as to the ambit of the term “licence”, it is submitted that the deletion of the expression “licensing body” does not serve any useful purpose and could only have contributed to confusion in this area. Copeling,¹⁴² dealing with how to better appreciate the function, and thus the scope of jurisdiction, of the Copyright Tribunal, highlights the importance of understanding the expressions “licence”, “licensing body” and “licence scheme”. It is submitted that this position would still apply today in respect of the expression “licensing body”. This is because while the expression “licensing body” has been deleted, it continues to feature both in the provisions relating to the referral of a dispute to the Copyright Tribunal under Chapter 3 of the Act (which also apply in respect of referrals of needle-time disputes in terms of s 9A(2)(c)), as well as the needle-time rights regulations themselves.¹⁴³ This engenders confusion as needle-time as one then has to read the expression “licensing body” to mean “collecting society” within the needle-time meaning, under such circumstances. Retaining the definition of “licensing body” would have ensured a clear distinction between those collecting societies that are not, at present, required to be accredited (termed “licensing bodies”) and those that are required to be accredited (termed “collecting societies”), thus avoiding interpretational problems.¹⁴⁴

7.3.1.6 Definition of “collecting society” – Copyright Amendment Bill

While the Needle-time Regulations were meant to only regulate “needle-time” collecting societies, it was observed in the preamble that “[d]uring stakeholder consultations, there was a common understanding that all rights in the copyright regime should be managed through collecting societies

¹³⁹ In this regard it needs to be noted that the regulatory environment in respect of collecting societies ushered by the Needle-time Regulations, empowering the Registrar of Copyright to have oversight over collecting societies, does not apply to the traditional societies such as SAMRO and the now defunct SARRAL and NORM (which has been replaced by CAPASSO, as dealt with in Chapter 6 supra).

¹⁴⁰ Act 125 of 1992.

¹⁴¹ See in this regard Dean and Karjiker *Handbook of Copyright Law* 4-129 at n 17B, where the authors remark that ‘... the effect of [the deletion of the definition of ‘licence’] is to empower the Copyright Tribunal to deal with applications for any type of licence under copyright and to clarify that the term “licence scheme” only has reference to the provisions of the Act dealing with the Copyright Tribunal ...’. The authors add that the deletion of the definition of “licensing body” ‘... is consequential to the deletion of the definition of “licence” ...’.

¹⁴² Copeling *Copyright Law* 223.

¹⁴³ See reg 3(1) of the Needle-time Regulations.

¹⁴⁴ Prior to the deletion a “licensing body” was defined, in respect of licences relating to literary, musical and artistic works, as “a society or other organization which has as one of its objects the negotiation or granting of such licences, either as owner or prospective owner of copyright or as agent for the owners or prospective owners thereof”, while in respect of licences relating to sound recordings it was defined as “any owner or prospective owner of copyright in sound recordings or any person or body of persons acting as agent for any owners or prospective owners of copyright in sound recordings in relation to the negotiation or granting of such licence.” While the issues raised herein may seem only pedantic, it needs to be noted that the court in *Shapiro v South African Recording Rights* (SGHC) unreported case no 14698/04 (6 November 2009) was seized with having to determine this question in relation to the application of the Needle-time provisions to collecting societies not dealing with needle-time rights. research project topics and materials

in future.” Earlier versions of the Copyright Amendment Bill attempted to implement this by introducing a system of mandatory collective management of copyright in respect of all rights in copyright.¹⁴⁵ This of course would have been problematic, as certain rights (e.g. rights in computer programs and broadcasts) have not traditionally been administered through a system of collective management and are best administered by the rights-holders themselves individually or through a system of voluntary joint licensing.

The intention to introduce a system of mandatory collective management in respect of all rights also went against the recommendations of the Copyright Review Commission (CRC) appointed “to assess concerns and allegations against the collecting societies model that is in place for the distribution of royalties to musicians and composers of music.”¹⁴⁶ The CRC’s recommendations were that “[d]ue to the recent collapse of SARRAL and inadequate protection of its members”, “all relevant collecting societies” should be regulated, and that a system of “one collecting society per set of rights” in respect of all music rights governed by the Copyright Act should be introduced.¹⁴⁷ Thankfully, later versions of the Bill, including the current version,¹⁴⁸ removed the provisions relating to the imposition of a system of mandatory collective management. The system of collective management introduced in the current version of the Bill seems to be voluntary in the sense that rights-holders could administer rights individually; however, if a “person” acts or intends to act as a collecting society, such person has to be accredited.¹⁴⁹

In light of the policy objective of subjecting all collecting societies to the regulatory oversight of the Companies and Intellectual Property Commission (CIPC) the need to review the definition of “collecting society” in the Bill was highlighted. The revised version now reads as follows:

‘collecting society’ means a non-profit company contemplated in the Companies Act, 2008 (Act No. 71 of 2008)—

- (a) that is owned by holders of rights in terms of this Act or the Performers’ Protection Act, 1967 (Act No. 11 of 1967);**
- (b) whose only members are holders of rights in terms of this Act or the Performers’ Protection Act, 1967 (Act No. 11 of 1967);**
- (c) to whom members have granted mandates to license, manage or otherwise represent rights contemplated in this Act or the Performers’ Protection Act, 1967 (Act No. 11 of**

¹⁴⁵ Thus for example clause 9B(1) of the 2015 version of the Copyright Amendment Bill (version BX-2015) provided the following: “There shall be one Collecting Society per copyright and per set of rights with regard to all music rights such as performance, needletime and mechanical, to be registered and regulation by the Commission.” See the Bill available at <https://pmg.org.za/bill/581/> (date of use: 13 July 2019).

¹⁴⁶ See https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf (date of use: 15 February 2019).

¹⁴⁷ CRC Report *id* at 46, paragraph 6.3.4.

¹⁴⁸ Version B13B—2017, approved by both houses of Parliament and awaiting the President’s signature, available at <https://pmg.org.za/committee-meeting/27878/> (date of use: 13 July 2019).

¹⁴⁹ Clause 22B of the Bill, in respect of the need for accreditation for persons acting or intending to act as collecting societies, and clause 22C(b) with respect to the ability to withdraw membership of a collecting society.

1967), on behalf of and for the benefit of those members or exercise any of the actions contemplated in section 22C(2)¹⁵⁰; and

(d) whose primary purpose is executing the mandates contemplated in paragraph (c)

It would appear that the definition of collecting society contemplates, in respect of rights in sound recordings, the existence of a collecting society representing copyright owners only and a separate one representing performers. This would go against developments in which the needle-time operations of the “old” South African Music Performance Rights Association (SAMPRO), which only represented copyright owners of sound recordings (i.e. record companies), merged its operations with the Performers Organisation of South Africa (POSA), a trust founded by SAMRO, which represented performers needle-time rights, to form the “new” SAMPRO.¹⁵¹ In fact a consideration of the provisions of clause 22B(2) of the Bill would confirm this suspicion not only in respect of rights in sound recordings but also in respect of for example, the collective management of performing rights and mechanical rights.¹⁵² This would be an untenable and regressive situation indeed.

Another problematic aspect of this definition is the fact that it prescribes that a collecting society has to be incorporated as a non-profit company under the Companies Act. This is because other forms of non-profit entities exist, in particular a non-profit trust established under the Trust Property Control Act,¹⁵³ or a non-profit organisation established under the Nonprofit Organisations Act.¹⁵⁴ This would also mean that profit entities such as the Dramatic, Artistic and Literary Rights Organisation (DALRO), a wholly-owned subsidiary of SAMRO, would be forced to cease operations as the Bill specifically provides that a collecting society has to be a non-profit company.¹⁵⁵ It is submitted that the Bill should permit the administration of rights by profit companies in circumstances similar to those in which DALRO exists or in cases where such entities can administer ancillary rights related to the rights administered by the parent company.¹⁵⁶ Other than these observations the definition is commendable and is in fact, broader than the now-repealed definition of “licensing body”, which only focussed on the licensing role of a collecting society.

7.3.1.7 Definition of “commercial” – Copyright Amendment Bill

¹⁵⁰ Section 22C(2) deals with the functions of a collecting society under the Bill.

¹⁵¹ See in this regard <http://www.samro.org.za/news/articles/sampra-samro-reach-agreement-needle-time-rights-impasse-support-and-blessing-principle> (date of use: 15 February 2019). Regulation 3(1)(c) of the Needle-time Regulations makes provision for a collecting society “administering on behalf of 50 or more copyright owners and performers jointly”, or on behalf of organisations representing such group of rights-holders, and this was a preferred position with regard to the administration of needle-time rights in the new regime.

¹⁵² See the further discussion in respect of clause 22B of the Bill below.

¹⁵³ Act No. 57 of 1988. The Performers Organisation of South Africa (POSA) was for example, established as a trust under this Act. This was necessitated by the fact that the Needle-time Regulations required the organisation that administers needle-time rights to be controlled by its members. This therefore became the only practicable way for SAMRO to satisfy these requirements while maintain some form of connection to the entity in its capacity as Founder of the trust.

¹⁵⁴ Act No. 71 of 1997.

¹⁵⁵ DALRO was formed by SAMRO to administer reprographic rights (essentially the right of copying in respect of literary works).

¹⁵⁶ For example, the administration of dramatico-musical rights, as is the case with DALRO, which administers such rights in addition to the reprographic rights.

“Commercial” is defined as “the obtaining of economic advantage or financial gain in connection with a business or trade”

The introduction of the concept of “commercial” in the definitions section of the Bill, as well as the introduction of the concepts of “commercial purpose”, “commercial exploitation”, “commercial nature” etc. within the text of the Bill, especially where this is used beyond cases dealing with limitations and exceptions, is a novel approach in our copyright law and is a matter for serious concern. This is because this suggests that, even beyond the case of recognized limitations and exceptions, the criterion to be used to determine if a particular act amounts to an infringement of a copyright work is whether the use was commercial or non-commercial. Such an approach is problematic because it encroaches into the exclusive nature of the rights of authors in respect of their copyright works, which entails the exclusive right “to do or to authorize the doing” of any act associated with the use of the particular work. In this regard it matters not if the use is of a commercial nature or not (except in the case of limitations and exceptions): the rights-holder has the exclusive right to do the acts relating to the exploitation of the work, or to authorize such exploitation.¹⁵⁷

A notable example in this regard is Clause 11 of the Bill, which introduces amendments in relation to section 9A of the Copyright Act. The proposed section 9A(1)(aA), which introduces provisions relating to the obligation of users to submit reports of their usages of sound recordings for purposes of “needle-time”, suggests that such an obligation will only apply if the usage is “for commercial purposes”. This is a very worrying situation because it implies that if the usage is not for commercial purposes, then such usage is permitted and no payment of royalties or no music usage report is required under such circumstances. This means that any entity that can argue that its use of needle-time rights is not for commercial purposes will be exempt from paying royalties and submitting music usage reports. This, it is submitted, would include the South African Broadcasting Corporation (SABC) – a major user of needle-time rights - because it would be very easy for the SABC to argue that, at least in respect of its public service offerings, it is not “obtaining [a] direct economic advantage or financial gain”¹⁵⁸ when using needle-time rights. This will have a dire negative effect on the livelihoods of authors.

7.3.1.8 Definition of “copy” – Copyright Act

A copy is defined as “a reproduction of a work, and, in the case of a literary [and a] musical work ... also an adaptation thereof”

¹⁵⁷ The position that the fact that a performance is given for no charge was of no significance in determining whether the act concerned constituted infringement was affirmed much earlier, as in the case of *Harms (Inc.) Ltd v Martans Club Ltd* [1927] 1 Ch 526.

¹⁵⁸ The definition of “commercial” in the Bill.

The definition of “copy” becomes very crucial when determining the question as to whether a work has been published or not. This does have a bearing on copyright owner’s exclusive right of “publishing the work if it was hitherto unpublished”, provided for in section 6(b) of the Act as one of the copyright owner’s bundle of rights in respect of literary and musical works. Section 1(5)(e) provides that, in respect, *inter alia* to a musical and literary work, the work shall be deemed to have been published “if copies thereof have been issued to the public”. In order to understand what would constitute an infringement of the publication right, it would, in the first instance, be necessary to understand what the “footprint” of this right is.

“Copy” refers to those copies that result from duplication or replication, as well as those that are derivative forms of the work (i.e. those arising from the adaptation of the work). This is because a copy is defined as a “reproduction”, and in this regard it needs to be also noted that a reproduction is defined as including a reproduction of a reproduction as well, and, in respect of a musical and literary work, “a reproduction in the form of a record or a cinematograph film”.¹⁵⁹ Thus in respect of a musical work and the lyrics of a song the work would be deemed to have been published not only where copies are made available to the public directly from the original works, e.g. sheet music available as copies of the original sheet music¹⁶⁰ but also where the musical work and lyrics are copied from copies of the copies of the original sheet music and / or recorded in sound recordings and cinematograph films; furthermore not only where the copies are made from the original sound recordings or cinematograph films¹⁶¹ but also where they are made from copies of these sound recordings and films, and lastly, not only in respect of the form in which the work existed originally but also in the form of derivative versions or adaptations of the work.

It is clear therefore from the foregoing that there is a wide scope with regard to what constitutes the publication of a musical or literary work, even in circumstances where the act, “taken on face value, would not appear to constitute publication.”¹⁶² This has a bearing on the so-called “first sale” doctrine introduced by the Bill in clause 13 thereof¹⁶³ and may have a welcome ameliorating effect in this regard.¹⁶⁴

The issuing of copies and the doctrine of the exhaustion of rights

Understanding the full footprint of the publication right is crucial also within the context of the concept of “exhaustion of rights”.¹⁶⁵ Various jurisdictions would deal with the doctrine of exhaustion

¹⁵⁹ See definition of “reproduction” in s 1 of the Copyright Act.

¹⁶⁰ Where sheet music is still used. As observed earlier, the market for sheet music has declined.

¹⁶¹ Termed ‘master recordings’, which as we have seen, are deemed to be ‘reproductions’.

¹⁶² See Smith *Copyright Companion* 7.

¹⁶³ The proposed section 12B(6) in the Bill.

¹⁶⁴ See the discussion further down of clause 13 of the Bill.

¹⁶⁵ “Exhaustion of rights” is defined as ‘[a] term usually applied to the position resulting when the right to distribute a particular copy of a work has been once exercised; the right is then said to be “exhausted” as regards that copy.’ Sterling *World Copyright Law* 1226. The principle of exhaustion of rights is thus used in respect of the distribution (i.e. publication) right. Generally two forms of exhaustion can be identified, namely “national exhaustion”, “where the national law provides that once the rightowner has authorised the distribution of a particular copy within the national territory, the right to authorise further distribution of that copy in that territory has ceased”; and “international exhaustion”, “the principle that a copy, once placed on the market by or with the rightowner’s consent anywhere in the world, can circulate freely in any

of rights in different ways, depending on the nature of the work. In the United States the exhaustion principle is popularly known as the 'first-sale doctrine'. In the interesting case of *Lee v ART Co.*¹⁶⁶ the ambit of this doctrine was dealt with. ART Co., the defendant-appellee (i.e. respondent), had bought certain notecards and lithographs created by the first plaintiff-appellant at an outlet, mounted them on ceramic tiles (in the process covering the art with transparent epoxy resin), and sold them. The plaintiff-appellants contended that the tiles were, in terms of US Copyright law, derivative works and could therefore not be prepared without the permission of the copyright proprietor. Remarking on how this matter would be dealt with if this was a simple first-sale doctrine issue and the plaintiff-appellants had not raised a claim in relation to an alleged infringement of a derivative work, the court remarked:

Now one might suppose that this is an open and shut case under the doctrine of first sale, codified at 17 U.S.C. § 109(a). A.R.T. bought the work legitimately, mounted it on a tile, and resold what it had purchased. Because the artist could capture the value of her art's contribution to the finished product as part of the price for the original transaction, the economic rationale for protecting an adaptation as "derivative" is absent. ... An alteration that includes (or consumes) a complete copy of the original lacks economic significance. One work changes hands multiple times, exactly what § 109(a) permits, so it may lack legal significance too.¹⁶⁷

In this case the court concluded that because it was not possible to obtain copyright in a 'card-on-a-tile', the defendant's action did not amount to the preparation of a derivative work. The card-on-a-tile did not amount to an original work of authorship 'because it is no different in form or function from displaying a painting in a frame or placing a medallion in a velvet case', it was no an art production as required for a derivative work; was not transformed in the slightest and still depicted 'what it depicted when it left Lee's studio'.¹⁶⁸

country, unimpeded by national exercise of the distribution right." Sterling *id* at 1227. As Sterling has noted (*ibid*), while the principle of exhaustion of rights is well understood and accepted in respect of national exhaustion, it is not in respect of international exhaustion. In the United States the exhaustion principle is known as the "first sale" doctrine and is provided for in 17 U.S.C. § 109(a). In *United States v Wise* 550 F.2d 1180 (9th Cir. 1977) it was held (at 1187) that the first-sale doctrine means that where the proprietor of copyright parts title with a particular copy of his copyright work, he thereby divests himself of the right to "vend" such copy, so that "[w]hile the proprietor's other copyright rights (reprinting, copying etc.) remain unimpaired, the exclusive right to vend the transferred copy rests with the vendee, who is not restricted by statute from further transfers of that copy."

¹⁶⁶ 125 F.3d 580 – Court of Appeals, 7th Circuit 1997.

¹⁶⁷ *Id* at 581.

¹⁶⁸ *Id* at 581 – 582. The essence of this judgment is of course, the fact that, because the alleged infringing work did not qualify as a derivative work (i.e. an adaptation), the copyright owner was not entitled to any economic benefit because her publication (distribution) right had been exhausted through the first-sale doctrine. This case is dealt with here merely to illustrate the essence of the first-sale doctrine in US law. In this regard it needs to be remembered that US copyright law can be distinguished from South African copyright law in several ways. With reference to this case, in South Africa a different finding would have been possible under similar circumstances. The courts would probably have arrived at the same finding with regard to the question whether the 'card-on-a-tile' was an adaptation (derivative work) or not. However, if the question was whether the existence of an adaptation ruled out the simultaneous or continuing existence of the publication right, the answer would have to be in the negative in the South African situation, because the footprint of publication (being defined as the issuing of copies to the public, and with reference to the definition of 'copy', which includes an adaptation) includes an adaptation.

Generally it is accepted that the copyright owner's rental and lending rights are not affected by the exhaustion doctrine.¹⁶⁹ Furthermore, the encroachment of the distribution right, such as through the exhaustion principle, is often ameliorated through provisions that control or restrain the importation of copyrighted works. Dutfield and Suthersanen express the view that the TRIPs Agreement¹⁷⁰ provides a specific right in respect of the prevention of *pirated* copyright goods.¹⁷¹ However, it is safe to indicate that the national laws of many countries do not provide for an exclusive right to control importation but rather deal with this in the infringement provisions of the copyright legislation. In South Africa this is dealt with in s 23(2)(a) of the Copyright Act, which provides that copyright shall be infringed by a person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work, 'imports an article into the Republic for a purpose other than for his private and domestic use', knowing that the making of such an article constituted an infringement of the copyright 'or would have constituted such an infringement if the article had been made in the Republic.'

The case of *Mr Video (Pty) Ltd v Nu Metro Filmed Entertainment (Pty) Ltd*¹⁷² dealt with the alleged infringement of copyright in cinematograph films through parallel importation as contemplated in s 23(2)(a), and in particular a claim for the delivery-up of infringing copies under s 24(1) of the Copyright Act. Dean has, (and it is contended correctly) criticised the court's decision in this case for not seeing the need for the authorised local distributor of the DVDs embodying the cinematograph films concerned, which were made overseas, to prove that the reproduction, locally, of such films by the appellant-defendant constituted the making of infringing copies because such reproduction, if it was done by the overseas manufacturer of the films in South Africa, would have constituted an

¹⁶⁹ See Sterling *World Copyright Law* 1226, where he notes that, generally, rental and lending 'do not exhaust the distribution right.' Thus the British Copyright Act, in defining the scope of the exhaustion of the publication right, provides: 'References ... to the issue to the public of copies of a work are to the act of putting into circulation copies not previously put into circulation, in the United Kingdom or elsewhere, and not to ... any subsequent distribution, sale, hiring or loan of those copies ... except that in relation to sound recordings, films and computer programs the restricted act of issuing copies to the public includes any rentals of copies to the public.' S 18(2) British Copyright Act. However, while UK law includes sound recordings, films and computer programs in the rental exception, US copyright law only includes sound recordings (and the musical works embodied in them), and computer programs in the exception to the first-use doctrine, and this only where the 'rental, lease or lending', (or any act 'in the nature of rental, lease or lending') is for direct or indirect commercial purposes. 17 U.S.C. § 109(b)(1)(A). In the United States films are for example, not included in the rental exception and thus once films have been distributed into the market they can be freely traded by way of rental, lease or lending. It has been said that the reason for the non-inclusion of films in the rental exception arose from the *Betamax* decision (*Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)), which 'weakened the debate surrounding videotape rentals' by holding that videotaping for time-shifting purposes was a fair use. Chatterjee 1995 *Fordham Intell. Prop., Media & Ent. L.J.* 396. Chatterjee argues however that the *Betamax* decision has not unduly burdened the movie and television industry because it did not result in unauthorised and wholesale copying, because of the high quality of rental videos as opposed to copies thereof, and because while people generally listen to repeats of musical works, they do not generally do so in respect of movies. Chatterjee 1995 *Fordham Intell. Prop., Media & Ent. L.J.* 399.

¹⁷⁰ In particular Art. 44(1) read with Arts. 50(1) and 51 thereof.

¹⁷¹ Dutfield and Suthersanen *Global Intellectual Property Law* 88. The emphasis here should be on '*pirated* copyright goods' or 'infringing copies' in the context of the South African Copyright Act, so that '[a] copyright holder (ie the copyright owner or an exclusive licensee) can only claim copyright infringement for dealing in grey goods if these goods are infringing copies (actual or deemed) and the dealing is done without his authority. It is not sufficient that the goods are merely dealt in without his authority. ... In practice many exclusive distributors of goods embodying copyright works labour under the misapprehension that their exclusive *distribution* right per se entitles them to prevent trading in grey goods. Such a right per se only binds the other contracting party and confers no rights enforceable against grey goods dealers.' Dean *op cit* note ... at 1-84.

¹⁷² 1097 JOC (A).

infringing of the reproduction rights in the films.¹⁷³ In the case the court held that it sufficed to infer that the making of such DVDs in South Africa by the overseas manufacturer 'would have constituted an infringement.'¹⁷⁴ In this regard Dean has (and again it is contended, correctly), remarked:

The real crux of the matter, whether in the case of imported goods or locally made goods, is not,; Did the maker of the article hold the right to infringement if made by the importer but rather what the position would have been if the actual maker who made the article abroad had instead made the article in South Africa. This turns on the question of the geographical scope of the *reproduction* right held by the actual maker of the article.¹⁷⁵

South African copyright law does not appear to have provisions relating to the exhaustion of rights as dealt with above. For one thing, s 1(5)(a) of the Copyright Act dealing with the scope of the publication right makes it clear that publication has to take place with the consent of the copyright owner.¹⁷⁶ No act within the distribution value chain therefore (i.e. no act that would constitute a 'publication' of the work) can be undertaken by anyone other than the copyright owner, or someone

¹⁷³ Dean op cit note ... 1-84 – 1-85.

¹⁷⁴ *Nu Metro Filmed Entertainment* supra n 447 para. 8. Dean *id* at 1-85, counters, arguing that '... the onus was on the claimant to prove all the essential elements of its case and one of those elements was that, for purposes of delivery-up, the contentious DVDs were made by a person who did not hold South African **reproduction** rights and were thus infringing copies. The fact that the respondents infringed the copyright in the films by distributing them (irrespective of whether they were infringing copies, in terms of s 8(1)(g) of the Act) does not in itself make the DVDs infringing copies of the films.' In this regard the learned author concludes: 'With respect, this case evidences confusion between **reproduction** rights and **distribution** rights and unduly equates them ...'. *Ibid.* It is submitted that this is the correct approach.

¹⁷⁵ Dean *id* at 1-82.

¹⁷⁶ It would appear, from the provisions of s1(5)(e), that the requirement that the copyright owner needs to give consent does not apply in respect of musical and literary works (the works in s 6), artistic works (s 7) and computer programs (s 11B). However, such a view would conflict with the provisions of s 6(b), s 7(b) and s 11B(b), which make provision for the exclusive right of 'publishing' and *authorising* publishing, in respect of these works. As indicated earlier (in the discussion of the meaning of 'copy' in respect of musical and literary works), a work would be deemed to have been published in respect of musical and literary works where copies are made available to the public directly from the original works (e.g. copies of original sheet music); where the musical work and lyrics are copied from copies of sheet music; where the musical works and lyrics are recorded in sound recordings and cinematograph films; where copies of these original sound recordings or cinematograph films (embodying the musical and literary works) are made, and lastly, not only in respect of the form in which the work existed originally but also in the form of derivative versions (arrangements and transcriptions). However it should be obvious that all the owner of copyright in a musical and literary work needs do in order to have copies of the work to be available to the public (i.e. to have the works published) is to authorise the *reproduction* of these works (in whatever form they are originally in), by means of the making of copies of the *original* works, or through use in records, films, and adaptations. When the licensee disseminates copies of sound recordings, cinematograph films etc, embodying these musical and literary works, to the public, such act will, *simultaneously*, constitute a publication of the musical and literary works. Furthermore, where a person seeks for authorisation from the owner of copyright in a musical or literary work to make an adaptation of the work, if permission is given to do so and the licensee makes an adaptation of the work, then the making of such an adaptation would constitute a publication of the musical and literary work, *even if the licensor has not specifically authorised publication of the work*. The musical and literary copyright owner therefore does not need to specifically give consent for the musical or literary work to be published under these circumstances, and where the licensee or another party makes copies of these works available to the public the works would be deemed to have been published, whether the copyright owner had specifically given such consent or not (provided that he had given authorisation in respect of the *reproduction* of the works). Within the circumstances of the publication of a musical or literary work it can furthermore be argued that the act of authorising reproduction creates an implied licence for publication, thus rendering unnecessary express consent. It should also be noted that, as the court in *Fichtel and Sachs Aktiengesellschaft v Road Runner Services* 174 JOC (W) held (at 182), 'a positive act of offer is not a pre-requisite [for publication] and passive availability suffices.' On the other hand in the case of sound recordings, where the copyright owner has given authorisation for the reproduction of the sound recordings such authorisation would impliedly include the licensee's right to sell records embodying such sound recordings, seeing that 'sale' of records does not constitute an exclusive right in respect of the owner of copyright in a sound recording (see the provisions of s 9 of the Copyright Act, which specifically excludes the 'sale' of the sound recording). Where however, a person sells records of the sound recording where the owner of copyright in respect of the sound recordings had not authorised the *reproduction* of the sound recording (through such records), such action would constitute an infringement of the copyright owner's rights in terms of s 23(2)(b).

authorised to do so by the copyright owner.¹⁷⁷ Furthermore, the Copyright Act clearly provides for the lending right as an exclusive right of the owner of copyright in a sound recording¹⁷⁸ and thus does not deal with it as an exception to the exhaustion doctrine, as other jurisdictions do.¹⁷⁹

Having indicated this, it is submitted that it is possible to detect certain manifestations, effects or residues of the exhaustion principle in the construction of certain provisions of our Copyright Act. For one thing, (i) it is clear, in respect of musical and literary works, that the publication footprint *ends* with the making of an adaptation of the original.¹⁸⁰ However, from the definition of 'copy' the footprint does not appear to extend to the making of *copies* of the adapted work, i.e. the making of such copies would be beyond the footprint of the publication right in respect of the original work and would thus not constitute an infringement of the publication right *in respect of the original work*.¹⁸¹ Further to this, (ii) the fact that the right to control and restrict importation applies only in respect of *infringing copies* can be seen as another manifestation of the exhaustion principle. This aspect is particularly important to note because parallel importation is very much frowned upon in the music industry.¹⁸² As Dean has so articulately expressed, the fact that the activity of the importer in distributing the contentious articles without the authority of the copyright owner infringes upon the copyright owner's exclusive rights of distribution does not, in itself, make the articles 'infringing

¹⁷⁷ On this see however the foregoing discussion, *ibid*.

¹⁷⁸ Section 9(b). The same position applies in respect of cinematograph films in terms of s 8(g). The case of *Nu Metro Filmed Entertainment (Pty) Ltd* supra n 447 dealt with the unauthorised rental of infringing copies of cinematograph films. The position would be equally applicable in respect of sound recordings because the wording dealing with this right in respect of films (in s 8(g)) is exactly the same as that used in respect of sound recordings in s 9(b).

¹⁷⁹ See, in this regard, the discussion on how this is dealt with in UK and US law, *op cit* note 344.

¹⁸⁰ Contrast this with the position in the United States, where adaptation is clearly excluded from the distribution right. Thus in the case of *Mirage Editions, Inc. v Albuquerque Art Co.*, 856 F. 2d 1341, another 'tile' case in which the appellant-defendant had taken images from a book and placed them on a tile, whereafter the prepared tiled images were sold, the court held (at 1344): 'We recognize that, under the "first sale" doctrine as enunciated at 17 U.S.C. § 109(a) and as discussed in *Wise*, appellant can purchase a copy of the Nagel book and subsequently alienate its ownership in that book. However, the right to transfer applies only to the particular copy of the book which appellant has purchased and nothing else. The mere sale of the book to the appellant without a specific transfer by the copyright holder of its exclusive right to prepare derivative works, does not transfer that right to appellant. The derivative works right, remains unimpaired and with the copyright proprietors As we have previously concluded that appellant's tile-preparing process results in derivative works and as the exclusive right to prepare derivative works belongs to the copyright holder, the "first sale" doctrine does not bar the appellees' copyright infringement claims.'

¹⁸¹ This should not, however, be taken to imply that the infringer would be absolved from any liability in respect of publishing unauthorised copies of *the adapted work*. While such unauthorised copies would not constitute an 'infringing copy' in respect of the original work, they would clearly constitute an infringing copy in respect of the adapted work. In other words, even though making copies of the adapted work would not constitute publication in respect of the original work, such activity would constitute publication in respect of the adapted work. Where in this case the owner of the copyright in the original work has not assigned the adaptation right to another, the unauthorised publication of copies of the adapted work would infringe upon what could be termed the copyright owner's 'adaptation exercise right' *in respect of the original work*, i.e. the right provided for in s 6(g) of the Copyright Act, seeing that one of the exclusive rights of the copyright owner is not only to make an adaptation of the work in terms of s 6(f), but also 'doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) inclusive' (s 6(g)). Thus, one of the copyright owner's rights in this regard would be the right to publish the adapted work in terms of s 6(b) read with s 6(g). Where however, the owner of the original copyright work has assigned the adaptation right to another, where a person makes infringing copies of the adapted work, he would be infringing the copyright in the adapted work and not the copyright in the original work. In other words, the publication right in respect of the original work would have been exhausted.

¹⁸² See for example s 2 of the Code of Conduct for the members of the Recording Industry of South Africa (RiSA), under the heading 'Parallel Imports', enjoins its record producer members not to 'knowingly, import into South Africa, or sell, any product in breach of the valid contractual rights [of] any other member.' See <http://www.risa.org.za/>, 'About', then 'Code of Conduct'. (Date of use: 22 October 2013). These parallel importation restrictions have however, fallen foul of competition authorities elsewhere. See, in respect of this, the decision of the Swiss Competition Commission to fine the International Federation of the Phonographic Industry (IFPI) of Switzerland for the use of such parallel import restrictions in respect of sound recordings and videos. <http://www.internationallawoffice.com/newsletters/detail.aspx?q=461619db-c1a7-4757-8127-46e9572097e1> (date of use 22 October 2013).

copies'.¹⁸³ Rather the test here is whether the person who made the imported article would, if he had made the article in South Africa, infringed upon the reproduction right in respect of the article. In this regard it can be argued that the importation of copies that are not infringing copies as contemplated in the Copyright Act,¹⁸⁴ is a form of exhaustion of the distribution rights of the copyright owner, seeing that such importation would not amount to copyright infringement.¹⁸⁵ [This means for example that if a South African owner of copyright in sound recordings authorises a record producer in Kenya to manufacture recordings in Kenya, but does not do so in respect of the South African territory; where a South African trader purchases a large stock of music CDs from the Kenya manufacturer and resells them in South Africa, such CDs would not constitute infringing copies in South Africa.] Further to this, (iii) the fact that a "sale" is excluded from the exclusive rights of the owner of copyright in a sound recording and is only prohibited if it relates to the sale of an infringing copy (i.e. a copy the making of which in South Africa would have amounted to the maker thereof infringing the reproduction right in the work),¹⁸⁶ can be seen as yet another form of the exhaustion. [Nevertheless, to the extent that the exhaustion rule has application in South Africa, its usefulness is reduced by the fact that the act of lending in respect of both sound recordings and cinematograph films is prohibited.]

7.3.1.9 Definition of "diffusion service"

An understanding of this definition is important for purposes of understanding the right to transmit a work in a diffusion service, which forms part of the performing rights in musical works – a subset of the bundle of rights available to the owner of copyright in a literary and musical work.¹⁸⁷ The essential difference between a broadcast and a diffusion service is that while the former uses

¹⁸³ Dean *op cit* note ... 1-85. The learned author also observed: 'It is not sufficient that the goods are merely dealt in without his authority. No infringement occurs in this situation' unless the goods are 'infringing copies'. *Id* at 1-84.

¹⁸⁴ A possible scenario here is where the overseas copyright owner has not assigned his copyright to a local person. Thus in territories where no one owns the copyright locally (through a transfer of the rights by assignment or an exclusive licence), anyone would be able to exercise the distribution right in respect of works embodying the copyright, without being liable for copyright infringement as the goods would not amount to 'infringing copies'. In this regard Dean has observed: 'In order to bring about a situation where imported goods made by or with the license [sic] of the copyright owner can become 'infringing copies' for purposes of s 23(2) of the Act, foreign copyright owners have resorted to the expedient [sic] of assigning their South African copyright in works embodied in imported goods to a South African distributor. Once such assignment has taken place, it follows that goods thereafter manufactured by or with the license [sic] of the former copyright owner embodying reproductions of the works in question will, in terms of the deeming provisions of the section, become technically infringing copies.' Dean *id* at 1-82.

¹⁸⁵ Compare this position with that of the United States as expressed in the recent Supreme Court case of *Kirtsaeng v John Wiley & Sons Inc.* 654 F. 3d 210. Kirtsaeng had imported books published by Wiley Asia, an assignee of the respondent, by asking friends and family to buy them for him in Thailand and to mail them to the United States, where he sold them, reimbursed his friends and family members and kept the profit. The respondent argued that Kirtsaeng had infringed upon its distribution right in terms of U.S.C. §106(3), read with §6029a)(1) (which prohibits unauthorised importation of copies of a work). Kirtsaeng argued that he was entitled to sell the imported books in terms of the first-sale doctrine provided for in §109. The legal question was whether the words 'lawfully made under this title' with regard to works made abroad restricted the scope of the first-sale doctrine geographically. The US Supreme Court, overruling the decision of the District court and the Second Circuit, agreed with Kirtsaeng that the first-sale doctrine applies in respect of copies of copyrighted works lawfully made abroad, holding that the phrase 'lawfully made under this title' means 'in accordance with' or 'in compliance with', rather than limiting the first-sale doctrine geographically, and arguing that both historical and the contemporary statutory context showed that Congress did not have geography in mind when writing the present version of §109(a). Pp 7 – 33. In contrast South African law, which as we have indicated, does not specifically provide for the exhaustion principle, still deals with the importation provisions within the context of geographical limitation. See in this regard Dean *ibid*.

¹⁸⁶ In terms of s 23(2)(b) of the Copyright Act.

¹⁸⁷ See s 6(e) of the Copyright Act.

wireless technology (“takes place by means of electromagnetic waves ... without an artificial conductor”) the latter “takes place over wires or other paths provided by material substance” (e.g. a music-on-hold service or a transmission of a musical service to rooms in a hotel from a central place, using wire). Furthermore while a broadcast may be intended for reception by the public or a section of the public, a diffusion service is intended for reception “by specific members of the public” (e.g. members of a hotel establishment). In other jurisdictions, such as the United States, transmission of content through a diffusion service is a major part of the broadcasting industry, through the use of “cable television”, which uses fixed optical fibres or coaxial cables to transmit content, rather than using the over-the-air method.¹⁸⁸

7.3.1.10 Definition of “distribution” and “distributor”

These expressions are important only in so far as it is necessary to note the fact that they are used in respect of programme-carrying signals and not in respect of musical copyright. In practice the music copyright enthusiast shall often be confronted with the concept of “distribution” and “distributor” within the context of the music industry. It is important to note that this is not the sense in which these expressions are used in the Act. The expressions are not used in respect of music copyright or the music industry. In contrast, the exclusive right of “distribution” is an important component of the laws of many jurisdictions. Thus the US Copyright Act¹⁸⁹ makes provision for the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending”.¹⁹⁰ The importance of the concept of “distribution” in the music industry is illustrated by the fact that entities called “distributors”¹⁹¹ play an important role with regard to disseminating recorded music to the public. In essence this “distribution right” is the same as the “publication right” provided for in the South African Copyright Act.¹⁹² Thus if the facts of a music rights case make reference to “distribution” in South Africa this would very likely be a reference to the concept of “publication” in the Copyright Act and not to the

¹⁸⁸ See <https://www.encyclopedia.com/media/encyclopedias-almanacs-transcripts-and-maps/cable-television-system-technology> (date of use: 20 July 2019).

¹⁸⁹ § 106.

¹⁹⁰ UK Copyright law does not specifically provide for this right, but the understanding that this right exists is there, as is evident from the use of the phrase “subsequent distribution” in s 18(3)(a) (within the context of dealing with the right “to issue copies of the work to the public” dealt with in s 16(1)(b) of the UK Copyright Act, read within s 18).

¹⁹¹ “[T]he wholesaler that sells ... records to the stores and also distributes ... music digitally”. Passman *All You Need to Know about the Music Business* 73.

¹⁹² See s 1(5) of the Copyright Act. The term “publication” is not specifically defined, but the Act deals with the scope of the concept or rather what the term entails. For example, a musical and literary work is deemed to have been published “if copies thereof have been issued to the public” (s1(5)(e)), and the publication of a sound recording is the “sale, letting, hire or offer for sale or hire, of copies thereof” (s1(5)(b)). This accords with the definition of “publication” under s 175(1)(a) of the UK Copyright Act. See further in this regard Baloyi 2012 *SA Merc LJ* 219 - 220 where the connection between the expressions “publish”, “publication”, “distribute” and “distribution” is made. There seems however to be a confusion in this regard, and some have called for the introduction of a stand-alone right of distribution in the Copyright Act through the process of the Copyright Amendment Bill and this has in fact now been incorporated in the Bill. See clause 4 of the Bill (version B13B-2017) in respect of literary and musical works and clause 6 of the Bill in respect of artistic works, available at <https://pmg.org.za/bill/705/> (date of use: 13 July 2019). It is not clear why there has been a selective inclusion of this right. See the observations further below in respect of clause 4.

definition of “distribution” or “distributor” in the Act. The concept of “distribution” is also used often in the music industry in respect of the distribution of royalties, especially by collecting societies.¹⁹³

7.3.1.11 Definition of “exclusive licence”

An “exclusive licence” is defined as “a licence authorizing a licensee, to the exclusion of all other persons, including the grantor of the licence, to exercise a right which by virtue of this Act would, apart from the licence, be exercisable exclusively by the owner of the copyright; and ‘exclusive licensee’ shall be construed accordingly”

This is self-explanatory but it needs to be noted that an exclusive licence should not be confused for a so-called “exclusive songwriter agreement”, which simply means that a songwriter is engaged by a music publisher to compose musical works solely for the music publisher during the period of engagement and may thus not compose musical works for another party.¹⁹⁴ See further in this regard the comment below in respect of clause 4 of the Bill.

7.3.1.12 Definition of “infringing copy”

“Infringing copy” is defined, in relation to a literary and musical work, as “a copy thereof ... being ... an article the making of which constituted infringement of the copyright in the work [or] recording ..., or in the case of an imported article, would have constituted an infringement of that copyright if the article had been made in the Republic”

What is important to note here is that defining an infringing copy in relation to a musical and literary work as “a copy thereof”, where (i) “publication” (i.e. *distribution*) is defined in relation to the issuing of “copies” of a work; (ii) “copy” is defined to include a reproduction and an adaptation, and (iii) a “reproduction” is defined to include a reproduction in the form of a record or cinematograph film and a reproduction of a reproduction; and “adaptation” is defined to include an arrangement and a transcription,¹⁹⁵ can only bring us to the conclusion that the same acts that give rise to the publication of a work as discussed above also give rise to the infringement of a work through *copying*, if such copying was unauthorised.¹⁹⁶ Thus the footprint of the publication right in this case would define the footprint of the infringement of the work through unlawful copying.¹⁹⁷

¹⁹³ Such a usage is very prevalent in the Copyright Amendment Bill.

¹⁹⁴ See *Poe Music Publishing* 99. During this period if the songwriter composes musical works or writes lyrics for the benefit of others, the original music publisher could claim ownership of the copyright in these songs or lyrics. The exclusive songwriter agreement is sometimes termed a “staff writer contract” and is distinguished from a “single-song contract”, where the songwriter is engaged to compose a specific number of songs, and could therefore, after doing so, enter into a songwriting agreement with other publishers. See *Poe id* at 90 – 91.

¹⁹⁵ See the definitions of “copy”, “reproduction” and “adaptation” in the Copyright Act, as well as the discussion above in relation to “adaptation” and “copy”.

¹⁹⁶ It needs to be emphasised that this observation is limited to instances where a work is infringed through unauthorised copying. This would affect three exclusive rights of the copyright owner, namely (i) the right to “reproduce the work” (s 6(a), seeing that the definition of “copy” includes a “reproduction” of the work), and (ii) the right to publish the work (s 6(b), seeing that publication entails the issuing of copies of the work to the public (s 1(5(a) and (e)) and the (iii) the right to make an adaptation of the work (s 6(f)), seeing that the definition of “copy” includes an adaptation of the work). It would however, not affect the “performing rights” dealt with in s 6 (c) – (e), since these do not constitute the issuing of copies

The above observations are important because, as contended below in the analysis of the proposed section 12B(6) in clause 13 of the Bill, the structuring of the proposed first-sale doctrine in the Bill would nullify many of the current provisions relating to the regime for “infringing copies” in our law.

7.3.1.13 Definition of “licence scheme”

“Licence scheme” is defined “for the purposes of Chapter 3, in relation to licences of any description”, as “a scheme prepared by one or more licensing bodies, setting out the classes of cases in which they are willing, or the person on whose behalf they act is willing, to grant licences of that description, and the charges, if any, and terms and conditions subject to which licences may be granted in those classes of cases, and includes anything in the nature of such a scheme, whether described as a scheme or as a tariff or by any other name”

It is important first to note that the expression “licence scheme” is used “for the purposes of Chapter 3”, which contains provisions dealing with the Copyright Tribunal. Thus a licence scheme, or a tariff as it is commonly known in the music industry, is particularly important for purposes of referring a matter to the Copyright Tribunal. In this regard it needs to be noted that a dispute that is referred to the Copyright Tribunal must relate to a licence scheme that “is in operation”,¹⁹⁸ which is referred to the Tribunal, or where a person (who has presumably been refused a licence) requires a licence in accordance with the licence scheme, or else requires a licence in a case not covered by the licence scheme.¹⁹⁹ In all instances the existence of a licence scheme (or a submission that an existing licence scheme does not cover the usage concerned) must form the basis for the reference of a matter to the Copyright Tribunal.

The second issue to note here is the fact that a licence scheme sets out the classes of cases in which the licensing bodies (namely the CMO) or the persons on whose behalf they act “*are willing ... to grant licences*” of the description concerned. This emphasises the nature of copyright as an exclusive right of the copyright owner, who has the sole right to use the work or to authorise others to use it. In this regard the copyright owner may decide to allow usages of his work in certain classes,²⁰⁰ and also decide not to allow certain usages in other classes or in respect of certain classes of persons. It is under those circumstances, i.e. (i) where the copyright owner is not willing to issue licences in respect of certain classes of usages or classes of persons;²⁰¹ or (ii) where the copyright owner is not willing to issue a licence apart from the payment of a certain licence fee, that

(including infringing copies) to the public (see s 1(5)(d) for the specific exclusion of the rights forming part of the performing rights).

¹⁹⁷ I.e. through the issuing of infringing copies. See further in this regard the discussion above regarding the definition of ‘copy’.

¹⁹⁸ Section 31(1) of the Copyright Act.

¹⁹⁹ Section 30 of the Copyright Act. See further in this regard Dean and Karjiker *Handbook of Copyright Law* 1-102 - 103.

²⁰⁰ SAMRO for example has “53 different tariffs for various uses”. See <http://www.samro.org.za/news/articles/public-must-pay-play> (date of use: 15 February 2019); <http://www.samro.org.za/node/686> (date of use: 23 October 2013). These classes of usages include radio, pubs, live music venues, cinemas, ‘spaza shops’, car washes, hairdressers, etc. See <http://www.samro.org.za/samro-music-users-south-africa/who-needs-a-music-licence-from-samro> (date of use: 23 October 2013).

²⁰¹ See in this regard *Johannesburg Operatic and Dramatic Society v Music Theatre International and Others* Patent Journal March 1969 223.

the role of the Copyright Tribunal comes into the fore. This role amounts to the issuing of a licence to compel the copyright owner to allow the usage of his work in a prescribed manner upon payment of a prescribed fee.²⁰²

A licence scheme may also prescribe certain “charges” that need to be paid, or impose certain terms and conditions. For example, the SAMRO standard broadcast tariff and licence provides that the licence fee is “subject to a surcharge or discount of 1% in respect of every increase or decrease of 1 complete point in the weighted average figure of the [official Consumer Price Index of 100 points]”.²⁰³ Furthermore, it is a condition of the licence agreement that the user, in addition to paying the licence fee, has to provide SAMRO with music usage information²⁰⁴ to enable the latter to distribute royalties to the correct rights-holders.

7.3.1.14 Definition of “musical work”

A “musical work” is defined as **“a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music”**

The definition of the term “musical work” is of course, crucial to understanding the protection accorded to this type of work under copyright.²⁰⁵ It has, in this regard been observed that there are “surprisingly” few definitions of the expression “musical work” in national and international copyright law; there is no internationally-accepted definition of the expression and that ‘many legislative bodies, both national and international, accept that the terms “music” and “musical work” are inherently difficult to define’.²⁰⁶ At one stage Canadian law defined music as “a combination of melody and harmony”, but this definition was abandoned when it presented problems.²⁰⁷

²⁰² That is, the Copyright Tribunal authorises the issuing of a “compulsory licence” in respect of the usage concerned. See in this regard Dean and Karjiker *Handbook of Copyright Law* 1-102.

²⁰³ Furthermore, the licence fees payable by the broadcaster are payable “less any commission payable by the [broadcaster] to advertising agents subject to a maximum of 16.5% of advertising income and any levies paid by the [broadcaster] to the South African Advertising Research Foundation subject to a maximum of 0.5% of advertising revenue”. This information was correct as at, and verified from actual documents received by the writer from SAMRO officials on, 18 April 2013.

²⁰⁴ That is, information reflecting the usage of SAMRO-controlled musical works by the user, such as “programme log sheets” in the case of broadcasters.

²⁰⁵ Although it has been suggested that, “... from the point of view of legislators it is not necessary to define the terms [“music” and “musical work”] strictly in order to provide protection to musical works under copyright.” Macdonagh 2012 *International Review of Intellectual Property and Competition Law* 408.

²⁰⁶ Macdonagh *id* at 407 – 408. Macdonagh highlights the fact that apart from the fact that the Berne Convention makes provision for the protection of “musical compositions with or without words”, international treaties do not define the expressions “music” or “musical work”, as also is the case in many jurisdictions such as Germany and the United States. See also Chapter 3 *supra* for the discussion on the historical development of treatment of musical works in copyright law.

²⁰⁷ See Sanderson *Musicians and the Law* 20. The full definition was “any combination of melody and harmony, or either of them printed, reduced to writing, or otherwise graphically produced or reproduced.” This definition was in fact based on the definition of the expression in the Musical (Summary Proceedings) Copyright Act 1902 (2 Edw. 7, c.15), as highlighted in Chapter 3 *supra*, which, as indicated, was criticised by Garnett, Davies and Harbottle *Copinger and Skone James* 96 for being “too restrictive ... as sounds which are neither in melodic nor harmonic combination may equally be recognised to be music.” Sticking to this definition the Canadian Federal court in *CTV Television Network Limited v Canada (Copyright Board)* [1993] 2 FCR 115 concluded that the telecommunication of musical works did not amount to a communication to the public of a musical work, but rather was a communication to the public of the performance of a musical work, so that such communication did not amount to a performance in public of the musical works. After *CTV* the Canadian Copyright Act was amended and now defines a musical work as “any work of music or musical composition, with or without words, and includes a compilation thereof.” S 2 Canadian Copyright Act (R.S.C., 1985, c. C-42).

The definition of “musical work” in our copyright law is similar to that in UK law.²⁰⁸ The fact that words sung or spoken with the music are excluded from the definition results from the fact that words, in this case in the form of lyrics, are protected in their own right as a literary work.²⁰⁹ In the same vein, “action ... performed with the music” is excluded because the action, such as a dance set to the tune of the music, would, if it satisfies the requirements for the subsistence of copyright,²¹⁰ be protectable as a “choreographic work”, which is a genre of a dramatic work (which in turn is protectable as a literary work).²¹¹ In the *Sawkins* case²¹² Mummery LJ held that the essence of music is “combining sounds for listening to”, further remarking that:

Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener’s emotions and intellect. The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it. Music must be distinguished from the fact and form of its fixation as a record of a musical composition. The score is the traditional and convenient form of fixation of the music and conforms to the requirement that a copyright work must be recorded in some material form. But the fixation in the written score or on a record is not in itself the music in which copyright subsists. There is no reason why, for example, a recording of a person’s spontaneous singing, whistling or humming or

²⁰⁸ Section 3(1) of the UK Copyright Act. In this regard observations made in respect of the application of the definition in English law would, in many cases, also have relevance in South African law. In this regard Garnett, Davis and Harbottle *Copinger and Skone James* 97 have noted, with regard to the definition of the expression “musical work” in *Sawkins v Hyperion Records Ltd* (see Chapter 5 supra) as “sound ... intended to produce effects of some kind on the listeners’ emotions and intellect”, that this intention is the intention of the author-composer, “and it is irrelevant whether he is successful in the attempt to affect the listener’s emotions or intellect.” The intention is thus not that of the musician who interprets the musical work by singing it. Furthermore, the authors have made other important observations worth repeating: “In music copyright the sounds are more important than the notes, as is shown by the fact that it is possible to infringe a musical work without taking the actual notes. In principle, there is no reason for regarding the actual notes of music as the only matter covered by musical copyright, any more than, in the case of a dramatic work, only the words to be spoken by the actors are covered by dramatic copyright. Accordingly it is wrong in principle to single out the notes as uniquely significant for copyright purposes and to proceed to deny copyright to the other elements that make some contribution to the sound of the music when performed, such as performing indications, tempo and performance practice indicators, if they are the product of a person’s effort, skill and time, bearing in mind the relatively modest level of the threshold for a work to qualify for protection. ... While words which are sung with music do not form part of the musical work, the human voice can constitute a part of the overall orchestration of the musical work, as with a musical instrument in a band or an orchestra. A passage of silence set within musical sounds and intended to be appreciated as part of those sounds is clearly part of the musical work as a whole. ...” Davis and Harbottle *Copinger and Skone James id* at 97 – 98.

²⁰⁹ This brings us to the vexing question as to the basis for the recognition as music of chant-based “music” forms such as rap (and closer to home, kwaito) – “in which the words of a song are not sung, but spoken in time to music with a steady beat” (Longman Dictionary of Contemporary English 2003). In this regard it is submitted that this question needs to be determined on a case-by-case basis. It has been said of “raps” that they “are lyric poems organised into verses ... [which] are performed most often in rhythm to a beat with a vocal delivery that ranges from *sing-song* to *conversational*. Their most distinguishing poetic feature is rhyme, which rappers employ in full and slant, monosyllabic and multisyllabic forms at the end of and in the midst of a line.” <http://adamfbradley.com/presskit/Bradley-Rap-Intro.pdf> xxxi. Emphasis added. (Date of use: 23 October 2013). The test as to whether the rapping itself, apart from the accompanying musical performance, constitutes a musical work in its own right would be the extent to which there are melodic elements in the rapping. In other words, can the rapping be expressed musically (i.e. with reference to any of the notes in the musical scale), or is it merely conversational? If the rapping is only conversational, then it can clearly not be protected as a “musical work” and would be protectable in the same way as the recitation or performance of a poem is protected, namely, either as a literary work that is being performed (provided the words of the rap have been reduced to writing and otherwise meet the requirements for the subsistence of copyright), or as a performance. The music accompanying the rapping can, of course, be protectable as a “musical work” and a “sound recording” (if recorded), provided its making met the requirements for the subsistence of copyright in a work. In this regard it needs to be noted that the practice of “sampling” is very much associated with rap and related forms of music (such as hip-hop and kwaito), and where such sampling is not authorised by the copyright owner, this would constitute copyright infringement. See generally for a discussion (including critical analysis) of the problem of sampling Schumacher 1995 *Media, Culture and Society* 253 and Lindenbaum *Music Sampling and Copyright Law* 1999.

²¹⁰ Such as choreography, which has been defined as “a written record of dances”, derived from the Greek for “dance” and “write”. See <http://www.merriam-webster.com/dictionary/choreography> (date of use: 25 October 2013).

²¹¹ See in this regard *Hadley v Kemp* [1999] E.M.L.R. 589, at 597.

²¹² *Sawkins v Hyperion Records Ltd* [2005] 1 W.L.R. 3281.

improvisations of sounds by a group of people with or without musical instruments should not be regarded as “music” for copyright purposes.²¹³

It is important, in dealing with the definition of “musical work” to confine understanding of the term to its definition in the Copyright Act and not, for example, to confuse this with the usage of the expression in other legislation.²¹⁴ In addition it is appropriate to mention the fact that the expression “song”, which is used in popular language, refers to a combination of *music* (i.e. the musical work) and the *words* (i.e. lyrics, protected as a literary work), that are sung or spoken in conjunction with the music.²¹⁵

7.3.1.15 Definition of “performance”

Performance “**includes any mode of visual or acoustic presentation of a work including any such presentation by *the operation of a loudspeaker, a radio, television or diffusion receiver or by the exhibition of a cinematograph film or by the use of a record or by any other means ... and references to ‘perform’ in relation to a work shall be construed accordingly: Provided that ‘performance’ shall not include broadcasting or rebroadcasting or transmitting a work in a diffusion service*”²¹⁶**

The right of public performance is, in addition to the right of broadcasting and transmission in a diffusion service, one of the three rights constituting the “performing right”.²¹⁷ This is the original performing right, before the right was extended to the other usages as a result of technological developments. The definition of “performance” in the Act in fact captures the historical development of the right of public performance in the Imperial Copyright era, where the right was adapted from a simple stage right to take into account modern forms of performance. Thus it was held in a number of the so-called “loudspeaker performance” cases that the playing of music through the use of

²¹³ *Id* at 53. This decision has, however, been criticised as introducing a rather “broad definition of the musical work”. See Macdonagh 2012 *International Review of Intellectual Property and Competition Law* 409. See also Rahmatian 2009 *International Review of Intellectual Property and Competition Law* 560; also Griffin 2010 *Legal Studies* 653. The writer has commented at length on the *Sawkins* decision in Chapter 5 *supra*.

²¹⁴ Thus for example the Consumer Protection Act 68 of 2008 defines “goods” as including “music”, and defines “services” as including “the provision of any entertainment or similar intangible product” (s1). In this context a musical work, within its understanding in copyright law, would be more akin to the phrase “the provision of any entertainment or similar intangible product”, within the definition of “services”, than it would be to the understanding of “music” as “goods”. The concept of music as “goods” would be more akin to the definition of “record” in the Copyright Act, where such record embodies the recording of a musical work. See also s 61(2)(c)(iii) of the Electronic Communications Act 36 of 2005, which provides that if the music or lyrics of a musical work broadcast by a South African broadcasting service “was or were principally performed by musicians who are South African citizens” then such musical work would qualify as “South African music”. Within copyright law such music would not be considered to be “South African music” in the sense of music authored by South Africans, if the authors or composers of the music are in fact, foreign persons (except that generally a work published simultaneously in South Africa and a foreign jurisdiction within a period of 30 days would be regarded to be of South African origin, within the concept of a “first publication” in terms of s 4(1) read with s 1(5)(c) of the Copyright Act).

²¹⁵ See *Hadley v Kemp* [1999] E.M.L.R. 589, at 597, where it was observed: “There are two copyrights in the song: one in the music (the “musical work” ...), and one in the lyrics (the “literary work” ...).” In the same vein Grove (ed) *Dictionary of Music* (III) 584 defines a song in the following manner: “In relation to the study of music, a song may be defined as a short metrical composition, whose meaning is conveyed by the combined force of words and melody, and intended to be sung with or without an accompaniment”, which makes the song to “belong equally to poetry and music.”

²¹⁶ Emphasis added.

²¹⁷ Section 6(c) – (e) of the Copyright Act.

loudspeakers constituted public performance.²¹⁸ It for example, comes as a surprise to many people that they should be held liable for infringing the right of public performance through the public use of a radio or television set (e.g. at a restaurant, hair saloon, pub or a similar public place), where the music played emanates from a radio or television broadcast. The confusion becomes even more pronounced when the users would have paid a TV licence or where the broadcast emanates from a subscription service such as MNET / DSTV.

The courts have however been clear that such use of radio and TV receivers, where copyright works are performed, would constitute an infringement of the copyright owner's right of public performance if no license has been received from the copyright owner (or his duly-authorized representative, e.g. a performing right society like SAMRO).²¹⁹ The fact that a person has a television licence or that a person pays a subscription fee to the broadcaster does not change the situation, as the licence issued to the broadcaster for the use of the musical works is for purposes of broadcasting the works for reception by the public or a member of the public in their homes or domestic circle. Similarly the performance of films or video cassettes where they were audible to a section of the public,²²⁰ as well as the related playing of music records (e.g. as background music) were held to constitute a performance in public.²²¹ To the mind unschooled in copyright law this might seem odd, where the person so performing the music records (e.g. CDs) bought and paid for the records. However, in copyright law the position is clear that the rights of ownership of copyright are "distinguishable from the rights of ownership in the physical object which is the subject of the copyright ... [and thus] the transfer of ownership of the physical object ... does not necessarily transfer the ownership of the copyright".²²²

7.3.1.16 Definition of "record"

"Record" "means any disc, tape, perforated role [sic] or other device in or on which sounds, or data or signals representing sounds, are embodied or represented so as to be capable of being automatically reproduced or performed therefrom"

The phrase "disc, tape, perforated [roll] or other device" reflects the historical development of the recording industry,²²³ in which the protection of sound recordings was first recognised through the accordance of copyright in perforated rolls as an embodiment of sound recordings and as a

²¹⁸ See *Performing Right Society Ltd v Hammond's Bradford Brewery Co Ltd* [1934] Ch 121; *Ernest Turner Electrical Instruments Ltd v Performing Right Society Ltd* [1943] Ch. 167; *Performing Rights Society v Harlequin Record Shops* [1979] 1 WLR 851; *Southern African Music Rights Organisation Ltd v Svenmill Fabrics (Pty) Ltd* 1983 (1) SA 608 (C).

²¹⁹ For radio see *Performing Right Society Ltd v George* (1936) 30 April, 1936, unreported, referred to in *Performing Right Society Ltd v Camelo* [1936] 3 All ER 557, which also dealt with a similar matter; *South African Music Rights Organisation v Trust Butchers (Pty) Ltd* 1978 (1) SA 1052 (E); *ICPL Performing Right Society v Kwik-Fit Group Ltd* [2008] EC.D.R (2) 13 (Outer House, Court of Session, Scotland).. For television see *Football Association Premier League Ltd v QC Leisure* [2008] EWHC 1411 (Ch); [2008] F.S.R. 32, at para 266.

²²⁰ *Australian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 25 I.P.R. 157; *Rank Film Production Ltd v Dodds* [1983] 2 NSWLR 553.

²²¹ *Performing Rights Society v Harlequin Record Shops* [1979] 1 WLR 851; *Australasian Performing Right Association Ltd v Tolbush Pty Ltd* (1986) 62 A.L.R. 521.

²²² *Electronic Media Network Ltd v Naidoo and Another* 2006 BIP 309 (W) at para 11.

²²³ Though not necessarily in a chronological sense.

mechanism for copying musical works,²²⁴ which was replaced by the shellac and then vinyl record.²²⁵ Compact cassettes or rather “cassette tapes” took over as a medium of sound recording embodiment, until they were replaced by the current compact disc (CD).²²⁶

The expression “or other device” is an attempt to make the definition of “record” technology-neutral.²²⁷ However, does the usage of the term “device” not imply that a tangible object is intended? If that is the case, would this then exclude digitised music from the definition of “record”? It needs, in this regard, to be noted that electronic devices, i.e. devices capable of storing digitised data and information, would also qualify as a “device”. In this regard storage of digital music in computers, cellphones, iPods and other similar devices “on which sounds, or data or signals representing sounds, are embodied or represented so as to be capable of being automatically reproduced or performed therefrom”, as the definition of “record” provides, would meet the requirements of the definition. Further to this, the expression of the sound recording copyright owner’s exclusive right in respect of the making of a record as “making, directly *or indirectly*, a record embodying the sound recording”²²⁸ would confirm the view that a record is not only to be limited to a physical record.

7.3.1.17 Definition of “Registrar”

“Registrar” means **“the Registrar of Copyright, who shall be the person appointed as Registrar of Patents under section 7 of the Patents Act, 1978”**

Thus the Registrar of Patents is also the Registrar of Copyright. The Copyright Registrar’s main function under the Copyright Act relates to the operations of the Copyright Tribunal provided for in Chapter 3 of the Act.²²⁹ Another important function of the Registrar relates to his supervisory and regulatory role over needle-time collecting societies under the Needle-time Regulations, as highlighted above in the commentary on the definition of “collecting society” in the Act.

7.3.1.18 Definition of “reproduction”

²²⁴ See the discussion supra in Chapter 3. Prior to the use of perforated (or piano) rolls music was primarily reproduced by means of phonograph cylinders. While phonograph cylinders are rarely available today, piano rolls are still available commercially today, though as a small niche market, with QRS Music claiming to be “the only manufacturer of piano rolls in business today, with over 5,000 master recordings and 45,000 music rolls.” <http://www.qrsmusic.com/music.asp?cid1=28> (date of use: 23 October 2013).

²²⁵ A type of “disc”. Like the piano roll, vinyl records are no longer mass produced, although a niche market still exists, especially in the electronic and hip hop music scenes, where DJs prefer the vinyl to the CD because of the advantage of direct manipulation through techniques such as slip-cueing, beatmatching and scratching on turntables. See <https://historyofthehiphop.wordpress.com/hip-hop-cultures/djingscratching/> (date of use: 20 July 2019).

²²⁶ It has, however, been observed that the cassette is well and alive in certain parts of the world. This is, for example, true of certain parts of Africa such as Zimbabwe, Mozambique and Botswana, where it has been said that the cassette is experiencing a boom, garnering more sales even more than the CD. In Zimbabwe, where it is said that the cassette is preferred to the CD because of considerations of affordability, durability and the belief that it is more difficult to pirate than the CD, a record company recently opened a cassette plant in Harare in order to meet this growing demand. See in this regard <http://edition.cnn.com/2011/BUSINESS/06/07/cassette.culture.zimbabwe/index.html>. (date of use: 25 September 2013)

²²⁷ I.e. not dependent upon the usage of a particular technological device, which, when it gets out of use would mean that copyright protection would also have ceased.

²²⁸ Section 9(a) of the Copyright Act.

²²⁹ In this regard his role has been rather passive and has only recently been brought to light, with the referral of disputes in relation to “needle-time rights”. See the observation in Chapter 1 in this regard.

See in this regard the discussion above on the definition of “copy”. See also the discussion below in respect of section 6 of the Act, which deals with the bundle of rights protected in respect of literary and musical works.

7.3.1.19 Definition of “sound recording”

“Sound recording” is defined as **“any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with a cinematograph film”**

Although this work is concerned with the copyright protection of musical works (and their related lyrics), it is important to make a short observation regarding sound recordings because, firstly, they are the most common and popular way in which musical works are embodied in a material form and secondly, together with musical works, musical sound recordings constitute the essence of what is commonly termed “music” in the modern day.²³⁰ Prior to the advent of recording technology the expression “music” referred largely to printed (or otherwise written) music, which could be performed vocally or instrumentally (or in both ways).²³¹ The improvised or other vocal performance of unwritten music could, of course, also be termed a performance of “music” (albeit not “serious music”).²³² For copyright purposes however only music reduced to a material form is recognised, and in the modern day this invariably takes place through the recording of the performance of a musical work, in this way embodying the musical work in a sound recording.²³³

Just as with the definition of “record”, it needs to be observed that the fact that the definition of sound recording is not limited to the “fixation or storage of sounds” but extends to the “fixation ... of ... data or signals representing sounds” means that the digital storage or compression of sound through a process such as MP3 technology²³⁴ would meet the requirements of the definition. Thus it can be said that the definition also applies in the digital environment. It is also important to note that the sound-track associated with a film is excluded from the definition of “sound recording”, as it is protected as part of the film.

7.3.1.20 Definition of “work of joint authorship”

²³⁰ Of course when a performer performs written music that has not been recorded, that too is a performance of “music”. However, amongst the popular masses the expression “music” refers to the *recorded music* that they can buy at shops, play in their cars and homes, and listen to on radio.

²³¹ See Chapters 2 and 3 *supra* generally in this regard.

²³² The term “serious” or “legitimate” music refers generally to notated, Western art music or rather musical traditions that entail advanced structural and theoretical considerations and a written musical tradition. Arnold (gen. ed) *Companion to Music* 111. However, although traces of music notation can be detected from ancient times, “[u]ntil very recently, the vast majority of music belongs to some form of oral tradition.” Scelta <http://www.thisisgabes.com/images/docs/musicsymbol.pdf> 1 (date of use: 23 October 2013).

²³³ Printed music of course continues to be used, especially in orchestral and other “serious music” performances, hence the continued recognition of “print rights” (see the discussion in Chapter 2 above). However, this market constitutes a small part of the music industry today when compared to the “pop music” scene.

²³⁴ MP3 stands for MPEG-1 or MPEG-2 Audio Layer III, and has been defined as “a computer file format for the compression and storage of digital audio data”. <http://www.merriam-webster.com/dictionary/mp3> (date of use: 24 October 2013)

A “work of joint authorship” is defined as **“a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors”**

This definition is important to refer to, if only to emphasise the fact that collaboration between authors (whether composers or lyricists or both) is very prevalent in the music industry. A lot of music has been produced through this collaboration. As Dean²³⁵ has noted, disputes as to who should be recognised as the author in works involving collaboration can become very difficult. Many disputes in music copyright cases relate to this issue. Often musicians would collaborate to create a satisfactory “piece” that can then be recorded for commercial release, without having reached agreement as to how ownership of copyright in the song shall be dealt with. This may happen amongst members of a band²³⁶ or in a studio environment, where a would-be recording artist with no ability to play musical instruments may sing her song, known to her mentally but not written down, to a studio band, which, following on (while the song is recorded “informally” by the studio engineer), thrashes the song out, removing unwanted elements, until a final version that is pleasing to the artist²³⁷ is arrived at. Under such circumstances who owns the copyright in the song?²³⁸

²³⁵ Dean and Karjiker *Handbook of Copyright Law* 1-33, where the learned authors observe: “If a work has gone through various development phases involving input by several people before reaching finality, it can be a difficult question of fact to assess whether a particular individual must be considered to be a co-author.”

²³⁶ In this regard Chislett *One, Two, One, Two* 22 distinguishes between the scenario where “the band is a vehicle for the creative expression of one individual who has basically hired musicians to play with him” and one where the band “is more of a creative collective”. While in the former case, the band owner would more likely be the owner of copyright in the songs created, in the latter case “the songwriting process will be far more organic and involve more members of the band.” Speaking further on the latter case Chislett opines (ibid): “For example, if the singer comes into the practice room humming a melody around which the rest of the band creates a song, the singer can be said to have originated the song, as melody is central to any song. However, seeing as it is only part of a song, all the further work that is done on any such song by other band members means that they become co-writers and originators of any such song.” It is submitted that each case would have to be determined on its own merit, as also in the former case it is possible that on the facts of the case the other band members are seen as being co-authors. Guidelines can be found from the English decision of *Stuart v Barret* [1994] E.M.L.R. 448, where collaboration on pieces of music by members of a pop group was seen to amount to works of joint-authorship.

²³⁷ And presumably to everyone else.

²³⁸ This is not an easy question to answer. Firstly, while it has been recognised that “[a] composer who composes a piece of music entirely in his head ... will be creating a musical work”, it is further recognised that such musical work, unless it has been reduced into material form, does not attract copyright. See Garnett, Davis and Harbottle *Copinger and Skone James* 98. Seeing that the artist in our example had not reduced the musical work into a material form, clearly no copyright existed in the musical work prior to the informal studio recording. The question that comes to mind is: While the informal studio recording was taking place, whose copyright in respect of the song was being created? Was it the copyright of the artist, or that of the studio band members, or of both? It needs to be recalled that it has been observed that “[t]here is no reason why, for example, a recording of a person’s spontaneous singing, whistling or humming or improvisations of sounds by a group of people with or without musical instruments should not be regarded as “music” for copyright purposes.’ *Sawkins v Hyperion Records Ltd* supra 487 at 53. In this case the singing may, of course, not have been spontaneous, as it may have been a singing of a song that the artist had composed in her mind. This does not make a difference, as the important consideration relates to the fact that no copyright subsisted in the song prior to the studio recording. It is submitted that in such a case the artist would have copyright in the song; however, if, in assisting the artist to produce a record-ready version of the song the other musicians added new elements to the artist’s original tune, then the musicians can also claim copyright in the musical work as co-authors, seeing that “where a musician plays music which has not previously been composed, what is produced is a musical work”. Garnett, Davis and Harbottle *ibid*. However which of the musicians can claim copyright is not an easy question to answer, and will depend upon the facts, including an analysis of each of the musical instruments that the musicians played to determine if they contributed original elements to the song. Such a determination would be difficult where there was no prior recorded version of the bare tune of the vocal artist, as it would not be easy to see what new elements were created. The present scenario would however, be similar to a situation where two or more people contribute to a literary work’s final expression, “one being the person actually responsible for committing the work to paper, [in this case being the artist who sings the song as it is recorded] the other providing an input into what is recorded [being the musicians playing the instruments, who can be said to be providing an input to what the artist is record through their playing].” Garnett, Davis and Harbottle *id* at 245, quoted with approval in *Peter-Ross v Ramesar* 2008 JDR 0660 (C) at 17. However, if what the band members do is to merely apply their skills as performers to

It has been said that for a work of joint-authorship to exist 'all the collaborators must answer the description of an "author", as that concept is properly to be understood."²³⁹ The work must of course, also meet all the requirements for the subsistence of copyright, including material embodiment. As indicated, material embodiment of a musical work can take place with the spontaneous recording of a person's singing, whistling or humming, including the recording of instrumental or non-instrumental improvisation of musical sounds.²⁴⁰ The contribution of one party need not be equivalent to, or of the same kind as that of the other, so that "someone whose principal role is to arrange the songs written by his collaborators can be a joint author."²⁴¹ However, it needs to be remembered that authorship is a question of status and fact, so that where a person is not an author in the legal sense, he cannot, by agreement of the parties, become a co-author (although he can, by agreement become a co-owner).²⁴² The effect of joint-authorship is co-ownership of the work of joint authorship, so that a co-author vested with such joint-ownership may not sue for damages in respect of the work of joint-authorship without joining the other co-authors or showing entitlement to sue alone.²⁴³

A final point to make in this regard relates to the distinction that must be made between the position in the United States and that in South Africa. The US legislation defines "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into

play a virtually finished song, without contributing to the words or music in the song, it would appear that they cannot qualify as joint-authors. See *Hadley v Kemp* [1999] E.M.L.R. 589. Note however that in this case the English court made reference to "significant contribution"; however, what is required in terms of our law for a work to become a work of joint authorship is simply that "the contribution of each author is not separable from the contribution of the other author or authors" (definition of "work of joint authorship").

²³⁹ Garnett, Davis and Harbottle *id* at 244. Though the authors are commenting on UK copyright law, it is submitted that this is the correct approach. In this regard it was held in *Peter-Ross v Ramesar* *ibid* that the contribution of each collaborator must be more than *de minimis* and not merely trifling, although their contribution to the final expression "need not be equivalent or of the same kind." However, in *Peter-Ross* the court (*ibid*) rejected the position applicable in UK law (see Garnett, Davis and Harbottle *id* at 245) that the contribution needs to be significant, holding that this requirement is not required in the definition of works of joint authorship. While it has been observed, in respect of UK law, that there is no requirement of joint intention "in the sense that each author must intend the other to be a joint author" (Garnett, Davis and Harbottle *id* at 244), it is not clear whether such intention is required in our law. In *Peter-Ross* the court (at 19), in substantiating the position that the work in question was a work of joint-authorship held that "there [was] collaboration from the outset and the contributing of ideas [did] not occur in *vacuo* but [was] directed towards the creation of [the] work". While this implies that there must be intention, it appears that the intention is one that is "directed towards the creation of [the] work", rather than one in which each author "intend[s] the other to be a joint author." In contrast, in the majority of US cases this stringent requirement that each author must intend that the other be a co-author is applicable. See in this regard Lind *Copyright Law* 73.

²⁴⁰ Proving material embodiment however, is a different issue. In this regard the party that can prove the earliest date of material embodiment would succeed in proving authorship and ownership of copyright in the work. What has often happened in South Africa is that unsuspecting artists would go to recording studios and sing their tunes to a studio band, after which an unscrupulous producer would take the recorded tune and "notify" it with SAMRO (i.e. register it as being a work in which he holds copyright). If the artist would not have embodied the song in material form prior to this, the producer would, under such circumstances, succeed in claiming copyright ownership on the basis of being able to prove an earlier date of material embodiment (the SAMRO notification, and producing by SAMRO of the original recording or sheet music lodged with it, being proof of such earlier embodiment).

²⁴¹ Garnett, Davis and Harbottle *Copinger and Skone James* 245. See also *Peter-Ross* 2008 JDR 0660 (C) at 17. See further in this regard the case of *Godfrey v Lees* [1995] E.M.L.R. 307, where a person who contributed orchestral arrangements to songs written by members of a pop band was seen to be a co-author.

²⁴² Garnett, Davis and Harbottle *id* at 247 – 248. This is important to note in view of the fact that many times unscrupulous studio producers demand of new artists that they should "recognise" them as co-authors of their works, in exchange for receiving assistance from them in securing recording deals or similar favours. Unless the artist-composer has specifically, in writing, assigned a share of his copyright in the song to such producer, the producer should not succeed in a claim of either co-authorship or co-ownership. Where such assignment has taken place however, the producer, under these circumstances, would become a co-owner of the copyright but not a co-author.

²⁴³ See *Feldman NO v Emi Music SA (Pty) Ltd; Feldman NO v Emi Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA).

inseparable or interdependent parts of a unitary whole.”²⁴⁴ An example of an *inseparable* joint work is a novel or painting, and an example of an *interdependent* joint work is the words and music of a musical composition.²⁴⁵ The effect of a joint work is that each author is regarded “as the joint owner of an undivided interest in the entire work”.²⁴⁶ Thus the joint work, even in the case of an interdependent work which may, in effect, comprise of two different works (as in the case of the words and music of a musical composition), is seen as constituting a *unitary work*²⁴⁷ in which the contributors become joint-authors.

It is submitted that South African copyright law does not make provision for a joint work that is in the nature of an interdependent work, providing instead only that “the contribution of each author [must] not [be] separable from the contribution of the other author or authors”.²⁴⁸ Joint work is thus in this regard, to be viewed in the sense of an *inseparable joint work* in US law, such as a novel or a painting. While a work comprising solely of music with no lyrics can be seen as a joint work, a musical work with lyrics must not, on the basis that someone contributed the musical work, while the other contributed the lyrics (i.e. the literary work), be seen as a joint work, as it is possible to separate the lyrics from the musical work. Thus in a musical work with lyrics, where the person who composed the musical work is different from the person who wrote the lyrics, two distinct works exist, even if the parties worked together in arriving at a final version of the music and the words. If that is the case, two joint works would exist (namely a joint musical work and a joint literary work).

This seems to be the issue that the court in *Feldman NO v EMI Music Publishing SA (Pty) Limited*, *Feldman NO v EMI Music (Pty) Limited*²⁴⁹ had to grapple with. In this case the court made the following observation:

It was also contended on behalf of the plaintiff that the requirements of the definition of “*Works of Joint Authorship*” in Section 1 of the Copyright Act, would not be satisfied, and consequently no joint ownership of copyright would vest, where the contributions of the various parties was capable of being differentiated. In this regard, the example of one person composing the music, and a second person writing the lyrics, was offered. This analogy is not apposite. In both the particulars of claim and in Annexure “A” thereto, the Late Brenda Fassie is identified as the joint author *and* the joint composer in respect of the works in question. On these particulars, the contribution of the various parties is consequently indistinguishable and inseparable from the contribution of other co-authors and composers.²⁵⁰

It appears in this case that the requirements of the definition of “work of joint authorship” was seen to have been satisfied because the late Brenda Fassie was both a joint author of the lyrics *and* a

²⁴⁴ 17 U.S.C. § 101, emphasis added. Lind *Copyright Law* 72 has divided this into a situation where (a) the authors collaborate with each other in creating the work; or (b) each of the authors prepare their contribution with the intention that it would be merged with the contribution of the other author/s as inseparable or interdependent parts of a unitary whole.

²⁴⁵ Lind *ibid*. See also Moser and Slay *Music Copyright Law* 49.

²⁴⁶ Valachovic 1992 *Loy. L.A. Ent. L. Rev.* 201, quoting Nimmer.

²⁴⁷ Valachovic *ibid*.

²⁴⁸ See definition of ‘work of joint authorship’, s 1 of the Copyright Act.

²⁴⁹ [2007] ZAGPHC 294.

²⁵⁰ *Id* at para 26. Emphasis added. See also *Feldman NO v EMI Music SA (Pty) Ltd / EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA) paras 6 and 7, where this reasoning was upheld.

joint author (i.e. a joint composer) of the musical works. She was thus a joint author in respect of two separate works. Having indicated this, for practical purposes,²⁵¹ in the computation of royalties, royalty-paying entities such as collecting societies and music publishers have treated the author of lyrics and the composer of the music in a song as *jointly sharing* in a hundred percent of the royalties payable in respect of the song as an inseparable work.²⁵²

7.3.1.21 Definition of “writing”

“Writing” “includes any form of notation, whether by hand or by printing, typewriting or any similar process”

With regard to this definition it is important that the expression “writing” has relevance to musical works not only in respect of the lyrics that are often associated with musical works, but also in relation to musical works in their own right. In this regard it has been observed:

To the extent that notation or words are written down *and are intended to represent sounds which qualify as music ...*, it seems *that they are excluded from the definition of literary work*, even though they can in one sense be read.²⁵³

7.3.2 Other relevant general sections of the Copyright Act

7.3.2.1 Section 1(2)(A) – A substantial part of the work

“Any reference in this Act to the doing of any act in relation to any work shall, unless the context otherwise indicates, be construed as a reference to the doing of any such act in relation to any substantial part of such work”

The concept of “substantial part” is a very important concept in copyright law, and more so in respect of music copyright where infringement is rife. Many musicians labour under the impression that “borrowing” (albeit without permission) from an existing song by taking only a “few” bars from the song would not constitute copyright. This however is not correct, as “substantial part” is reckoned on the basis of the “quality” rather than the “quantity” of what has been copied, so that “the unauthorised copying of a small but essential part of a work constitutes copyright infringement.”²⁵⁴ In the area of music, a short refrain or what is termed the “hook” of the song would often be seen as amounting to an essential part of the song.²⁵⁵

In the English case of *G. Ricordi & Co. v Clayton and Waller Ltd*²⁵⁶ it was held that taking eight bars from a song would constitute copyright infringement. Likewise, in *Hawkes & Son (London) Ltd v*

²⁵¹ Perhaps as an influence from the American situation, seeing that American practices have had a huge influence on the international music business.

²⁵² The writer has knowledge of this from his previous employment in the music industry.

²⁵³ Garnett, Davis and Harbottle *Copinger and Skone James* 97 – 98.

²⁵⁴ Dean and Karjiker *Handbook of Copyright Law* 1-65.

²⁵⁵ Garnett, Davis and Harbottle *Copinger and Skone James* 471.

²⁵⁶ [1928 – 1935] Mac.C.C. 398.

*Paramount Film Service Ltd*²⁵⁷ the copying of 28 bars, although it only amounted to less than a minute of a composition lasting for about four minutes, was considered to amount to a substantial part of the work. The determination of what constitutes a substantial part also often has to do with the degree of similarity between the original work and the alleged infringing work.²⁵⁸ In this regard what has to be considered is what is original in the original work, so that what would be considered as prior art in the original work would be excluded from the determination.²⁵⁹ In music rights cases evidence as to the degree of similarity between the two works is often led by experts, who are called in “to identify and explain the significance of similarities and differences between the works.”²⁶⁰

As indicated, the focus in this regard must be on what has been taken from the original work - particularly drawing the court’s attention to those parts of the work that are alleged to have been reproduced - and not what portion of the infringing work qualitatively infringes the original work.²⁶¹ As highlighted in Chapter 5 supra, what is copyrightable (or rather “what the copyright work is”) is not dependent upon what the claimant “chooses to say it is”, but is to be determined objectively by the court.²⁶² In this regard it was noted that a claimant may narrowly confine the subject-matter of his claim in order to deprive the defendant of a good defence to the effect that what he took did not amount to a substantial part.²⁶³ In this regard courts have warned against cherry-picking those features of the work that are the same with those of the alleged infringing work, as being the material copyright work, without regard to the surrounding melody (i.e. the notes, duration and rhythm).²⁶⁴

In the recent Australian Federal Court decision of *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited*²⁶⁵ the court distilled many of the principles relating to the concept of “substantial part” in respect of musical works, which are worth rehearsing hereunder:

- (a) In some musical works comprising of several smaller, discreet works (such as operas), copyright may subsist in an air or melody and may be infringed by copying a part or the whole of the air or melody. Essentially, “[t]here will be an infringement if that in which the whole meritorious part of the original work consists is incorporated in a new work.”²⁶⁶

²⁵⁷ [1934] Ch. 593.

²⁵⁸ Dean and Karjiker *Handbook of Copyright Law* 1-65 – 166. In *Jacana Education (Pty) Ltd v Frandsen Publishers* 624 JOC (T) the court (at 626) held that a substantially different arrangement of a grid (or table) did not infringe the copyright in the applicant’s grid because there was *no substantial similarity*, seeing that a grid is in itself, commonplace and thus does not qualify for copyright protection. Compare this with the English decision of *EMI Music Publishing Limited v Papathanasiou and others* [1993] E.M.L.R. 306, where the court held that a sequence of four notes (termed “the turn”) was “musical commonplace” and thus did not infringe upon the plaintiff’s copyright.

²⁵⁹ Dean and Karjiker *id* at 166.

²⁶⁰ Garnett, Davis and Harbottle *Copinger and Skone James* 471. In this regards the authors note (ibid) that “[a]lthough the court is often helped by such evidence, the issue of substantial part does not depend solely on a note for note comparison but must be determined by the ear as well as by the eye, for the most uneducated in music can recognise that an altered work of music is, in effect, the same as or is derived from the original work.” See also in this regard *Austin v Columbia Gramophone Company Limited* (1917 – 1923) Macg. Cop. Cas. 398.

²⁶¹ Dean and Karjiker *Handbook of Copyright Law* 1-67.

²⁶² *Coffey v Warner/Chappel Music Ltd* [2005] F.S.R. 34, at para 10.

²⁶³ Ibid.

²⁶⁴ See *id* at para 11.

²⁶⁵ [2011] FCAFC 47.

²⁶⁶ At para 45.

- (b) Copyright shall be infringed if all the bars that “consecutively form an entire air or melody” are copied without material alteration. However, if the bars are taken in a different order or broken by an intersection of other bars this will not necessarily constitute infringement of the original work. Furthermore, the adaptation of an air or melody by transferring it from one instrument to another, if such air or melody “can still be recognised by the ear” would constitute infringement.²⁶⁷
- (c) Infringement shall take place when the substance of the original work is taken, even if the actual notes are not taken, such as where the new work is arrived at by imitation and appropriation.²⁶⁸
- (d) “... The originality of a particular musical work may be due, not to the sequence of the notes, but to the treatment, accentuation and orchestration by the composer.” Furthermore, “[it] is the musical work as a whole that is entitled to the protection of copyright”, and even where the bars of a song may be seen to constitute a substantial part, there will be no infringement of copyright if such bars “are not the most distinctive or important part of the original air”.²⁶⁹
- (e) “When dealing with the word **substantial** in the context of infringement of copyright in a musical work, it is appropriate to consider whether or not the amount of the copyright musical work that is taken is so slender that it would be impossible to recognise it However, even though the alleged infringement is not very prolonged in its reproduction, there will nevertheless be infringement if what is reproduced is a substantial, vital and essential part of the original”²⁷⁰
- (f) Further to the above, “there will be infringement if the bars of a musical work that are taken contain what constitutes the principal air or melody of the copyright work, which anyone who heard the alleged infringing work would recognise as being the essential air or melody of the copyright work. ...”²⁷¹
- (g) When determining whether a musical work infringes the copyright in another, it is often appropriate to analyse the musical features and structure of both works, noting the points of similarity and difference in order to determine if the degree of similarity is definite or considerable.²⁷²
- (h) A part that is not original would not constitute a substantial part as there is no copyright in an unoriginal part that may, however form part of a whole in which copyright subsists.²⁷³ Furthermore, the part taken from the original work, though required to be substantial, does not need to form a substantial part of the infringing work, and a substantial part can be taken

²⁶⁷ At para 46.

²⁶⁸ At para 47.

²⁶⁹ At para 48.

²⁷⁰ At para 49.

²⁷¹ Ibid.

²⁷² At para 50.

²⁷³ At para 52.

from the original work even if the infringing work bears no resemblance to the original work.²⁷⁴

7.3.2.2 Section 1(2)(3) – *application of Act in respect of ships and aircraft*

“The provisions of this Act shall with reference to any act or omission outside the territorial limits of the Republic by or on any ship or aircraft registered under any law in the Republic apply in the same manner as it applies with reference to acts or omissions within the territorial limits of the Republic”

This provision clearly arises from the international law rule that ships sailing on international waters (the “high seas”) and aircraft flying in international airspace need to bear the nationality of (and fly the flag of, in the case of ships, or bear the registration markings of, in the case of aircraft), the State in which they are registered, which then exercises jurisdiction over them.²⁷⁵ On this basis, collective management organisations have tariffs that apply in respect of the usage of music in aircrafts. Thus the scope of the airline tariff of the UK performing rights society, PRS for Music, relates to “performances of copyright music ... in aircraft registered in the United Kingdom by any means other than by live performance”,²⁷⁶ including but not limited to radio or television; record or compact disc players; audio or video tape players; cinematograph equipment and “any other mechanical and / or electronic device(s) for performing musical works”.²⁷⁷ Frith²⁷⁸ illustrates the significance of royalty income from this type of tariff in respect of the PRS’ licence to British Airways, in the following manner:

In 1997 the PRS received a little under £1m from airlines for the rights to play PRS members’ works as part of inflight entertainment and as piped-in ‘taking-off and landing music’. The fee charged to each airline was calculated according to the number of passengers hours involved ... In 1998 British Airways appealed to the Copyright Tribunal for a reduction in its annual fee (which the PRS had raised to £953,000). BA argued that this fee was unreasonable when compared with the fees charged by ASCAP and BMI to airlines using US airports ... [and] made a number of other points about the unfairness of the existing airline fee formula. [It was argued that] [m]ost passengers ... weren’t actually listening to music during take-off and landing; no passengers were listening when inflight

²⁷⁴ At para 53. This is because the question as to whether a part is substantial depends upon the part’s importance to the original work and not its importance to the infringing work. Ibid.

²⁷⁵ Although, in respect of aircraft, it is the State over whose air space an aircraft is flying that has jurisdiction thereto. See in this regard Art. 17 of the Convention on International Civil Aviation of 1944 (the Chicago Convention) and Art. 91 of the United Nations Convention on the Law of the Sea, 1982. South Africa is a party to the Chicago Convention and has incorporated it into municipal law through the Civil Aviation Act 13 of 2009. Jurisdiction over ships is dealt with through the Ship Registration Act 58 of 1998. See further in this regard Dugard *International Law* 366 – 399.

²⁷⁶ The fact that live performances are excluded presumably arises from the fact that live music rarely takes place in moving airplanes. The provision however, would also allow the PRS to claim further royalty payments in the event that such live performance takes place, as has recently been reported in respect of the so-called “I’m with the band” concept, in which “intimate performances by popular musicians” take place in-flight. See in this regard <http://www.forbes.com/sites/leorgalil/2012/08/31/can-live-music-work-as-in-flight-entertainment/> (date of use: 24 October 2013).

²⁷⁷ <https://pplprs.co.uk/wp-content/uploads/2018/02/Tariff-aircraft.pdf> (date of use: 16 February 2019); <http://www.prsformusic.com/SiteCollectionDocuments/PPS%20Tariffs/AC-2013-01%20Tariff.pdf>. (Date of use: 24 October 2013).

²⁷⁸ Frith “Music and the Media” in Frith and Marshall (eds) *Music and Copyright* 176 – 178.

entertainment was not available ...; few passengers listened to inflight services *all* the time they were available. The tribunal reduced the fee to £700,000.²⁷⁹

7.3.2.3 Section 1(2)(5) - *Publication*

This section deals with the issue of “publication”. See the discussion above on the meaning of “copy”, as well as below in Chapter 9 with regard to the recommendations relating to the proposed section 12B(6) in clause 13 of the Bill.

7.3.2.4 Section 3(2)(a) and (c) – *The term of copyright*

This section deals with the term, or duration of copyright. In the case of a literary and musical work the term of protection is the life of the author and fifty years “from the end of the year in which the author dies”. However, if the author died before the work, or its adaptation, was published, performed in public, offered for sale to the public by means of records, or broadcast, copyright shall continue to subsist in the work concerned for a period of fifty years “from the end of the year in which the first of the said acts is done”. This is a very important section to note in respect of music, since it happens many times that a prolific composer would die without having “released”, or done any of the afore-mentioned acts in respect of some of his works. In the case where for example, the work of a deceased composer is discovered fifteen years after the composer’s death, for the sake of argument – then the fifty years posthumous protection of the work shall only be counted from the end of the year in which any of the afore-mentioned acts first takes place.

It will be noticed that the acts mentioned in this section relate to most of the rights forming part of the bundle of rights in relation to musical and literary works but exclude the acts of reproduction and transmission in a diffusion service. It is submitted, in respect of the former, that its inclusion would be inferred from the fact that publication, performance in public, offering for sale and broadcasting would not be possible without prior reproduction of the work. However, it should be noted that the act of reproduction in itself, without being linked to or associated with one or more of the other acts, is not of much significance as it does not involve commercial exploitation or exchange.²⁸⁰ It is not clear however, why the legislature excluded the act of transmission of the work in a diffusion service, as this act does, in itself, involve commercial exploitation and rights-holders do issue licences in this regard.²⁸¹

Finally, section 43(d) provides, in respect of the term or period of subsistence of copyright applicable (for our purposes) to musical and literary works, where the author died prior to the exploitation of the

²⁷⁹ The Tribunal agreed that the method of calculation of music usage needed to be amended, but rejected the argument that passengers not using in-flight entertainment ought to be excluded from the calculation, as they could use the service if they chose. The Tribunal however, agreed that the calculation was to be based on the number of passengers and not on the length of the journey, ruling that ‘in future the PRS airline tariff should involve two rates – one for the inflight entertainment, another lower one for the take-off and landing music – a distinction which seemed to be based on the quality of the musical experience involved.’ *Id* at 178.

²⁸⁰ Commercial exploitation takes place within the context of “publication”.

²⁸¹ An example is a “music-on-hold” licence, which is a diffusion licence as it involves a transmissions taking place “over wires or other paths provided by material substance and intended for reception by specific members of the public” (see definition of “diffusion service” in s 1 of the Copyright Act and the discussion above in this regard).

work as contemplated in section 3(2)(a) (namely fifty years from the end of the year in which the first act of exploitation took place); that if this period would have expired at the commencement of the Copyright Amendment Act, 1984,

it shall be deemed that, subject to any rights acquired by any person after the lapse of that period and before the said commencement, copyright did not expire on [the ground of lapse of the said period].

7.3.2.5 Section 3(4) – *Term of protection in respect of works of joint-authorship*

“In the case of a work of joint authorship the reference ... to the death of the author shall be taken to refer to the author who dies last, whether or not he is a qualified person.”

In view of this, the term of copyright protection in certain cases could be fairly long in works of joint authorship. Suppose two persons co-author a musical work, both at the age of twenty (20). Composer A dies at the age of fifty (50), while composer B dies at the age of eighty (80). In terms of this provision, the copyright in the co-authored work will be durable for an effective posthumous period of eighty (80) years when reckoned from the end of the year in which composer A died. If however, the duration is reckoned to include the lifetime of both composers, the work would have been protected for a period of one hundred and thirty (130) years. Having indicated this, what was said above (when discussing the definition of “joint-authorship”) needs to be taken to note here – namely the fact that matters of joint authorship tend to be difficult to resolve. It may thus be left to the courts to rule as to whether a person claiming to be the last-dying of the co-authors of a work was in fact, a co-author – a determination that would have a bearing on whether copyright still subsists in the work concerned.

Where the assignee or heir of a person considered to be the last-dying of two or more co-authors exploits the work commercially by issuing licences in respect thereto and receiving payment of royalties, and it is found that the said person does not satisfy the requirements of co-author, disastrous outcomes can arise from such a situation. For example, the effect of such a ruling would be that the supposed rights-holder would have commercially exploited the work also in a period when the work had, in fact, gone into the public domain, i.e. at a time when it was freely available to be used by anyone without having to pay any compensation for such usage.²⁸² Any licences issued during such period would therefore, be of no effect, potentially making the “rights-holders” liable for repayment of any moneys received by way of royalties during the period. It is thus important to tread carefully in this situation.

7.3.2.6 Section 20 – *Moral rights*

Section 20 deals with moral rights. Moral rights are “the right to claim authorship of the work ... and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author”. This provision is akin to the provisions of

²⁸² This would be the period after fifty years since the death of the legitimate author.

article 6bis(1) of the Berne Convention.²⁸³ The right to claim authorship of the work is generally known as the *paternity right*, while the right to object to the distortion, mutilation or other modification of the work, where such action would be prejudicial to the honour and reputation of the author, is termed the *integrity right*.²⁸⁴ It needs to be noted that, under the current Copyright Act, the moral right applies in respect of literary and musical works, and not in respect of sound recordings.²⁸⁵ The moral rights of the author remain intact despite the transfer of copyright ownership in the work.

Regarding the *paternity right*, it has been said that the usage of the phrase “the right to *claim* authorship” implies that there is no obligation on others to recognise the author as such whenever the work is used, if the author has not “require[d] that authorship be attributed to him”.²⁸⁶ In *Technical Information Systems v Marcon*²⁸⁷ it was held that the removal of all references to the applicant as being the publisher of a computer programme constituted a violation of the applicant’s moral right to claim authorship in the programme, “thereby infringing such right and consequently the applicant’s copyright.” English law provides that any reasonable form of identification may be used to identify the author, unless the author has specified a particular form of identification, in which case such form should be used.²⁸⁸ Thus in the case of *Hyperion Records Ltd v Sawkins*,²⁸⁹ where the author’s contribution was merely acknowledged in the CD booklet (as one who had prepared performance materials),²⁹⁰ this was held as being inadequate to identify him as the author of the “performing editions”.²⁹¹ Furthermore, the form of identification “required” by the author in a

²⁸³ The wording is similar to that used in the Berne Convention except that the Berne Convention adds the phrase, “or other derogatory action in relation to ... the said work” after the words “distortion, mutilation or other modification of”. It is submitted however that the omission of this phrase does not detract from the full scope of the integrity right in South African law. As an illustration, English law, in dealing with the integrity right, simply provides for the right *not to have one’s work subjected to derogatory treatment* (s 80(1) of the UK Copyright Act). However, it is then provided that “the treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author ...” (s 80(2)(b)). Thus, within this context, the phrase “derogatory treatment” is seen as meaning the same thing as the phrase “distortion or mutilation” and “prejudicial to the honour or reputation of the author”.

²⁸⁴ See Dean *Copyright Law* 1-110. Civil jurisdictions often recognise two other forms of moral rights, namely the right of divulgation (i.e. the right to disclose the work) and the right of retraction (i.e. the right to retract the work from circulation if the author changes his mind). See Sterling *World Copyright Law* 1236.

²⁸⁵ Although it also applies in respect of artistic works, cinematograph works and computer programs. However, it needs to be noted that under the Copyright Amendment Bill 2017 approved by Parliament (version B13B – 2017) the moral right applies in respect of all works. See clause 21 of the Bill.

²⁸⁶ Dean and Karjiker *Handbook of Copyright Law* 1-112. This position would be consistent with English law, where the UK Copyright requires (in s 77) that the author must *assert* his right of identification. “Assert” is defined as “to *claim* that you have the right to do something”. <http://www.macmillandictionary.com/thesaurus/british/assert> (date of use: 27 October 2013) [Emphasis mine]. See also in this regard Sterling *id* at 782. Dean and Karjiker do not indicate how the author should “require” that authorship be attributed to him. In contrast, the UK Copyright Act provides, in terms of s 77, that the author’s right of identification is not infringed unless it has been asserted in terms of s 78, which in turn provides that the right “may be asserted either in an instrument of assignment of the copyright or by instrument in writing signed by the author.” However, while Dean and Karjiker (*ibid*) suggest that where someone else wrongly claims to be the author of the work, “then such a claim would *ipso facto* impinge upon the author’s right to claim authorship of that work” (impliedly even if the author had not “claimed” attribution as such), the English Chancery Division held in *Christoffer v Poseidon Film Distributors* [2000] E.C.D.R. 487, at G.2., where the claimants had argued that film credits did not identify them as authors of scripts that they alleged to have written (and where another was identified as the author), that because the authors had not asserted their identification as required by s 78, “even if they are authors of three of the scripts which have been filmed (which they probably are, although Poseidon does not admit it), Poseidon has not infringed their rights under section 77.” Garnett, Davis and Harbottle *Copinger and Skone James* 717 have acknowledged that this requirement in English law imposes “[a]n important and controversial hurdle”.

²⁸⁷ 1047 JOC (T) para 55.

²⁸⁸ Section 77(8) of the UK Copyright Act.

²⁸⁹ [2005] EWCA Civ 565.

²⁹⁰ In the following manner: “With thanks to Dr Lionel Sawkins for his preparation of performance materials for this recording”.

²⁹¹ *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565 at para 67.

letter was not followed.²⁹² Consequently the court held: “Although the CD sleeve named Dr Sawkins, it did not identify his authorship.”²⁹³

With regard to the *integrity right* the Copyright Act does not give an indication of the types of acts that would constitute “distortion, mutilation or other modification”, as well as what would amount to action that is “prejudicial to the honour or reputation of the author”. In this regard it is submitted that South Africa can draw inspiration from the manner in which this matter is dealt with in English law, in particular because English law *generally* employs the same linguistic usage in dealing with this right as does South African law, as both draw from the Berne Convention. English law defines the integrity right as “the right ... not to have [one’s] work subjected to derogatory treatment”.²⁹⁴ “Derogatory treatment” is then defined as treatment which “amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director”.²⁹⁵ It is however, the definition of “treatment” that sheds more light as to the types of acts that would infringe the integrity right. In this regard “treatment”, in respect of a work, is defined as

any addition to, deletion from or alteration to or adaptation of the work, other than—

- (i) a translation of a literary or dramatic work, or
- (ii) an arrangement or transcription of a musical work involving no more than a change of key or register.²⁹⁶

Examples of acts that have been held to constitute “treatment” are: adding a single word to a poem (which, it is submitted, would include adding a word to the lyrics of a song); destroying an entire work, even if the work “remains recognisable as such”; altering a single note of a musical work, and “virtually any change to the work”.²⁹⁷ However, in English law the ambit of “treatment” does not extend to translations of literary and dramatic works (as in the translation of lyrics from one language to another) and an arrangement or transcription of a musical work “involving no more than a change of key or register”, on the ground that “such changes would not affect the basic integrity of the work.”²⁹⁸ This exclusion has however, been criticised as not being capable of justification under the Berne Convention, seeing that “if a translation or change of key or register is so inept or unsuitable

²⁹² *Ibid.*

²⁹³ *Id* at para 69.

²⁹⁴ Section 80(1), UK Copyright Act.

²⁹⁵ Section 80(2)(b), UK Copyright Act.

²⁹⁶ Section 80(2)(a), UK Copyright Act.

²⁹⁷ Garnett, Davis and Harbottle *Copinger and Skone James* 728. Unlike in English law, however, in our law, the author who authorises the use of his work in a cinematograph film (e.g. through a synchronisation licence or a public performance licence) or a television broadcast; the author of a computer program or the author of a “work associated with a computer program” (such as, for present purposes, a computer-generated musical work as dealt with above), “may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work” (i.e. – with regard to the later instance – if it is deemed to be absolutely necessary to ensure commercial viability) (s 20(1) of the Copyright Act). It needs to be noted that this exception applies only in respect of *modifications*, and where such modifications are *absolutely necessary*. The exception does not therefore, apply in respect of distortions and mutilations of a work. See Dean and Karjiker *Handbook of Copyright Law* 1-112 – 1-113, where the learned author continues to highlight the difficulty that may be experienced “in practice to distinguish between changes which are, on the one hand, modifications and those which, on the other hand, are distortions or mutilations.”

²⁹⁸ Garnett, Davis and Harbottle *id* at 728 – 729.

as to amount to a derogatory treatment, there seems no good reason why the author should not have a remedy.”²⁹⁹

It has been noted that the integrity right would apply even if the prohibited act is carried out in respect of an addition to, deletion from or alteration to or adaptation of (i.e. treatment of) the work, which was carried out by someone other than the author, “if the result is seen to be the work of the original author.”³⁰⁰ Furthermore, action which is a distortion or mutilation would not constitute infringement of the author’s integrity right unless it is also prejudicial to the honour or reputation of the author.³⁰¹ In this regard it has been observed that if there was no such qualification, this provision “would pose great difficulties in its application” because of its subjective nature, as the author might consider action (such as editing) carried out in respect of his work as seriously impairing the work’s worth, while others may see the alteration as being insignificant, or even as an improvement.³⁰² The distortion of a work is said to involve “some form of twisting or perversion”, while mutilation “involves some form of cutting or destruction so as to render it imperfect”.³⁰³ Prejudicial treatment on the other hand, refers to all usages of the work, which, though not amounting to a distortion or mutilation,³⁰⁴ “is nevertheless prejudicial to the honour or reputation of the author”, although it would not be easy to think of examples in this regard.³⁰⁵

There are conflicting positions as to the duration of moral rights, namely Dean and Karjiker’s position that it is for the term of the copyright in the work or the life of the author, whichever is shorter; Visser *et al*’s position that it is for the full duration of the copyright in the work, since the Copyright Act is silent on the issue and seeing that moral rights emanate from copyright; and Copeling’s position that it is for the full term of copyright, on the basis of an interpretation of article 6*bis* of the Berne Convention.³⁰⁶ Dealing with this question, Garnett, Davis and Harbottle have observed that this “has been a matter of controversy in the international treatment of these rights.”³⁰⁷ It appears to the current writer that Dean and Karjiker’s position has more plausibility.³⁰⁸ The fact that moral rights,

²⁹⁹ *Id* at 729. It is submitted that where a usage is likewise seen by our courts as not being justifiable from an interpretation of the Berne Convention, such usage should not be excluded from the ambit of the integrity right. This would be a useful test in determining the ambit of this right, while of course, taking cognisance of the fact that the Berne Convention in itself “does not form part of our law ... [and] is [thus] not directly justiciable in our courts.” *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* (6) SA 329 (SCA) para 18.

³⁰⁰ Garnett, Davis and Harbottle *id* at 729. In this regard the authors give the example of a novel that is edited by the publisher, where another makes a dramatization of the edited version. In such an instance the author remains the recognisable author of the edited version also. In relation to music an example can be given of a musical work that is arranged (or rather “adapted”) by an arranger in the “hired-gun” scenario dealt with in the commentary on the definition of “adaptation” above. Under such circumstances, the author of the original work would remain the author of the arranged work.

³⁰¹ *Ibid*.

³⁰² *Id* at 729 – 730.

³⁰³ *Id* at 730.

³⁰⁴ And one may add, “or other modification”.

³⁰⁵ Garnett, Davis and Harbottle *Copinger and Skone James* 730. It is however submitted that the conclusion by the authors (*ibid*) that the expression “distortion, mutilation, [as well as, in our law, “other modification”] or other prejudicial treatment ‘further cut[s] down the ambit of “treatment” from its defined meaning’, while applicable to UK copyright law, would not be applicable to our law because while the definition of “treatment” is mandatory and prescriptive in UK law, it would, in our law, only serve as a guide as to what constitutes action that would infringe upon the author’s integrity right.

³⁰⁶ See in this regard Klopper *et al Law of Intellectual Property* 181.

³⁰⁷ Garnett, Davis and Harbottle *Copinger and Skone James* 742.

³⁰⁸ For more on this view see Dean and Karjiker *Copyright Law* 1-111 – 1-112. Essentially the authors make reference to two scenarios, namely (i) where the term is “co-terminous” with the copyright in the work, and (ii) where the term expires

just like personality rights, adhere in the person of the author, are not transmittable and are only enforceable by the author, would strengthen this position.³⁰⁹ However, the position has been vehemently opposed by some.³¹⁰ The main thrust of this opposition is the argument that “[t]he author’s moral rights form part of his or her copyright and are not rights of personality” and further that there is no reason why these rights “cannot be transferred expressly.”³¹¹

Notwithstanding the foregoing, the position that moral rights are in the nature of personality rights is however, one that is generally accepted, particularly as a result of their emanation from the Continental *droit moral* and the latter’s roots in Kantian and Hegelian personhood theories.³¹² So is the position that they are unalienable,³¹³ so that Klopper *et al*’s view that “[t]here does not appear to be any reason why these rights cannot be transferred expressly”³¹⁴ seems rather far-fetched. Although moral rights may at times devolve to heirs, this is something that is left to national legislation to determine.³¹⁵ In this regard support for Dean and Karjiker’s view that moral rights, in the case of a natural person, would cease to exist at the person’s death, can further be found on the fact that the Brussels text of the Berne Convention, which South Africa acceded to in respect of substantive provisions,³¹⁶ only *requires* that moral rights are protected for the author’s lifetime. In this regard the Brussels text leaves it to national legislation to extend this protection until the expiration of copyright in the work.³¹⁷ Seeing that the South African Copyright Act has not made any provision regarding the duration of moral rights, Dean and Karjiker’s position appears to be the most plausible under these circumstances.

It is also important to note that the infringement of moral rights is treated as being an infringement of the copyright in the work so that the author can institute infringement proceedings as if he were the owner of the copyright in the work.³¹⁸ Furthermore, it needs to be noted that the author’s moral rights supersede the instances of copyright created by operation of law mentioned in s 21(b), (c) and (d) of

before the termination of copyright in the work. The former case would take place where the author of the work is a juristic person, which can also enjoy moral rights. In such a case the moral rights would expire when the copyright in the work expires. On the other hand, the latter case relates to the situation where the author is a natural person, in which case the moral rights would expire at the person’s death; or in the case where the author is a juristic person, if the juristic person ceases to exist prior to the expiration of copyright in the work concerned. This argument seems more plausible because it places an emphasis on moral rights adhering in the person of the author, in the nature of a personality right, which itself is also concerned with “the honour and reputation of the individual and the right to control the use of his identity”, and which, like moral rights, are not transferable to heirs (and by implication, to other successors-in-title). Note however, regarding the devolution of moral rights to heirs that it is, many times accepted that that these rights “may descend to heirs or successors in title under testamentary dispositions.” Sterling *World Copyright Law* 393. In this instance *it is left to national legislation to determine how this matter is to be dealt with*. Thus the UK Copyright Act, ss 95(1)(a), provides for the moral right to pass to such persons as the author may specifically direct by testamentary disposition.

³⁰⁹ There is, of course, controversy or rather some uncertainty as to whether moral rights should only adhere in natural persons, or whether they should extend to juristic persons. See in this regard Sterling *World Copyright Law* 393.

³¹⁰ See in this regard Klopper *et al* *Law of Intellectual Property* 194.

³¹¹ *Ibid*.

³¹² See in this regard generally Garnett, Davis and Harbottle *Copinger and Skone James* 707; Sterling *World Copyright Law* 392; Priya 2008 *Nujs Law Review* 363 and Weir 1992 *Australian Intellectual Property Journal* 232.

³¹³ See for example Sterling *id* at 393 and Garnett, Davis and Harbottle *id* at 707 and 743. Moral rights can however, be waived, “like all personal rights”. Visser (gen. ed) *Mercantile & Company Law* 733.

³¹⁴ Klopper *et al* *Law of Intellectual Property* 194. Emphasis added.

³¹⁵ See *supra* n 583.

³¹⁶ See in this regard Dean and Karjiker *Handbook of Copyright Law* 1-166. South Africa only subscribes to the Paris text of the Berne Convention in respect of its administrative provisions (*ibid*).

³¹⁷ See in this regard Garnett, Davis and Harbottle *Copinger and Skone James* 742.

³¹⁸ Section 20(2) of the Copyright Act.

the Copyright Act. This means that the author of a literary or a musical work created in the course of such author's employment, and the author of a sound recording created under a commissioning agreement retains his or its moral rights in such work despite not being the owner of copyright thereto. A final consideration regarding this subject relates to the use of a work "in a context which may be highly injurious to the reputation of the author", such as where, for example, the work of a Christian artist singing Gospel music is used in a sexually-explicit music video.³¹⁹ It has been said that "as a matter of UK law" such action would not amount to "derogatory treatment", seeing that the definition of "treatment" in UK law is limited to "addition, deletion, alteration or adaptation", so that the use of the work may be derogatory, while its "treatment" is not.³²⁰ It is submitted that this is as far as South African law can borrow from UK law with regard to acts that would constitute an infringement of the author's moral rights. A resort to the provisions of the South African Act would, it is submitting, render such conduct as infringing the moral rights of the author.

In this regard Garnett, Davis and Harbottle³²¹ acknowledge the fact that this outcome in UK law "appears not to be consistent with art.6bis of the Berne Convention", in particular its reference to the author's right to object to *any derogatory action*³²² which would be prejudicial to his honour or reputation. It is submitted that in South African law the use of an author's work out of context as explained herein would clearly amount to *action* that "is or would be prejudicial to the honour or reputation of the author."³²³

7.3.2.7 Section 21 – Copyright conferred by operation of law

³¹⁹ Seeing that Christians generally consider such conduct as morally reprehensible.

³²⁰ Garnett, Davis and Harbottle *Copinger and Skone James* 732.

³²¹ Garnett, Davis and Harbottle *op cit* note 490.

³²² Thus not limited to the acts that UK law define as "treatment" that is derogatory.

³²³ Such as the author's reputation as a renown Gospel composer. An example of a music case where an issue of this nature arose is the US Supreme Court case of *Shostakovich v Twentieth Century-Fox Corp.* 196 Misc. 67 (1948), where the plaintiffs, Russian composers, objected to the unauthorised use of their musical works in a film titled "The Iron Curtain" (which dealt with conditions in Soviet Union), on the ground, *inter alia*, that such usage infringed upon their moral rights (despite the works being in the public domain in the United States). The plaintiffs sought to permanently enjoin the use of their names and music in the film "and in any advertising and publicity matter relating to it". The "gravamen of plaintiffs' charge" was "that by the portrayal of the espionage activities of the representatives of the Union of Soviet Socialist Republics in Canada and by the depicted disowning of these activities by one of these representatives a picture with an anti-Soviet theme has been published." It was then argued that the use of the plaintiff's music in such a picture implied their "approval", "endorsement" and "participation" therein thereby casting upon them "the false imputation of being disloyal to their country" (69 – 70). It was then argued that the use of the plaintiff's names and music necessarily implied their consent, approval or collaboration in the production and distribution of the film, "because "the public at large knows that living composers receive payment for the use of their names and creations in films" (at 70). The court found that the use of the plaintiffs compositions in the film did not warrant a restraint order under the US Civil Rights Law because the works were not protected by copyright; it was further held that the usage did not amount to defamation and that there was no evidence that the usage had caused harm to the authors or that the usage violated the authors' moral rights (arising also from the fact that the position on moral rights in the United States at the time was not clear. Current US law does not provide for moral rights except in respect of visual works). In denying the claim of violation of the authors' moral rights the court said: "There is no charge of distortion of the compositions nor any claim that they have not been faithfully reproduced. Conceivably, under the doctrine of moral right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's rights." (at 70). However, on the same facts the French court, in *Societe Le Chant du Monde v. Societe Fox Europe and Societe Fox Americaine Twentieth Century* held that the composers' moral rights were violated and ordered the film to be seized. See for a discussion of these cases Strauss 1955 *American Journal of Comparative Law* 506.

This section deals with instances of copyright created “by operation of law”.³²⁴ Section 21(1)(b) and (d) deals with cases where copyright is created in the course of a person’s employment,³²⁵ while section 21(1)(c) deals with the instance where copyright is created through a commission.³²⁶ It is submitted that these cases (and more particularly the commissioning situation) can best be understood from a simple understanding of the concept of “works-made-for-hire” used in United States copyright law. In other words, these are instances where copyright does not belong to the author but rather belongs to the person who *hired* the author to create the copyright work.

It is important to, in particular, consider the types of works that may be subject to a commissioning arrangement in terms of section 21(1)(c), since confusion often arises in this regard. While all works would be subject to the position regarding ownership of copyright by the employer when the work is created in the course of a person’s employment,³²⁷ it is clear, from the reading of section 21(1)(c), that not all works are subject to the transmission of copyright through commissioning. In relation to music copyright it would be noticed that only sound recordings are subject to the commissioning regime, and that copyright in literary works (i.e. lyrics) and musical works cannot be transmitted through commissioning. This is important to note because often in the music industry people speak about “commissioning a composition”, implying “commissioning” the making of a musical work (and many times, with the attendant lyrics). A musical or literary work cannot however, be “commissioned” within the meaning of the word in the Copyright Act. It is thus submitted that any such purported “commissioning” of a musical or literary work will not result in the transmission of copyright from the author to the purported commissioner, unless the transaction complies with the requirements for transfer of copyright by means of a written assignment.³²⁸

In other words, in order to transfer ownership of copyright in a musical or literary work, it would be important to effect a valid instrument of assignment, and any purported commissioning of the musical or literary work, if it does not satisfy the requirements for a valid assignment, would be of no effect.³²⁹ The fact therefore, that a “commissioning agreement” in respect of *musical* or *literary* works was entered into does not mean that there was a transference of copyright to the commissioner if a

³²⁴ See s 22(1) which mentions three ways in which copyright may be transmitted, namely (i) by assignment, (ii) by testamentary disposition or (iii) *by operation of law*. It is acknowledged that the phrase “by operation of law” is generally understood to refer to cases where copyright devolves in instances such as death, insolvency of the copyright owner and execution by a judgment creditor. See for example in this regard Garnett, Davis and Harbottle *Copinger and Skone James* 315 – 319. However, it is contended that there is no reason why, *under our law*, all other instances where copyright is not transmitted (i) by assignment or (ii) by testamentary disposition, as provided for in s 22, these should not then be seen as instances where copyright is transmitted *by operation of law*, seeing that s 22(1) admits of only these three manners through which copyright may be transmitted. Accordingly, transmission of copyright through the system of commissioning and where copyright work is created by an employee in the course of the employee’s employment must of necessity be seen to be a case where the copyright was transmitted by operation of law.

³²⁵ See generally in this regard *King v South African Weather Services* 2009 (3) SA 13 (SCA).

³²⁶ A commission is “an instruction by one person to another person and when the receiver of the instruction accepts it an agreement comes into being between the parties.” Dean and Karjiker *Handbook of Copyright Law* 1-39.

³²⁷ Through a reading of s 21(1)(d).

³²⁸ Dean and Karjiker *Copyright Law* 1-142 – 1-147 deals comprehensively with the requirements for a valid assignment. For example it is stated that “[t]here must ... be an agreement to assign or cede, ie there must be a mutual intention to transfer rights by offer and acceptance. If the underlying agreement which gives rise to the assignment is invalid – for instance there was no consensus ad idem between the parties or there had been a Justus error on the part of the parties – no valid assignment can take place even if on the face of it the requirements set forth in the Act have been met.” *Id* at 1-143.

³²⁹ See also in this regard Smith *Copyright Companion* 13 – 14.

written assignment of copyright was not concomitantly (or separately) effected. On the other hand, a commissioning agreement (just like an employment relationship) does not have to be in writing, and, if it is submitted, can be implied from the facts. The effect of the section 21(1)(b) – (d) provisions is to put aside the rule in respect of first ownership of copyright works, as provided for in section 21(1)(a), which states that the author is the first owner of copyright in a work.³³⁰ Instead, these provisions confer first ownership of copyright on someone other than the author “by operation of law”.

This position is not, however, absolute, as such ownership can, in terms of section 21(1)(e), be specifically excluded by agreement.³³¹ Furthermore, in all these instances, the author’s moral rights remain intact, as indicated above.³³² It would be useful to indicate that while the commissioning provisions in respect of sound recordings find general application in the mainstream *commercial* recording business, the provisions relating to ownership of musical works in an employment scenario are not very prevalent.³³³

7.3.2.8 Section 22 – Assignment and licences in respect of copyright

It is important, in considering the provisions of section 22 to indicate that the Copyright Amendment Bill proposes to make far-reaching amendments to this section that are also important to consider, in the event that the Bill becomes law. For this reason the discussion here is divided into a consideration of the current provisions and a consideration of the provisions in terms of the Bill.

(a) A Consideration of the Provisions of the Copyright Act

The current position in relation to the provisions of section 22 can be summed up as follows:

- (a) Just as with assignment, both existing and future copyright may be transmitted as movable property by testamentary disposition.³³⁴ In the same vein, copyright can pass to the heirs in

³³⁰ Section 21(1)(a) provides that “the ownership of any copyright conferred by section 3 or 4 on any work shall vest in the author or, in the case of a work of joint authorship, in the co-authors of the work.” This has been termed the “first-ownership rule”. S 21(1)(a) does not, of course, use the phrase “first owner”. Other legislations are more explicit in this regard; for example the UK Copyright Act provides in s 11(1) that “[t]he author of a work is the first owner of copyright”. Likewise the US Copyright Act provides: “Copyright in a work protected under this title vests initially in the author or authors or authors of the work.” 17 USC § 201(a). However note that s 21(2) provides that copyright in a work created under the control and direction of the State or an international organisation shall vest initially in the State or such organisation. This presupposes that the State or such international organisation may later transfer ownership of such copyright to another (including the author). Thus if a composer composes a musical work under the control and direction of the State, the copyright would belong to the State, but the State could assign the copyright to the composer. However note that the Bill proposes to change this position under clause 23(a) of the Bill, where it is provided that “copyright owned by, vested in or under the custody of the state may not be assigned.”

³³¹ The agreement does not have to be in writing and can be tacit or oral. Dean and Karjiker *Copyright Law* 1-42.

³³² Pursuant to s 22(1)(e).

³³³ In this regard the emphasis is on the *commercial* recording business, that is, that part of the sound recording business that has to do with the release of “hits” in particular, or popular music recordings in general. This is to be contrasted from the field of so-called production music (also termed “library music” or “stock music”), i.e., recorded music produced and owned by production music “houses”, for licensing in films, television, radio and other media. See <https://www.warnerchappellpm.com/production-music/> (date of use: 23 July 2019). In the case of production music the copyright in the sound recording and in the underlying musical works is generally owned 100% by one entity, namely the production music publisher. The composers who create the music are either employed by the publisher or “commissioned” to do so on a case-by-case basis. Other content-based entities such as media producers involved in the advertising industry may also see the need to employ “staff writers” to write music for specific usages.

³³⁴ Section 22(1) and (5).

terms of the laws of intestate succession where there was no will.³³⁵ In all these cases the copyright forms part of the copyright owner's deceased estate and will pass to the heirs in the normal way after winding up of the estate. In *Disney Enterprises Inc v Griesel NO & Others*³³⁶ the executor (or estate representative) represented the author's deceased estate with regard to an application relating to a claim of copyright infringement in respect of the author's musical copyright.

- (b) Furthermore, a testamentary disposition, just as with an assignment, can be limited in respect of only some of the acts constituting the bundle of rights in respect of a work; or in respect of part of the term of copyright in the work, or in respect of a specified country or geographical area.³³⁷
- (c) Where a deceased copyright owner bequeaths to an heir "material on which a work is *first* written or otherwise recorded", such bequest shall be taken to include the copyright or future copyright embodied in such work and vesting in the deceased at the time of death.³³⁸ This provision is an exception to the general position that the transfer of title in the physical material does not, without a specific transfer of the underlying copyright, entail a transfer of the ownership of such copyright.³³⁹ For example, a popular musician may, in his will, state: "I bequeath the Verbatim CD-R containing my unreleased [or unpublished] compositions to my son Harry." Harry would, on this basis, be taken to be the owner not only of the CD-R but also of the copyright in the said compositions.
- (d) Where the owner of copyright had granted a licence in respect of a work, such a licence will be binding on every successor-in-title (thus including an heir), except a purchaser in good faith who did not have notice, whether actual or constructive, of the existence of such a licence, or any person deriving title from such a purchaser. Furthermore, any act authorised by the grantee of a licence or a person deriving title from him, shall, if done within either the express or implied terms of such licence, be deemed to be done with the licence of the grantor and every person upon whom the licence is binding (thus also including any successor-in-title to the copyright concerned).
- (e) A last observation regarding the assignment of copyright to foreign persons warrants addressing here. Regulation 10(1)(c) of the Exchange Control Regulations³⁴⁰ requires the permission of the National Treasury prior to entering into any transaction in which capital or any right to capital is directly or indirectly exported from the Republic. In the case of *Couve*

³³⁵ See Smith *Copyright Companion* 14.

³³⁶ 895 JOC (T).

³³⁷ Section 22(2).

³³⁸ Section 22(6). Emphasis added.

³³⁹ See Dean and Karjiker *Handbook of Copyright Law* 1-147 – 1-148 and Garnett, Davis and Harbottle *Copinger and Skone James* 286 – 288.

³⁴⁰ Exchange Control Regulations of 1961, as amended by GN R.445 in GG 35430 of 8 June 2012 promulgated under the Currency and Exchanges Act 9 of 1933 (as amended).

*and Another v Reddot International (Pty) Limited and Another*³⁴¹ the question was whether the assignment of intellectual property in the form of patent rights, to a person or entity outside the Republic amounted to the export of capital as contemplated in the Exchange Control Regulations. The court decided in the affirmative, ruling that such an assignment, without the prior approval of the Treasury, contravened the provisions of Regulation 10(1)(c) and renders the assignment null and void. This decision was however overturned in the recent Appeal Court decision of *Oilwell v Protec International Ltd and Others*,³⁴² where the court found that the decision was incorrect and that intellectual property (this time in the form of trademarks) should not be regarded as capital for purposes of the Exchange Control Regulations.

(f) National Treasury however acted swiftly to restore the position under the *Couve* decision, amending the Exchange Control Regulations by including “any intellectual property right, *whether registered or unregistered*”, in the definition of “capital”, and by providing that the expression “exported from the public” includes “the assignment or transfer of any intellectual property right, to or in favour of a person who is not resident in the Republic.”³⁴³ It is submitted that subjecting the owners of copyright, as an unregistered intellectual property right, to the often expensive and complex process of obtaining exchange control approval, amounts to imposing unnecessary burdens on rightsholders. This is more so in the case of many forms of “cultural copyright” such as musical works and general arts and crafts, seeing that the authors of these works are usually small-scale players lacking the financial and other resources to function within such a sophisticated system.

(b) A Consideration of the Provisions proposed in the Copyright Amendment Bill³⁴⁴

(i) *Clause 23(a) of the Bill*

Clause 23(a) of the Bill amends section 22(1) of the Act by adding the proviso that “copyright owned by, vested in or under the custody of the state may not be assigned.”

Based on the observation above, where it is noted that currently the State may assign copyright vesting in it, it is now clear that the Bill introduces a different position, where the State may not assign copyright that vests in it. It is not clear why this proviso was introduced, but it may have to do with the row that erupted recently in respect of the national anthem, where claims of ownership of copyright in the anthem by individuals have been made.³⁴⁵ On face value it would appear that there is nothing untoward with a provision of this nature, as it would ensure that the State can be assured

³⁴¹ [2004] 6 SA 425 (W).

³⁴² [2011] ZASCA 29.

³⁴³ Regulation 10(4)(a) – (b). Emphasis added.

³⁴⁴ The discussion here relates to the version B13B-2017, currently awaiting the President’s signature and available at <https://pmg.org.za/bill/705/> (date of use: 2019).

³⁴⁵ See Chapter 5 supra.

of copyright ownership in circumstances similar to those relating to the making of the national anthem under the direction or control of the State, thus avoiding contestations. Indeed in the past legislation was passed in terms of which individuals assigned copyright to the State for purposes of State ownership of the national anthem.³⁴⁶

The problem however is that, phrased in the manner in which it has been phrased, the proviso introduced in clause 23(a) is not limited to the creation of the national anthem. It would in fact apply in all cases where copyright “is owned by, vested in or under the custody of the state”. The significance of this becomes clear when one considers that the term “state” would include entities known as organs of State, such as the South African Broadcasting Corporation (SABC).³⁴⁷ Understood from this perspective, the effect of the proviso introduced by clause 23 of the Bill is that under no circumstances may the SABC ever assign copyright to a composer who created copyright, whether under the circumstances provided for in section 5 of the Act or under those provided for in section 21.³⁴⁸

During the process of the public hearings in respect of the Bill a furore had erupted in respect of an earlier insertion in the Bill, namely the proposed amendment to section 5(2) of the Act by adding a provision that stated that the section also applied to works “funded by the State”. Read together with section 21(2), which provides that copyright conferred in terms of section 5 “shall initially vest in the state”, composers and other rights-holders argued that this meant that rights-holders were unlikely to own copyright in commissioned works, in terms of which the likes of the SABC paid for the making of the work “in money or money’s worth”, as contemplated in section 21(1)(c).³⁴⁹ What this means therefore is that the drafters of the Bill have stealthily brought back the harsh provisions in respect of ownership of copyright by the State, which had sparked an outcry. It appears however that rights-holder groups have not been able to detect this situation, in their sense of achievement and victory that section 5(2) of the Act that sought to introduce funding provisions in respect of ownership of copyright by the State, have now been removed. It is submitted therefore that the proposed amendment to section 22(1) of the Act through clause 23(a) of the Bill would have a

³⁴⁶ The “Stem Van Suid Afrika” Copyright Act 2 of 1959, whereby the heirs and administrator of the deceased estate of Cornelis Jakob Langenhoven assigned the copyright in the words and music of “Die Stem” to the South African government. See in this regard <http://blogs.sun.ac.za/jplaw/2012/06/18/an-anthem-to-ignorance-the-case-of-nkosi-sikelel-iafrika/> (date of use: 16 February 2019).

³⁴⁷ As an institution exercising public power the SABC is clearly an “organ of state” as contemplated in Section 239 of the Constitution of the Republic of South Africa, 1996. See further in this regard *Democratic Alliance v SABC and Others* Case No:12497/2014 (on appeal) at para 26.

³⁴⁸ It needs in this regard to be noted that the provisions of s 5 of the Copyright Act as they currently stand do not prohibit the assignment of copyright by the State; and further that the commissioning provisions of s 21 of the Copyright Act can be subjected to “any agreement excluding the operation thereof”, in terms of subsection (1)(d) thereof. Thus in *South African Broadcasting Corporation v Pollecutt* 1996 (1) SA 546 (A), where the SABC had commissioned the production of a film, “[i]t was a term of the appointment that the respondent would retain ownership of all his copyright in and to all music composed by him, but he granted the SABC “the perpetual right to broadcast the music and to license the broadcast of the music ...” This has been a common practice in commissioning arrangements, and gives the composers and musicians an opportunity to pursue other markets of exploitation for the musical works outside of broadcasting (e.g. commercial release of recordings), as was the case in the *Pollecutt* case.

³⁴⁹ This was compounded by the fact that earlier versions of the Bill made the provisions of section 21(1)(c) to apply in respect of all works and not only the works currently specifically mentioned therein (which exclude musical works, as highlighted above).

limiting effect on the ability of composers and other musicians to earn a living, as copyright shall under such circumstances never ever be assigned to them.

(ii) Clause 23(b) of the Bill – the proposed amendment to section 22(3) of the Act

In a working draft of version B13-2017 of the Bill considered prior to the final version approved by Parliament the proposed amendments to section 22(3) of the Bill limited the requirement for an assignment of copyright and an exclusive licence to be in writing only to literary and musical works. Furthermore, this would only be the case where such an assignment concerned the assignment of copyright “by an author to a publisher”,³⁵⁰ and further only in cases dealt with in the proposed Schedule 2 (i.e. in relation to see *translation licences*, as this is what Schedule 2 is concerned with). This would have been a grave error as it is an internationally-recognised legal position that an assignment of copyright and an exclusive licence have to be in writing *in respect of all works*. Fortunately this insertion has now been removed in the version approved by Parliament and awaiting the President’s signature (version B13B-2017).

What remains worrying about the proposed amendment to section 22(3) of the Act however is the subjection of the section to the proposed Schedule 2 to the Act.³⁵¹ It is submitted that subjecting the content of section 22(3) to the proposed Schedule 2 shall nullify the effect of this subsection, which is crucial because it deals with the fact that an assignment and an exclusive licence have to be in writing. By subjecting the subsection to Schedule 2 however this therefore means that only licences contemplated in that Schedule³⁵² will be required to be in writing (thus implying that all other licences do not need to comply with the writing requirement). This of course was clearly not the intention but this just illustrates what happens when those with no technical knowledge and expertise in legal subject-matter are tasked with writing legislation.

An important innovation in the proposed amendment to section 22(3) is the introduction of a proviso that states: “Provided that assignment of copyright in a literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment.” This is thus an attempt to introduce a

³⁵⁰ Clause 23(b) of Draft 3 of version B13-2017 of the Bill, available at <https://www.parliament.gov.za/storage/app/media/uploaded-files/Copyright%20Amendment%20Bill%20Draft.pdf> (date of use: 12 July 2019). This in essence meant that if the assignment was by an author to another person or entity that is not a publisher (e.g. to a construction company, for whatever reason), or if the assignment was by someone other than an author, e.g. an assignee of copyright, to another person, then the assignment provisions would not apply.

³⁵¹ The full proposed amendment to section 22(3) reads as follows: “No assignment of copyright and no exclusive licence to do an act which is subject to copyright *in such work* [sic] shall have effect unless it is in writing and signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sub-licence, the exclusive sub-licensor, *as stipulated in Schedule 2*”. Emphasis added.

³⁵² It appears that the intention with respect to the amendments proposed in terms of the Schedule 2 is to avail South Africa to the rights accorded to developing countries in respect of the translation and reproduction of works pursuant to the Appendix to the Berne Convention (although this seems to be a deviation from the provisions of the Appendix to the Berne Convention which makes provision for a system of non-exclusive and non-transferable licences. In this regard it needs to be mentioned that the Berne Convention requires a developing country that wishes to avail itself of the provisions of the Appendix to deposit a notification with the Director-General of WIPO to the effect that it will avail itself of such provisions (see art. 1 of the Appendix to the Berne Convention). If the insertion of Schedule 2 is an attempt by the drafters to avail South Africa to the provisions of the Appendix to the Berne Convention then it begs the question whether South Africa has deposited such a notification to the Director-General.

reversionary interest in relation to copyright in literary and musical works.³⁵³ In the writer's view this in fact is a good amendment and one of the few commendable amendments in the current Bill, as it will give more control to authors with regard to the exploitation of their works and finding new markets for the use of such works.³⁵⁴

(ii) Clause 23(b) of the Bill – the proposed amendment to section 22(4) of the Act

Another perplexing amendment is the proposed amendment to subsection 4 of section 22 of the Act. If the proposed amendments are accepted, this is how section 22(4) of the Copyright Act shall read:

(4) A non-exclusive licence to do an act which is subject to copyright may be verbal or in writing, or may be inferred from conduct, and may be revoked at any time: Provided that such a licence granted verbally or in writing, or an electronic equivalent thereof, shall not be revoked, either by the person who granted the licence or his or her successor in title, except as the contract may provide, by a further contract or by operation of law.³⁵⁵

The phrase “such a licence granted *verbally or in writing, or an electronic equivalent thereof*” replaced the phrase “such a licence granted *by contract*”. Deleting the phrase “by contract” and replacing it with the phrase “verbally or in writing, or an electronic equivalent thereof” *misses the point* with regard to the original intention relating to the section.³⁵⁶ The original wording is meant to illustrate that generally, a non-exclusive licence can be verbal or in writing, *and may be revoked at any time*. The principle of revocability of a non-exclusive licence was thus established. However the current provision goes further to state that where the non-exclusive licence is in writing, by means of a contract, it can only be revoked “as the contract may provide”.

Given the foregoing explanation the proposed amendments clearly miss the point. The insertion of the phrase “verbally or in writing, or an electronic equivalent thereof” suggests amongst others that a non-exclusive licence given verbally may only be revoked “as the contract may provide”. Firstly, this goes against the principle that a non-exclusive licence “may be revoked at any time”. Secondly,

³⁵³ See Chapter 3 above for a discussion of the reversionary interest provided for under the Imperial Copyright Act. Compare §203 of the US Copyright Act, which makes provision for a reversion (or the termination of a copyright transfer) after 35 years of such transfer. It is also worth noting that initially this proposed amendment applied to all works. After much lobbying, the drafters then limited this to literary and musical works. It is also worth mentioning that this proposed amendment is clearly an implementation of a recommendation in the CRC Report in this regard (see paragraph 10.12.10 of the CRC Report).

³⁵⁴ The writer has elsewhere strongly advocated for this, where the writer has argued that because of the transferability principle in copyright law emanating from the English copyright law tradition, many authors feel compelled to part with the copyright in their works through assignment, because of a low bargaining position and also because of lack of resources, which places them in a position where they cannot “act entrepreneurially” in respect of their works and thus feel that they need a partner to assist. At the time however where they are in a position to invest in the music careers, they awaken to the reality that they do not own copyright in their works and thus cannot use those works in entrepreneurial endeavours. See Baloyi 2014 *PELJ* 176 – 196 and generally.

³⁵⁵ The underlined parts reflect the proposed amendments introduced by the Bill. The italicisation is that of the writer, to highlight the problematic parts.

³⁵⁶ It is interesting in this regard that while the word “contract” is removed, it is later referred to (in line 5), yet in circumstances where there is no referral point for its usage. If the term was deleted and replaced with another phrase, why is it then resurrected here?

since the term “contract” is connected to the expression “in writing”, the proposed amendment suggests that a *verbal* non-exclusive licence *may be in writing*. This of course is not possible. The phrase “by a further contract or by operation of law” at the end *adds to the confusion*. Furthermore, although the phrase “or an electronic equivalent thereof” is useful to show that a contract made electronically would also satisfy the requirements of a contract, it is not necessary because the legal position in this regard is clear, especially in light of the provisions of the Electronic Communications and Transactions Act.³⁵⁷

7.3.2.9 Section 39 – Regulations

Section 39 provides that the Minister responsible for the Act (currently the Minister of Trade and Industry) may make regulations (i) relating to any matter required or permitted by the Act to be prescribed by Regulation; (ii) regarding the tariff of fees payable in respect of proceedings before the Copyright Tribunal, and the remuneration and allowances payable to members of the advisory committee contemplated in s 40, and its sub-committees, and the conditions of appointment of such members; (iii) in respect of the establishment, composition, funding and functions of the collecting societies contemplated in section 9A (i.e. the needle-time societies), and any matter necessary or expedient to ensure proper functioning of such societies, and (iv) generally, in respect of any matter which he deems necessary or expedient to prescribe to ensure achievement of the purposes of the Act. In the cases mentioned in (ii) – (iii) the relevant Minister makes the regulations in consultation with the Minister of Finance.

There are two main sets of regulations promulgated under the Copyright Act, namely those (i) relating to the general exceptions in respect of the reproduction of works, in terms of section 13; the special exception in respect of records of musical works in terms of section 14; authors of cinematograph films in terms of section 26(6), and the Copyright Tribunal in terms under sections 29 – 36 of the Act,³⁵⁸ and (ii) those relating to needle-time rights societies, as contemplated in section 39(cA) of the Copyright Act.³⁵⁹ Some confuse these two sets of regulations, often labouring under the impression that there is only one set of regulations.³⁶⁰

7.3.2.10 Section 41 – Savings

³⁵⁷ Act 25 of 2002.

³⁵⁸ The Copyright Regulations, 1978, published in GN R2530 in GG 6252 of 22 December 1978, as amended by GN R1211 in GG 9775 of 7 June 1985 and corrected by GN 1375 in GG 9807 of 28 June 1985 (the 1978 Regulations).

³⁵⁹ Regulations on the Establishment of Collecting Societies in the Music Industry GN 517 in GG 28894 of 1 June 2006 (the Needle-time Regulations).

³⁶⁰ See for example in this regard Ramsden *A Guide to Intellectual Property* 36 where the author, dealing with royalties payable in respect of needle-time rights as contemplated in s 9A of the Act, refers the reader to s 14 of the Act ‘for the regulations relating to royalties for sound recordings’, which he deals with under the general rubric of ‘the Copyright Regulations’ (see p. 43). This is further supported by the fact that, when later dealing with s 39 of the Act and the subject of regulations, the author further observes that “[a]ll references in this book to ‘the Copyright Regulations’ are to the 1978 Regulations (at 95). S 14 however has nothing to do with needle-time rights and deals rather with the special exception in respect of the manufacturing of records of musical works, something dealt with under the 1978 Regulations. The royalties contemplated in s 9A of the Copyright Act are instead dealt with under the Needle-time Regulations.”

No copyright “or right in the nature of copyright” subsists except in terms of the Copyright Act or similar legislation (section 41(4)). Copyright is thus a creature of statute and there is no common-law copyright.³⁶¹ Having indicated this, it is important to note that there are other areas of law outside the copyright system which often have a bearing on the activities of musicians and other persons or entities having exclusive rights in music and performances. Section 41(3) contemplates these cases when it provides:

The provisions of this Act shall not derogate from any rule of law relating to confidential or privileged information, unlawful competition or personality rights.

These areas represent very important interests for musicians and other “celebrities”, although they are not subject to copyright protection.³⁶² Dean and Karjiker indicate, and it is submitted correctly, that the right of privacy, the right to restrain unlawful competition and the right to restrain others from passing off their works as being those of the author constitute *special remedies* available to the author in addition of his right to restrain the infringement of the copyright in his work(s).³⁶³

7.3.2.11 Section 43 – Application of the Act to works made before the commencement of the Act

Section 43(a) (i) and (ii) provides that the Act applies in respect of works made before its commencement in the same way as it applies in respect of works after such commencement, provided that this shall not affect the application of the 1965 Copyright Act in respect of the ownership, duration or existence of copyright subsisting in terms of the said Act; and further subject to the fact that this shall not be construed as creating copyright in a work in which copyright could not subsist prior to 11 September 1965.

This establishes the important principle that copyright created under repealed legislation will continue to subsist under such previous legislation with regard to the question of who owns the copyright (which would of necessity include who the author is, seeing that the author is usually the first owner of copyright; as long as the requirements for the subsistence of copyright as provided for in such repealed legislation are met, and as long as the term of protection in respect of such

³⁶¹ See Ramsden *id* at 96. See also Dean and Karjiker *Handbook of Copyright Law* 1-4D.

³⁶² In this regard copyright (and trademark) law has been criticised as providing limited protection in these cases. See in this regard Louw *Sport Law* 446. The cases contemplated in s 41(3) of the Copyright Act often fall within the spectrum of privacy and / or publicity rights. In South Africa both the common law and the Constitution recognise a right of privacy, defined as comprising “the sum total of information or facts which pertain to an individual in the state of solitude [which] are thus excluded from disclosure to outsiders [and embrace] all personal facts”. Dean and Karjiker *Handbook of Copyright Law* 1-119. South African law recognises a privacy right both in terms of the common law and the Constitution. With regard to the common law position see Neethling, Potgieter and Visser *Law of Personality*, generally. The constitutional protection is provided for in terms of s 14 of the Constitution of the Republic of South Africa, 1996. South Africa recognises some form of publicity right (see regarding the ambit of this right the recent high court case of *Kumalo v Cycle Lab (Pty) Ltd* ZAGPJHC 56); however, such recognition falls short of that recognised in other jurisdictions such as the United States, where this is seen as “the right of each individual to control and profit from the commercial value of his or her own identity ... [protecting] the unauthorized commercial exploitation of a celebrity’s name ..., image, or likeness, as well as other aspects of identity such as biographical facts and records of performance.” Biederman *et al Law of the Entertainment Industries* 557. See in this regard generally Louw *Sports Law* 446 – 455.

³⁶³ Dean and Karjiker *Handbook of Copyright Law* 1-110. For the authors’ discussion of these rights see pp 1-114 – 1-120.

copyright has not expired.³⁶⁴ The scope of protection (i.e. relief sought) and issues relating to infringement are however, to be determined in terms of the current Copyright Act.³⁶⁵ The 1965 Copyright Act had similar provisions.³⁶⁶ This principle was applied successfully in the case of *Disney Enterprises Inc v Griesel NO & Others*,³⁶⁷ where the court accepted the arguments of the executor of the deceased estate of Solomon to the effect that the provisions related to the reversionary interest in the song *Mbube* (later adapted as *The Lion Sleeps Tonight* in the Disney movie *The Lion King*) under the 1916 Copyright Act continued to apply despite the repeal of the 1916 Act through the 1965 Act; and despite the repeal of the later Act through the 1978 Act.

7.4 Conclusion

This chapter was concerned with the exposition of relevant provisions within the Copyright Act that have a bearing on the protection of musical works, lyrics (protectable as literary works) and the concept of music in general.. In this sense the chapter provides the gist of what constitutes modern copyright law in relation to musical works in South Africa today. As part of the Chapter's explorations it was recognised that a brief overview of the US legal system and the historical and Constitutional basis of US copyright law needed to be considered. This was as a way of giving a sense to the complexity of United States copyright law owing the complexity of the US court systems. What necessitated this is the fact that several provisions of the Copyright Amendment Bill clearly derive from the position in US law, with the result that if the Bill is passed into law in its current state, South African judges would be compelled to refer to US copyright law on a number of occasions in order to adjudicate matters relating to such provisions. This analysis thus served to discourage the course of action taken by our legislators in this regard and insists on keeping the English law roots of South African copyright law.

The rest of the chapter was a consideration of specific provisions of the Copyright Act that have a bearing on musical works and using a contextual approach that takes into account the context and / or environment in which music business practices take place. As in other chapters, the judicial decisions of various jurisdictions were highlighted throughout the Chapter, and examples from real life were also given. Aspects of the Copyright Amendment Bill that had a bearing on the subject-matter under consideration were also highlighted, with a view to either supporting the proposed amendments or finding fault therewith. In a nutshell therefore the Chapter represented an attempt to provide a comprehensive analysis of the copyright protection of musical works in South African copyright law, with a view to providing reference material for those wishing to probe the intricate aspects of this complicated area of law.

³⁶⁴ See further in this regard the discussion under Chapter 4 above, including the discussion on the concept of a two-way traffic in the application of legislation in this regard.

³⁶⁵ See in this regard Dean and Karjiker *Handbook of Copyright Law* 3-3.

³⁶⁶ See s 48 read with the sixth schedule of the 1965 Copyright Act in this regard.

³⁶⁷ *Disney Enterprises Inc v Griesel NO & Others* 895 JOC (T).

Chapter 8: Digital Technology and Music Copyright's Continuing Struggle for Survival

“Recently, a heated debate has taken place as to whether the impact of computer networks will lead simply to a further evolutionary development of copyright law or whether the implications are so great as to necessitate revolutionary responses to the traditional concepts of copyright law.”¹

¹ Makeen *Copyright in a Global Information Society* xix.

8.1 Introduction

Since the enactment of the Statute of Anne in 1710, and in particular since the interpretation of this statute as providing protection to musical works in the case of *Bach v Longman*,² copyright law has been the main legal instrument used to provide legal protection to musical works. In *Bach v Longman* Lord Mansfield remarked that the words of the Statute of Anne were “very large”, providing protection for “books and other writings”.³ To a large extent copyright law has been successful and enduring in fulfilling the role of “Protector” of music rights. Nevertheless, as shown above, it is also true that the advancement of technology has always presented problems in relation to the copyright protection of various works, including musical works. As Jones has noted, the Statute of Anne was responding to the challenges of print technology, “and so [began] the close and inevitable relationship between copyright and technology.”⁴ In the twenty-first century, the advent of digital technology has brought about perhaps the most daunting challenges ever to the copyright protection of various copyright works.

Particularly, the prevalence of copyright issues in relation to the digital exploitation of music has brought to the fore the question “whether to focus on the future of copyright law generally or on the future of music copyright more specifically.”⁵ Generally the digital revolution has given rise to issues relating to the appropriate subject-matter, scope and duration of intellectual property rights. In the area of music the digital revolution has nevertheless given rise to further issues relating to “the law’s division of rights between producers, distributors, and consumers of music.”⁶ Consequently it is often argued that tailored solutions, rather than a broad review of copyright law as a whole, would be more suited to resolving current music copyright issues.⁷ The foregoing can be further supported by the fact that attempts by the international community to address digital copyright issues, e.g. through the WIPO “Internet Treaties”,⁸ have proven inadequate. This has been ascribed to “the unrestrained versatility of innovation in the digital arena”, which has led to the WIPO Internet Treaties

... [falling] considerably short in what was to be their central mission, namely to provide a relevant and credible source of norms to facilitate knowledge creation in the global digital context.⁹

Similar problems have been detected in respect of attempts aimed at resolving this problem in national law. In this regard it has been observed that US courts have struggled to apply the provisions of the Digital Millennium Copyright Act (DMCA), enacted in 1998 to align US copyright law with the WIPO Internet Treaties, as a result of enormous, persistent technological changes.¹⁰ These problems have particularly been noted in respect of the digital exploitation of musical works.

² (1777) 2 Cowp. 623. See for a full discussion of this case Chapter 2 supra.

³ *Bach v Longman* id at 623 - 624.

⁴ Jones 2010 *European Journal of Law and Technology* 4.

⁵ See Carrol 2005 *Florida Law Review* 910.

⁶ Carrol id at 908.

⁷ Carrol id at 911.

⁸ The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) of 1996.

⁹ Okediji 2009 *Fordham L. Rev.* 2380.

¹⁰ See <http://about.bloomberglaw.com/law-reports/dmca-provisions-proving-problematic-for-courts-but-revisions-will-take-time/> (date of use: 16 May 2017).

In this Chapter the author seeks to highlight the challenges faced by music rights-holders as a result of the digital exploitation of music, with a focus on how current digital technologies have disrupted the traditional music value chain system and the fragmentation of copyright. The Chapter also seeks to highlight how copyright as a legal system is experiencing challenges in properly providing protection to music rights-holders in respect of the online exploitation of their musical works and expressions. As South Africa is struggling with ensuring that South African copyright law is reformed to make it more relevant in the digital environment – which is one of the objectives of the Copyright Amendment Bill, 2017 – the writer hopes that this Chapter can be of assistance understanding the critical issues that need to be addressed by such a reform process.

8.2 Dealing with Digital Technology

8.2.1 *The Beginning: Napster and P2P Technology*

How did we arrive here? How did it all begin? At times, when dealing with the complex questions posed by digital technology it is so easy to forget that the state of uncertainty experienced today came to the fore not so many moons ago – through the advent of the new peer-to-peer (P2P) file-sharing technology that came to popular use towards the end of the 1990s. In this regard the complex legal issues arising from the use of this new technology were brought to the fore in the precedent-setting *Napster* case,¹¹ a decision of the US Court of Appeals for the Ninth circuit. Unlike other peer-to-peer file-sharing services, Napster was different in that it offered a service whereby information about users and the music files used on their computers was indexed on a central server.¹² This created a searchable list of music that was easily accessible to anyone connected to the Napster network. This is what has been termed a “hybrid P2P architecture”.¹³ The court found not only that users of the Napster service were liable for direct infringement of copyright (by violating the plaintiffs’ reproduction and distribution rights),¹⁴ but more importantly that Napster itself was liable for both *contributory* and *vicarious* infringement.¹⁵ The court also rejected Napster’s fair use

¹¹ *A&M Records, Inc. v Napster, Inc.* 239 F.3d 1004 (2001).

¹² This service was accessed after the user downloaded the MusicShare software from the Napster website onto his own computer.

¹³ Other forms of P2P designs are so-called Closed P2P architecture; Pure P2P architecture (the two also termed “decentralised or semi-structured P2P services”); and so-called next-generation P2P architectures, dealt with briefly below. See in this regard Goldschmied *Digital Music Piracy v Music Industry* 99 – 103; Dean & Dyer *Introduction to Intellectual Property* 431 – 435.

¹⁴ See para 19, *A&M Records, Inc. v Napster, Inc.* 239 F.3d 1004 (2001).

¹⁵ In US copyright law **contributory infringement** occurs when a person “with knowledge of the infringing act, induces, causes or *materially contributes* to the infringing conduct of another”, or rather “engages in personal conduct that encourages or assists the infringement.” *Napster id* at para 48; emphasis added. In such cases the contributory infringer must know or have reasons to know (or should have known) that direct infringement was taking place; and must *materially contribute* to such infringement. See paras 50 and 58 of the *Napster* case. In this regard it was observed: “... [Without] the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant boasts.” *Id* at para 58. Under South African copyright law the principles of contributory infringement are found in the law of delict, where a person “aids and abets” the commission of copyright infringement by another, and such person knew or had reasons to believe that the acts he aided and abetted constituted an infringement of copyright. In this regard it has been observed: “I think it is plain ... that, upon ordinary delictual principles, it is unlawful to incite or aid and abet the commission of a civil wrong, and I do not think it matters whether it is a wrong at common law or whether it is a wrong created by statute ...” *Cipla Medpro (Pty) Ltd v Aventis Pharma SA; Aventis Pharma SA and Others v Cipla Life Sciences (Pty) Ltd and Others* 2013 (4) SA 579 (SCA), at paras 34 – 39 generally, and para 39 specifically. See also Dean *Handbook of Copyright Law* (2015) 1-88 – 1-90. In this regard it would seem that the South African test is more general than the US test, which requires *material contribution* in addition to knowledge, although the outcome in practice would be

defences raised on the grounds that (i) the sampling of music by Napster users through the download of MP3 files “in order to decide whether to purchase the recording” was fair use; and that (ii) “space-shifting” of music files by a Napster user in order to listen to music that such user already owned on audio CD was fair use.¹⁶

In responding to the *sampling* question the Ninth circuit made some important findings that would be worth considering by our courts if a matter of this nature were to come before our courts.¹⁷ It affirmed the district court’s finding, in line with US fair use requirements, that sampling is a commercial use “even if some users eventually purchase the music” and further that “even

similar. Thus in the case of *Atari Inc, and Another v JB Radio Parts (Pty) Ltd*, Case No 17419/83 TPD, unreported, the court granted an interim interdict restraining the respondent from selling a device aimed at making reproductions of the applicant’s computer games protectable by copyright on the ground that, by selling the device and promoting sales thereof by drawing customers to the capabilities of the device, the respondent instigated or facilitated the making of unauthorised copies of the computer games by third parties. Regarding **vicarious liability** under US copyright law this is seen as extending “beyond an employer/employee relationship to cases in which a defendant has the right and ability to supervise the infringing activity and also *has a direct financial interest* in such activities.” *Napster id* at para 60; emphasis added. In South Africa vicarious liability occurs when a person who is in a position of authority, i.e. a person who has the right and ability to supervise another instigates or instructs the commission of an act that infringes copyright, and may be a form of causal infringement as provided for in s 23(1) of the Copyright Act, which provides that copyright is infringed by a person who “does or *causes any other person*” to do an act restricted by copyright, without the authority of the copyright owner. Emphasis added. See also *Dean id* at 1-90. Nevertheless it is submitted that it may be difficult in the South African context to hold internet service providers (ISPs) liable for the copyright infringement on the basis of vicarious liability (except in relation to the ISP’s own employees). This is because in South Africa vicarious liability has largely been used in respect of the employer-employee relationship or at most, in “situations which are analogous to that of the employer-employee relationship”. Du Bois Wille’s *Principles* 1224. (A different scenario of course concerns a situation where the owner of a motor vehicle can be found to be vicariously liable for someone negligently causing an accident while driving the owner’s vehicle, but this is not the concern for present purposes). A clear situation “analogous to that of the employer-employee relationship” is the principal-agent relationship and the principle of vicarious liability has naturally been extended to this relationship. Nevertheless, since the existence of an agency relationship necessitates the contractual grant of authority by the principal (in this case the ISP) to the agent (in this case the person using the ISP’s platform to infringe copyright), it would be an overstretch to suggest that such a contractual relationship exists ordinarily between an ISP and a copyright user (i.e. to suggest that the ISP has in fact, contractually granted such authority to the user). Even if the relationship between the ISP and the user could be said to be a mandatory-mandatory relationship, which, though considered to fall within the concept of agency, does not involve the grant of authority by the mandatory to the mandatory, it has been observed that “[t]he real issue is ... what degree of control the [mandatory] had over the [mandatory] when the delict in question was committed.” In US copyright law, as evident from the *Napster* case, ISP vicarious liability is made possible by the fact that the test used is that the defendant must have “the right and ability to supervise the infringing activity and also [have] a direct financial interest in such activities.” *Napster* *ibid*. No such specific requirement exists in the South African law relating to mandate agreements; thus the observation that “a mandator should never (except where he has been at fault himself) be liable for the wrongs committed by a mandatory” seems to be a more rational encapsulation of the South African law relating to ISP vicarious liability. See Du Bois *id* at 1226, n 69, referring to the opinions of Van der Merwe and Olivier, and Neethling, Potgieter and Visser. See further in this regard Saw and Chik 2012 *SACLJ* 707 – 708, paras 20 and 21, who, in reviewing the English and other common-law authorities, while acknowledging that ordinarily an employer-employee or principal-agent relationship would give rise to vicarious liability, observe: ‘By definition, no defendant would ever be able to confer on a third party the right or permission to do the act complained of, or to “clothe [a third party] with authority, particularly legal authority, thereby giving a right to act” – simply because the defendant is not himself the “principal” (in whom actual authority, which is capable of being granted, resides) nor the owner of copyright in the subject-matter in question. ... Even in the case of an employer-employee or principal-agent relationship, the employer or principal (the alleged authoriser) does not possess any authority whatsoever that he can possibly grant to the employee or agent (third party) to commit the underlying act of infringement, for the same reason (because he is neither a true “principal” who is capable of granting actual authority nor the owner of copyright.)’ It is submitted that the South African position in relation to vicarious liability for copyright infringement is more aligned to this position and is sharply distinguishable from the position in American law.

¹⁶ See *Napster id* at paras 38 – 45. A further fair use defence raised by Napster, namely the contention that certain acts of reproduction by Napster users amounted to “permissive reproduction” as a result of permission granted by certain independent or established artists; and further that certain other uses on the Napster system, such as the use of chat rooms, message boards and Napster’s New Artist Program were non-infringing uses, was not opposed by plaintiffs and was not challenged on appeal. See *Napster id* at para 46.

¹⁷ This would of course need to be done taking into account the unique status of our copyright law vis-à-vis US copyright law; and further considering the fact that further technological developments have taken place since the *Napster* case came before the courts, in particular the fact that while the digital download market was at its infancy when the case was heard, it has now been overtaken by the streaming market. This notwithstanding it is to be noted that the digital download market is still a fertile market in South Africa and our courts are yet to be confronted by a case dealing with these matters.

authorized temporary downloading of individual songs for sampling purposes is commercial in nature.”¹⁸ Furthermore it was demonstrated that while Napster users downloaded “a full, free and permanent copy of the recording”, the free promotional downloads provided by the record companies consisted of thirty-to-sixty second samples; or where full songs were provided, they were programmed to “time out” and thus only existed for a short time on the downloader’s computer.¹⁹ The court also quelled the argument made by Napster – and often made by other proponents of fewer restrictions on access to digital music – which suggested that the sampling of music resulted in increased sales of audio CDs, observing: “... [I]ncreased sales of copyrighted material attributable to unauthorized use should not deprive the copyright holder of the right to license the material. ... Nor does impact in one market, here the audio CD market, deprive the copyright holder of the right to develop identified alternative markets, here the digital download market.”²⁰

With regard to the *space-shifting* question Napster had argued that a previous ruling of the court²¹ had found that the space-shifting of musical compositions and sound recordings was fair use, and that space-shifting was analogous to *time-shifting*, which had been found to constitute fair use in the *Betamax* case.²² The court refused to uphold the “shifting analyses” in this case on the ground that they were “inapposite because the methods of shifting in these cases did not also simultaneously involve distribution of the copyrighted material to the general public”, but only exposed the material to the original user. In the present case however, once a user listed a copy of music on the Napster system it became available to millions of other users.²³ This ruling of the court led to the demise of Napster, a technological wonder that, at its peak, boasted some eighty million registered users.²⁴

8.2.2 Second – Generation Closed Systems – Grokster and Kazaa

In an attempt to circumvent the legal shortcomings of Napster’s centralised hybrid P2P system the technologists introduced newer, decentralised P2P platforms, termed closed and pure P2P

¹⁸ *A&M Records, Inc. v Napster, Inc.* 239 F.3d 1004 (2001), at para 40. Under US copyright law a requirement of one of the four factors that need to be considered when making a fair use determination, namely the “purpose and character of the use”, is a consideration of whether the infringing use was commercial or non-commercial. See *Napster id* at para 25. If the use is non-commercial then it is likely to be a non-infringing use. Apart from the specific exceptions provided for in the Copyright Act 1978 (i.e. the fair dealing and other exceptions provided for in ss 12 – 19B of the Copyright Act) South African copyright law does not embody a concept of commercial v non-commercial use, and every unauthorised usage of a copyright work apart from the permitted uses shall constitute copyright infringement, whether the usage is for commercial or non-commercial purposes. This observation is apt in light of the provisions of the Copyright Amendment Bill, 2017 approved by both houses of Parliament (version B13B-2017), available at <https://pmg.org.za/bill/705/> (date of use: 2019), which introduces provisions relating to the making of commercial considerations when determining if a use is acceptable or not, in addition to a broad fair use regime. References to “commercial” are found throughout the Bill. Clause 1(c) of the Bill defines “commercial” as “to obtain direct economic advantage or financial gain in connection with the business or trade of the user of the work in question”. Provisions relating to the fair use defence are introduced by clause 10 of the Bill; clause 10(1)(b)(iii)(bb) provides: “In determining whether an act done in relation to a work constitutes fair dealing or fair use, all relevant factors shall be taken into account, including but not limited to ... the purpose and character of the use, including whether ... it is of a commercial nature ...” The Bill awaits the signature of the President. See also Chapter 9 for a detailed comment on the Bill.

¹⁹ *Napster id* at para 40.

²⁰ *Id* at paras 41 – 42.

²¹ *Recording Industry Association of America v Diamond Multimedia Systems Inc.* 180 F.3d 1072 (9th Cir. 1999), at 1079.

²² *Sony Corporation of America et al. v Universal City Studios, Inc., et al.* 464 U.S. 417. See the discussion supra under paragraph 3.1.1.4.

²³ *A&M Records, Inc. v Napster, Inc.* 239 F.3d 1004 (2001) at para 45.

²⁴ See https://www.pcworld.idg.com.au/article/22380/requiem_napster/ (date of use: 28 April 2018).

architectures.²⁵ A common feature of these second-generation P2P systems is that the users did not have to rely on a central database to share files, but could share the files between one another. Platforms using a closed P2P systems have included Grokster and Kazaa (both now closed); while Freenet is an example of a pure P2P system.²⁶ Dealing with the differences between closed P2P networks and pure P2P networks Goldschmeid has observed:

In order to locate files on a closed network, a peer routes a search to the next peer in the network via a node. The peer that is connected then checks whether it has that file. If this is the case, it sends the file back to the peer via a node from which the search originated. Alternately, the peer on sends the request in conjunction with the IP address of the originating peer to the next peer in the network. This process is repeated until the file is available from another peer. ... Pure P2P architecture's most significant difference is that the destination peer who holds the file requested by the originating peer does not transfer the file directly to the originating peer. Instead the destination peer routes the file to the next peer in the request chain. Each of these peers then retain a copy of the file before sending it on to the next immediate peer in the request chain, who in turn does the same, until it reaches the originating peer from which [sic] the request was made. ... [E]ach peer is aware of only those IP addresses of the directly previous and following in the chain. ...²⁷

By decentralising the system in this way the providers hoped to avoid liability (whether contributory or vicarious), since they believed they could argue that “they did not have knowledge of their users’ activities or the ability to control them.”²⁸ The various mechanisms to either avoid or conceal liability for copyright infringement did not deter rights-holders from fighting for the survival of music copyright. Litigation instituted by rights-holders led to the eventual demise of both Kazaa and Grokster.²⁹ The *Grokster* case gave rise to some important principles noteworthy for the South

²⁵ Goldschmied *Digital Music Piracy v Music Industry* 100 – 102; see also Johnsen, Karlsen and Birkeland 2005 <http://web.cs.ucla.edu/classes/cs217/05BitTorrent.pdf> (date of use: 28 April 2018).

²⁶ Goldschmied *Digital Music Piracy v Music Industry* 101 – 102.

²⁷ Goldschmied *Digital Music Piracy v Music Industry* 101 – 102. In this regard a node is a local server, and each computer in the network becomes a node. Dean & Dyer *Introduction to Intellectual Property* 432.

²⁸ Dean & Dyer *id* at 433.

²⁹ Kazaa was sued by Burma / Stemra in the Netherlands in 2001 at the District Court of the Netherlands, for copyright infringement. The court found that Kazaa violated Dutch copyright law by enabling its users to download music using its software and that by offering the P2P software in conjunction with its website's search engine it could be regarded as the user of the music; and ordered Kazaa to take measures to prevent the software from being used to infringe Burma / Stemra's copyrights. The court furthermore ordered the parties to continue with their negotiations. Kazaa opted rather to shut down its website but appealed the judgment to the Court of Appeal of Amsterdam, which ruled instead that in so far as there were acts of infringement, these were attributable to the users of the software and not to Kazaa itself. It was held, against the spirit of the US courts in the *Napster* case, that the mere provision of means of publication and multiplication of copyright works did not amount to an act of publication or multiplication *per se*. It was further held that because Kazaa's software was also used to share works that were in the public domain and works where the authors had given permission of use, the software could not be said to be unlawful. This decision of the Court of Appeal was upheld by the Dutch Supreme Court on 19 December 2003. See in this regard <http://merlin.obs.coe.int/iris/2004/2/article31.en.html> (date of use: 28 April 2018). Meanwhile Kazaa, which had since been sold to a Vanuatu-based company, Sharman Networks, in 2002, was embroiled in yet another litigation, this time in the United States and involving co-defendants Grokster and Streamcase Networks (owners of Morpheus). Although Kazaa eventually pulled out – see the district court's observation in *Metro-Goldwyn-Mayer Inc. v Grokster* 259 F.Supp.2d 1029 (C.D.Cal. 2003), at para 13 – the case proceeded at the district court and on appeal in the Ninth Circuit – *Metro-Goldwyn-Mayer Inc. v Grokster* 380 F.3d 1154 (9th Cir. 2004) – culminating in the Supreme Court ruling in *Metro-Goldwyn-Mayer Inc. v Grokster* 545 U.S. 913 (2005). Kazaa also faced litigation in Australia (through its parent company) in the case of *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, where the Federal Court of Australia held that six respondents had authorised acts that infringed copyright in sound recordings by users of the Kazaa software. The court found that the use of the software had infringed the reproduction right and the right of communication to the public of the sound recordings concerned. The court affirmed that the test to determine if a person has authorised copyright infringement was that the person must have sanctioned, approved or countenanced the primary infringing act. The court found that the respondents were aware of the

African environment also and it would thus be useful to consider the case in some depth. In the *Grokster* case the plaintiffs / applicants had sued Grokster and Streamcast for knowingly and intentionally distributing their file-sharing software to enable users to reproduce and distribute copyright works in violation of copyright legislation. In the Supreme Court decision³⁰ it was noted that though the respondents did not know when particular files were copied as a result of the decentralised nature of their file-sharing networks, “a few searches using their software would show what is available on the networks the software searches.”³¹ Grokster and Streamcast in turn alluded to the significant *potential* non-infringing nature of their software, “even if infrequent in practice.”³² The court nevertheless observed that evidence by MGM (the first applicant) showed that the majority of downloads related to infringing acts and “the probable scope of copyright infringement is staggering.”³³

It was further noted that the respondents were not merely passive recipients of information about infringing use. Apart from the fact that they had occasionally received emails from their users with questions on how to play copyright-protected movies that they had downloaded, when they first distributed their free software they made it clear that the objective was to download copyright-protected works. Thus it was observed that “... each took active steps to encourage infringement”, with Streamcast planning to be the next Napster and thus specifically targeting former Napster users in the event that Napster shut down.³⁴ Just as in the *Kazaa* case in Australia, the *Grokster* court also noted that the respondents’ business model was to generate income through the sale of advertising space and streaming the advertising to its users; which demonstrated their support for the use of their software to download copyright-protected works. The court further noted that no evidence existed to show that the companies made efforts to filter copyright-protected materials from their users’ downloads or to block the sharing of copyright-protected files.³⁵

The lower courts ruled out contributory liability on the part of the respondents on the ground that the respondents had no actual knowledge of direct infringement; and read the *Betamax* case³⁶ “as

infringement of copyright occurring through the Kazaa software and failed to implement measures to prevent such infringement, even though the evidence showed that they had the power to do so or to at least substantially reduce the infringing activity. The court opined that they did not do so because they had a financial interest in maximising copyright-infringing file-sharing, as they derived advertising revenue from this. The court found that the six respondents had in fact, actively encouraged users of the system to increase their file-sharing activity and that their warnings and end-user licence agreements were ineffective in preventing copyright infringement. Justice Wilcox found that, on the facts of the case the respondents could not rely on s 112E of the Australian Copyright Act, which provides that a person who provides facilities for the making or for facilitating the making of a communication is not considered to have authorised the infringement of copyright merely because another person uses such facilities to commit an act restricted by copyright. Furthermore, while persons who do not themselves make copyright material available on the internet cannot be found liable for primary communication of the material to the public, they can nevertheless, in terms of s 22(6) of the Australian Copyright Act (which provides that a communication other than a broadcast is considered to have been made by the person responsible for determining the content of the communication), be found liable for authorising the communication of the copyright material.

³⁰ *Metro-Goldwyn-Mayer Inc. v Grokster* 545 U.S. 913 (2005).

³¹ *Id* at 4.

³² *Ibid*.

³³ *Id* at 5.

³⁴ *Id* at 5 – 7. The evidence showed that, to a less extent, Grokster also wished to capture the Napster market and promoted its ability to provide particular, popular copyright-protected materials.

³⁵ *Id* at 8 – 9.

³⁶ *Sony Corporation of America et al. v Universal City Studios, Inc., et al.* 464 U.S. 417. See *supra* at paragraph 3.1.1.4.

holding that distribution of a commercial product capable of substantial non-infringing uses could not give rise to contributory liability unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge.”³⁷ The lower courts also found that the respondents had not materially contributed to their users’ infringing conduct “because it was the users themselves who searched for, retrieved, and stored the infringing files, with no involvement by the defendants beyond providing the software in the first place.”³⁸ Contributory liability was also ruled out on the ground that “the defendants did not monitor or control the use of the software, had no agreed-upon right or current ability to supervise its use, and had no independent duty to police infringement.”³⁹ In granting its judgment the court made very important observations with regard to the tension between two values, namely, (i) the value of supporting creative pursuits through copyright protection; and (ii) the value of protecting innovation in new communication technologies “by limiting the incidence of liability for copyright infringement.” The court observed that this tension was at the core – or rather the subject – of the case.⁴⁰

While the court noted that there was a concern that imposing liability “could limit further development of beneficial technologies”⁴¹ it nevertheless provided a noteworthy rationale for imposing liability in cases where the use of technologies would encourage rampant infringement of works. In this regard the court observed:

The argument for imposing indirect liability in this case is ... a powerful one, given the number of infringing downloads that occur every day using Streamcast’s and Grokster’s software. When a widely-shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.⁴²

This observation is an important one, especially in the South African context when copyright law is in a state of development to align it with the digital environment.⁴³ In the debates that have ensued in relation to the Copyright Amendment Bill 2017 some have called for more “flexibility” in the copyright legislation in light of technological changes.⁴⁴ These arguments often fail to consider what the impact of such technological changes often is on the ability of rights-holders to enforce their rights. It is submitted that South Africa can benefit from the cautionary approach taken by mature jurisdictions

³⁷ *Metro-Goldwyn-Mayer Inc. v Grokster* 545 U.S. 913 (2005), at 10.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Id* at 10 – 11.

⁴¹ *Id* at 11.

⁴² *Id* at 12. For the application of the theory of vicarious liability within the South African context see the discussion below under paragraph 8.4.2.3.

⁴³ See the Copyright Amendment Bill (version B13B – 2017), approved by both houses of Parliament and now awaiting the signature of the President, available at <https://pmg.org.za/bill/705/> (date of use: 13 July 2019).

⁴⁴ See for example the submission made by Google in respect of the Copyright Amendment Bill 2017, where it is noted: “Flexibility is the heart of a modern copyright law because creativity, innovation and technological change are dynamic. One cannot have a dynamic, creative environment if our copyright laws are static.” https://libguides.wits.ac.za/ld.php?content_id=33934566 (date of use: 29 April 2018). This argument is, in the writer’s view, faulty in that it suggests that certainty is not an important consideration in relation to copyright laws. It suggests that copyright legislation needs to be fluid enough to adjust to every technological change *per se*, without considering what the impact of such technological changes is to the safeguarding of the rights of rights-holders.

like the United States in relation to these matters; and this would in fact align with the provisions of section 39(1)(c) of the Constitution,⁴⁵ which provides that when interpreting the Bill of Rights (which includes intellectual property rights) a court, tribunal or forum “may consider foreign law”. In the quest to make South African copyright law more flexible in light of technological developments it is important to also note the downside of doing so in relation to the ability of rights-holders to enforce their rights and to thus create an appropriate balance in this regard.⁴⁶ It is submitted that such a cautionary approach must not only be employed by courts when interpreting laws but also by the legislature when enacting new legislation.

8.2.2.1 Seeking Relief in the theory of Secondary Liability

Reverting to the case it is important to note how the Supreme Court distinguished the *Grokster* case from the earlier Sony (*Betamax*) case, relied upon by the lower courts to rule in favour of Grokster and Streamcast. The court noted that in the *Betamax* case there was no evidence to show that Sony’s object in introducing its videocassette recorder (VCR) was to violate copyright law or that Sony had taken active steps to profit from unlawful taping. Furthermore, the uses for which the VCR was intended (e.g. recording favourite shows and building a library of recorded programs) were non-infringing uses.⁴⁷ As a result,

the only conceivable basis for imposing liability was on a theory of contributory infringement arising from [the] sale of VCRs to consumers with knowledge that some would use them to infringe. ... But because the VCR was “capable of commercially significant non-infringing uses,” we held the manufacturer could not be faulted solely on the basis of its distribution. ...⁴⁸

The court showed that the theory of contributory infringement was adapted from the “staple article of commerce” doctrine in US patent law,⁴⁹ in terms of which if an article of commerce is capable of substantial lawful and unlawful uses, the manufacture would only be held liable in “instances of more acute fault than the mere understanding that some of one’s products will be misused.”⁵⁰ The court pointed out however, that the focus should not be on the design and the distribution of the product concerned (e.g. whether it was or not capable of substantial non-infringing uses), to the disregard of the existence of “an actual purpose to cause infringing use”; in this regard the court found that the

⁴⁵ Constitution of the Republic of South Africa, 1996.

⁴⁶ An example in this regard in relation to the Copyright Amendment Bill, 2017 approved by both houses of Parliament and currently awaiting the President’s signature, available at <https://pmg.org.za/bill/705/> (date of use: 13 July 2019), relates to clause 27 of the Bill, which purports to prohibit the use of a technological protection measure circumvention device “in respect of a work protected by a technological protection measure”, vis-à-vis clause 28P, which in fact permits the use of such a device under the pretext that it is used for purposes of performing a “permitted” act or “to overcome security measures” for purposes of performing a “permitted” act.

⁴⁷ *Metro-Goldwyn-Mayer Inc. v Grokster* 545 U.S. 913 (2005), at 14.

⁴⁸ *Ibid.*

⁴⁹ In the *Cipla* case our Supreme Court of Appeals observed that the South African Patent Act has no provisions comparable to those in the US Patent Act relating to the staple article doctrine, but further noted that our law does nevertheless, have “a remedy against intentionally aiding and abetting infringement”. See *Cipla Medpro (Pty) Ltd v Aventis Pharma SA; Aventis Pharma SA and Others v Cipla Life Sciences (Pty) Ltd and Others* 2013 (4) SA 579 (SCA), at para 33. For a full discussion on the application of the doctrine of secondary liability under South African copyright law see the discussion under paragraph 8.4 below.

⁵⁰ *Metro-Goldwyn-Mayer Inc. v Grokster* 545 U.S. 913 (2005), at 15. In this regard ‘where an article is “good for nothing else” but infringement ... there is no legitimate public interest in its unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe ...’ *Ibid.*

Ninth Circuit erred in its interpretation of the *Betamax* decision, as it converted the case “from one about liability resting on imputed intent to one about liability on any theory.”⁵¹ The court observed, importantly, that the rule in the *Betamax* case did not displace other theories of secondary liability; *was not meant to ignore evidence of intent if such evidence occurs* and further was not meant “to foreclose rules of fault-based liability derived from the common law.”⁵²

Accordingly, while the theory of secondary liability provided a safe harbour from liability, if the evidence shows “statements or actions directed to promoting infringement, *Sony’s* staple article rule will not preclude liability.”⁵³ Under such cases the defendant would be found liable based on *the rule of inducement* (persuading or enticing another to infringe copyright or taking active steps to encourage the direct infringement of copyright). Thus where for example, a person uses advertisement to promote infringing use or provides instruction to do so an “affirmative intent” that the product be used for infringing use is shown.⁵⁴ In adopting the inducement rule the court was mindful of the need “to keep from trenching on regular commerce or discouraging the development of technologies” with the capability of both non-infringing and infringing use. In this regard the court observed that liability would not result from mere knowledge of infringing potential or actual infringing uses; or from ordinary acts “incident to distribution” (e.g. offering customers technical support or product updates). Rather it arises from “purposeful, culpable expression and conduct”.⁵⁵ In this regard the court made an important observation that holding the defendant liable on the basis of the inducement rule under such circumstances “does nothing to compromise legitimate commerce or discourage innovation having a lawful purpose.”⁵⁶

8.2.2.2 Lessons for South Africa from the *Grokster* judgment

The observations made in the *Grokster* decision are apt for the South African environment, where, it appears, an attempt is being made to limit the liability of users in the name of promoting technological developments, by means of introducing an expanded exceptions regime. In this regard the outcome will be to render otherwise infringing uses lawful through legislative enactment. This situation is apparent from the provisions of the Copyright Amendment Bill 2017.⁵⁷ Lessons can be

⁵¹ *Id* at 16.

⁵² *Id* at 17. Emphasis added.

⁵³ *Id* at 17 and 19.

⁵⁴ *Id* at 17 and 18.

⁵⁵ *Id* at 19. This would pre-eminently be demonstrated by messages sent out by the defendant that prove, “by a defendant’s own statements that his unlawful purpose disqualifies him from claiming protection”. In the present case the court found additional evidence of culpable expression and conduct on the part of the respondents: First, each company demonstrated that it aimed to satisfy the demands of a market comprising former Napster users - a known source of demand for copyright infringement; secondly, neither company developed filtering uses or other mechanisms to diminish infringing use; thirdly, the respondents had an interest in high volumes of use of the software because this generated advertising revenues for them, because the evidence showed that the more the software was used, the more the ads were sent out, resulting in higher advertising revenues. The court also observed that in addition to such evidence there had to be evidence of actual infringement by the recipients of the device concerned (in this case the software); which it founded to also exist. *Id* at 21 – 23.

⁵⁶ *Id* at 19 – 20.

⁵⁷ Version B13B-2017, approved by both houses of Parliament and now awaiting the signature of the President. See for the Bill <https://pmg.org.za/bill/705/> (date of use: 13 July 2019). The Bill has evoked a heated debate with respect to the direction that South African copyright law is taking, and has pitted the so-called pro-user camp against the pro-rights camp, with over seventy submissions made. For a representation of the divergent views expressed in this regard and a synopsis

learnt from the observations made in the *Grokster* decision in this regard. Just as in the case of US law, our rules on contributory liability also emanate from our common law.⁵⁸ As observed in the *Grokster* decision, in finding a defendant liable on the basis of secondary liability, the focus cannot be on the technology or the good that it can achieve (i.e. the non-infringing uses that it is capable of); rather it should be on whether there is nonetheless evidence of an intent to cause infringing use. The determination of whether there is such infringing intent is of course a competence of the courts and generally becomes an issue when a case has been brought before the courts. In this regard the submission by Google, as part of submissions made to the parliamentary portfolio committee in relation to the Copyright Amendment Bill 2017, that “[n]o legislature can decide *a priori* when a particular song will infringe another song”⁵⁹ is thus partially correct. This does not, however, detract from the responsibility of the legislature to exercise diligence in law-making to ensure that legislation does not itself, become an instrument for the encouragement of infringing activities.

The Google argument highlighted above is aligned with the argument, often made by those favouring substitution of the fair dealing exception with a fair use exception, that a fair use standard shall eliminate the need for legislatures to constantly amend copyright legislation in response to new technologies.⁶⁰ In this regard it is argued that the fair use defence would “futureproof” copyright legislation – by which is meant that “a flexible fair use provision ‘will enable [copyright legislation] to adapt to changing technologies and uses without the need for legislative intervention’”.⁶¹ This argument nevertheless neglects the fact that in the United States, where the fair use defence originates and which is in fact the main jurisdiction where the defence is used more frequent

of some of the areas of concern raised by the rights-holder camp see https://libguides.wits.ac.za/Copyright_and_Related_Issues/SA_Copyright_Amendment_Bill_2017 and <https://www.adamsadams.com/south-africas-copyright-law-knife-edge/> (date of use: 29 April 2018). The complicated (and convoluted) issues raised in the Bill has are so grave that at one stage when the Bill was before Parliament it was reported that this situation left members of the parliamentary committee tasked with finalising the Bill “so confused” that it has been observed that “[t]he reworked, technically improved Copyright Amendment Bill is unlikely to complete its passage through Parliament unless National Assembly Trade and Industry Committee members spend time familiarising themselves with the many complex issues it seeks to address.” See <http://legalbrief.co.za/login/?next=/diary/legalbrief-today/policy-watch/legislation-copyright-bill-process-limps-on/> (date of use: 3 May 2018).

⁵⁸ *Cipla Medpro (Pty) Ltd v Aventis Pharma SA; Aventis Pharma SA and Others v Cipla Life Sciences (Pty) Ltd and Others* 2013 (4) SA 579 (SCA), at paras 34 – 39.

⁵⁹ https://libguides.wits.ac.za/ld.php?content_id=33934566 (date of use: 29 April 2018)

⁶⁰ See for example *ALRC Report 2013* <https://www.alrc.gov.au/publications/copyright-report-122>, the Final Report of the Australian Law Reform Commission made in response to terms of reference to determine if the current exceptions and statutory licences in the Australian Copyright Act were adequate and appropriate for the digital era, at p. 95, para 4.41. (Date of use: 21 May 2018). The proposal to replace fair dealing with fair use in Australian copyright law has not, as such, been embraced by the Australian legislature to date. A similar debate ensued in Australia in 2005 but the legislature rejected the adoption of a fair use defence and instead adopted a position that extended the flexibility of the fair dealing provisions by creating new exceptions such as parody, satire and a limited private use exception (through the 2006 Copyright Amendment Act) while rejecting a general fair use defence. See the Explanatory Memorandum to the Bill leading to the amendment, where it is noted that “[i]n the public consultation phase of the Fair Use Review, no significant interest supported fully adopting the US approach”, and it was noted that the “extended dealing exception” proposed “would be less broad than US copyright law which provides an open list of purposes that may qualify as a ‘fair use’ exception”. http://www.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/legis/cth/bill_em/cab2006223.pdf_at_10 (date of use: 21 May 2018). This is also in line with the position adopted in the United Kingdom under both the Gowers Review of 2006 and the Hargreaves Review of 2011. See *Gowers Review of Intellectual Property* 2006 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf at 6; 44; 61 *et seq* (date of use: 21 May 2018) and *Digital Opportunity – A Review of Intellectual Property and Growth*, An Independent Report by Professor Ian Hargreaves, May 2011 (“the Hargreaves Review”)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf at 44 para 5.13 (date of use: 21 May 2018), respectively.

⁶¹ *ALRC Report* *ibid*.

amendments to the copyright legislation occur than in many other jurisdictions. In fact the US courts have themselves argued that it is not the role of the courts, but that of Congress, to respond to major technological innovations by amending or reforming copyright legislation.⁶²

In light of the above, the argument that fair use would be of assistance to rights-holders because of its flexibility and will thus “save the legislature from constant law reform to ‘catch up with new technologies and uses’⁶³ is wanting. In this regard it is apt to make an important observation: in circumstances where the legislation has not been clear as to the protections available to rights-holders in respect of particular technologies the fair use defence has been used to support the user and not rights-holders, as was the position in the *Betamax* case. In cases dealing with new technologies like the *Napster* and *Grokster* cases where the US courts found in favour of rights-holders it was not the fair use standard that came to the aid of the rights-holders. Instead it was the existence of other doctrines of law⁶⁴ – not as such originating from copyright legislation – which rendered the application of fair use inappropriate and thus came to the aid of the rights-holders.

Perhaps one of the most enigmatic arguments posited by those who favour a fair-use defence is the argument that because fair use is a technology-neutral standard it would be of assistance not only to users but also to rights-holders, as it will bring about certainty and predictability in cases of new technology.⁶⁵ First, the argument that fair use is technology-neutral is a rather stretched argument, according primacy to exceptions in relation to the technological neutrality rationale rather than to the right itself.⁶⁶ In this regard it needs to be noted that traditionally the technological neutrality rationale has primarily been concerned with the *protection* granted to authors by copyright and not with the exceptions to that protection.⁶⁷ Secondly, the assertion that fair use would bring about certainty

⁶² See *Sony Corporation of America et al. v Universal City Studios, Inc., et al.* 464 U.S. 417 (the *Betamax* case) at para 25, where it is observed that “Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by ... new technology.” Similar observations were made in *Metro-Goldwyn-Mayer Inc. v Grokster* 545 U.S. 913 (2005) (the *Grokster* case) and in the dissenting judgment of Scalia J in *American Broadcasting Companies, Inc. v Aereo, Inc.* 573 U.S. _ (2014) (the *Aereo* case), at para 13.

⁶³ ALRC Report 2013 <https://www.alrc.gov.au/publications/copyright-report-122> at p 97, para 4.48.

⁶⁴ In particular the doctrines of secondary liability.

⁶⁵ ALRC Report 2013 <https://www.alrc.gov.au/publications/copyright-report-122> at pp 95 – 97.

⁶⁶ This, it is submitted, is part of the emerging trend in copyright law discourse under the broader rubric of “users’ rights”, which clearly seeks to re-interpret the very foundation of copyright law.

⁶⁷ See for example Gendreau 2000 *Science, Truth and Justice* 198, generally, for an overview of the historical development of the technological neutrality rationale in copyright treaty law. See also Von Lewinski *International Copyright Law* 140, observing in respect of the right of “reproduction in any manner or form” under art 9(1) of the Berne Convention, that “[t]he notion of ‘reproduction ... in any manner or form’ is technically neutral and very broad, so that it does not exclude any technique by which the reproduction is effected ... [and] also should be understood as including reproduction in a different dimension ...”. See also WIPO *Guide to the Berne Convention* 54. In this regard it has been observed in respect of the reproduction right: “Oddly enough this right, which is the very essence of copyright, did not appear in the Convention as one of the minima until as late as Stockholm (1967). Though the right was recognised, in principle, by all member countries, the problem was to find a formula wide enough to cover all reasonable exceptions *but not so wide as to make the right illusory.*” WIPO *Guide to the Berne Convention* *ibid.* In other words, while it was deemed necessary to specify the ambit of the exceptions, the right of reproduction itself was phrased in a technologically-neutral manner. Of course it is understood that as an offshoot of the technological neutrality rationale this would be extended to the exceptions relating to the protection concerned but it is submitted that it is faulty to accord primacy to this rationale in relation to the exceptions themselves. Even within the context of the revitalised assessment of the principle of technological neutrality by the Canadian courts, the principle has not, where the courts have denied relief to rights-holders, been deemed to arise from the operation of the fair dealing defence but rather seen as being premised on the scheme and object of the copyright legislation and the intention of the legislature. The courts have thus first recognised and affirmed the protections due to rights-holders, and held either that, based on the principle of balance and technological neutrality, no further remedy was due to the rights-holders - see *Entertainment Software Association v SOCAN* 2012 SCC 34; or, where the existence of a

requires further justification, seeing that one of the main arguments levelled against the fair use defence is its lack of certainty vis-à-vis fair dealing which does bring about certainty as to the scope of the exceptions concerned.⁶⁸ Thirdly, in support of the argument that fair use does bring about certainty it has been observed that a consideration of the fair use cases that have come before the US courts reveal certain patterns or “policy clusters”, which make it possible to predict whether a use is likely to be fair or not.⁶⁹ Doing so however means that one has to peruse previous cases to determine whether the case at hand falls within any of the proposed policy clusters. Such an exercise would of necessity be required within the context of litigation or seeking legal advice, as lay persons would not be able to do so without legal training.⁷⁰ This however supports the argument that fair use is litigation-intensive and would result in “an American style proliferation of high cost litigation”.⁷¹

In light of the foregoing it is the duty of the legislature to ensure that copyright legislation provides enough certainty to eliminate the need to frequently seek recourse from the courts. Copyright legislation cannot be a regime of limitations and exceptions (thus a regime of users’ rights), with the rights of authors not clearly defined.⁷² The propensity for legislators to stray from exercising their legislative diligence function provides the justification for the system of judicial review, which in South Africa has since the advent of the new constitutional dispensation, been elevated to the level of *constitutional review*. In this regard judicial review is defined as:

remedy was recognised, held that the licence fee was inappropriate since the Copyright Board had failed to consider the principles of balance and technological neutrality when determining the fee – see *CBC v SODRAC* 2015 SCC 57.

⁶⁸ See in this regard the Hargreaves Report where it was noted that introducing fair use in the United Kingdom would bring about “massive legal uncertainty because of [fair use’s] roots in American law”. *Digital Opportunity – A Review of Intellectual Property and Growth*, An Independent Report by Professor Ian Hargreaves, May 2011 (“the Hargreaves Review”)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf at 44 para 5.13 (date of use: 21 May 2018). Fair use is also seen as a general criterion employed at the discretion of the judge and “not limited to certain purposes of the allegedly infringing act”. See Brenncke 2007 Heft 71 at 5; also Burrell 2001 *I.P.Q.* 364 – 365, who criticises fair use for “providing flexibility at the expense of certainty”. In this regard it needs to be noted that some who support a fair use defence in the place of fair dealing have levelled the same criticism of uncertainty to fair dealing. Thus it has been argued that “[t]he close-ended nature of the fair dealing exceptions creates uncertainty, because it can be difficult to determine if a particular use falls into one of the specified purposes.” In this regard reference is made, in the Australian context, to the case of *TCN Channel Nine v Network Ten Ltd* (2002) 118 FCR 417, where the focus was on the question whether the use of clips in an entertainment show amounted to news reporting or criticism and review, and it is concluded that “[f]air use would avoid this problem, by not confining the exception to a set of prescribed purposes.” See in this regard *ALRC Report* 2013 <https://www.alrc.gov.au/publications/copyright-report-122> at p 115 para 4.130. It is submitted that such an assertion is rather far-fetched as it can be argued that this was an exception to the norm and that in the majority of cases such uncertainty does not exist.

⁶⁹ See Samuelson 2009 *Fordham Law Review* and Sag 2012 *Ohio State Law Journal*, generally. Samuelson *ibid* identifies some of these policy clusters as including free speech and expression fair uses, authorship-promoting fair uses, uses that promote learning etc.

⁷⁰ Samuelson 2009 *Fordham Law Review* 2621 states: ... [J]udges and commentators should ... look ... for common patterns in the fair use caselaw upon which to build a predictable body of fair use law. *Analyzing fair uses in light of cases previously decided within the same policy cluster will make fair use more rule-like ...*” Emphasis added. Likewise Sag 2012 *Ohio State Law Journal* 49 observes: “... [W]hile there are many shades of gray in fair use litigation, there are also consistent patterns that can assist individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection.” Emphasis added.

⁷¹ *Digital Opportunity – A Review of Intellectual Property and Growth*, An Independent Report by Professor Ian Hargreaves, May 2011 (“the Hargreaves Review”)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf at 44 para 5.13 (date of use: 21 May 2018).

⁷² The current Copyright Amendment Bill 2017 contains more provisions that relate to “users’ rights” or exceptions and limitations, than it does provisions that relate to authors’ rights and thus can be properly termed a “users’ rights law”.

... the power of the courts to scrutinise and declare unconstitutional *any type* of legislation, whether original or delegated, ... that infringes on the rights in the Bill of Rights ... or otherwise offends against provisions of the Constitution.⁷³

“Any type of legislation” includes intellectual property legislation and in this case, copyright legislation. As section 2 of the Constitution⁷⁴ provides, the Constitution is the supreme law of the Republic and “any law or conduct inconsistent with it is invalid”. Thus in the constitutional dispensation a Damocles’ sword hangs over every type of legislation that manifests what has elsewhere been termed “bad legislative intent” or “constitutionally-forbidden legislative intent”.⁷⁵ It was indicated above that the *Grokster* court identified a tension between the values of (i) supporting creative pursuits through copyright protection and (ii) protecting innovation in new communication technologies “by limiting the incidence of liability for copyright infringement”, in the case that came before it.⁷⁶ This tension is perfectly reflected not only in the debates that have raged with regard to South Africa’s Copyright Amendment Bill 2017 but also in the Bill itself. In this regard it is submitted that the Bill has failed to create a proper balance between these two competing values, and clearly shows a bias towards so-called “users’ rights” to the detriment of “authors’ rights”.⁷⁷

More particularly, it is submitted that the conversion of what is supposed to be an author’s rights legislation into a users’ rights legislation, without also providing a mechanism for proper compensation for authors, would bring about a legislature-induced promotion of copyright infringement.⁷⁸ This pitting of users against authors in legislation reflects a bad or constitutionally-forbidden legislative intent. The resultant legislation cannot thus stand constitutional muster and would almost immediately be ripe for constitutional review. This is also exacerbated by the apparent lack of proper consultation with rights-holder groups - also required by the Constitution⁷⁹ – prior to

⁷³ Hoexter *Administrative Law* 113. Emphasis added. In this regard it needs to be noted that our courts have since clearly recognised that intellectual property rights are also protected under the Bill of Rights (as a genre of the property rights provided for in s 25 of the Constitution), where earlier in the *Certification* case – *Ex Parte Chairperson of the Constitutional Assembly : In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), at 799 – the Constitutional Court had been ambivalent in this regard. See in this regard *Laugh It Off Promotions CC v The South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC); *Laugh It Off Promotions CC v The South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2005 (2) SA 46 (SCA) paras 10 – 11; *National Soccer League v Gidani (Pty) Ltd* [2014] ZAGPJHC 33, at paras 96 and 105. See also Currie and De Waal *Bill of Rights Handbook* at 539, where it is observed: “‘Property’ for purposes of s 25 should ... be seen as those resources that are generally taken to constitute a person’s wealth, and that are recognised and protected by law. Such resources are legally protected by private law rights - ... intellectual property rights in the case of intellectual property. ...”

⁷⁴ Constitution of the Republic of South Africa, 1996.

⁷⁵ See Hasen 2006 *Wisconsin Law Review* and Fallon 2016 *Harvard Law Review*, respectively.

⁷⁶ *Metro-Goldwyn-Mayer Inc. v Grokster* 545 U.S. 913 (2005), at 10 – 11.

⁷⁷ This is borne out by the fact that in many instances in the Bill users are bizarrely identified as parties that must share in the payment of royalties in the same way as authors. The Bill is replete with such provisions but see for a few examples, clauses 4, 5, 6, and 8 of the Bill. See also for an analysis of this issue Hollis <https://www.adamsadams.com/south-africas-copyright-law-knife-edge/> (date of use: 30 April 2018).

⁷⁸ This also defeats the stated purpose of the Bill as outlined in the Memorandum on the Objects of the Bill, namely “to protect the economic interests of authors and creators of work [sic] against infringement ...” See the Memorandum on page 35 of the Bill, available at <http://infojustice.org/wp-content/uploads/2017/05/South-Africa-Copyright-Amendment-Bill-2017.pdf> (date of use: 28 April 2018).

⁷⁹ See *Doctors for Life International v The Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) 2007 (1) BCLR 47 (CC), where the constitutional obligation for the legislature to facilitate reasonable public participation in respect of legislative processes was highlighted. In this regard it was stated in the *Matatiele* case (at para 68): “The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the

introducing the Bill in Parliament. In this regard the following was stated in one of the submissions made to Parliament:

... [T]he sudden appearance of the 2017 Bill raises real concerns about whether there has been proper consultation and engagement with the relevant stakeholders. Given the controversial nature of the 2017 Bill ... and its complexity, it is, once again, necessary to question the time period allotted for comment; it smacks of another attempt to pass ill-considered, and ineptly drafted, legislation, without affording interested parties adequate opportunity to formulate and voice their concerns about the consequences and implications of the proposed legislation. It is even arguable that this type of *modus operandi* could leave legislation of this nature open to constitutional challenge, given the fact that there is flagrant disregard for the substance and spirit of the constitutionally-enshrined principals, with a mere veneer of procedural formality being applied.⁸⁰

In the *Poverty Alleviation Network* case⁸¹ the Constitutional Court ruled that consultation is concerned with the process of engagement and not its outcome. Thus Parliament does not have to be “swayed by public opinion in its ultimate decision”, and reasonable public participation would have taken place in spite of such public opinion not being taken into account in the ultimate decision.⁸² This notwithstanding it is submitted that (i) the process of engagement in respect of the Copyright Amendment Bill was itself defective because no proper opportunity was afforded to the sectors mainly affected by the Bill, to present their opinion; (ii) Parliament cannot pass a law that itself, is in contravention of the Constitution, the supreme law of the land. With regard to the latter observation the concern is not limited to depriving authors of their property rights as provided for in section 25 of the Constitution (through the displacement of such rights by so-called “users’ rights”⁸³) : it also relates to the fact that the Bill is likely to also give rise to a contravention of international law. This point requires further elaboration.

importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.” It is submitted that this fits squarely the Copyright Amendment Bill 2017, which indeed is an important legislation having a dire impact on the public and affecting directly the livelihoods of musicians and other rights-holder groups. Musicians fit the description of a “discrete and identifiable ... section of the population” even more, based on the fact that they were identified in the Copyright Review Commission (CRC) of 2011 as a particularly vulnerable community, with a final recommendation to “assess the efficiency of legislation in South Africa” to address the issues faced by this community. The Memorandum to the Bill itself also makes reference to the CRC as being one of the instruments that motivated the formulation of the Bill. It is thus surprising that the majority of the provisions of the Bill have turned out to be anti-author and pro-user. For the CRC see <http://www.gov.za/documents/copyright-review-commission-report-2011> (date of use: 28 April 2018). For the inadequacy of the consultation process in relation to the rights-holder community see Hollis <https://www.adamsadams.com/south-africas-copyright-law-knife-edge/> (date of use: 28 April 2018), who refers to a “perceived lack of proper and meaningful stakeholder engagement ... with the report under the Government’s Socio-Economic Impact Assessment System (SEIAS) not indicating any independent research - or any research at all – on the impact of the Bill, especially its proposed exceptions and the ‘fair use’ clause.”

⁸⁰ The Anton Mostert Chair of Intellectual Property Law <http://blogs.sun.ac.za/iplaw/files/2017/06/CIP-Comments-Copyright-Amendment-Bill-2017.pdf> at 2 (date of use: 30 April 2018).

⁸¹ *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* 2010 (6) BCLR 520 (CC).

⁸² *Id* at paras 62 and 63.

⁸³ The concept of a “user’s right” is alien to international copyright law. The conceptual basis for the idea of a “users’ right”, rather than referring to a limitation of authors’ rights under certain circumstances, was found or rather given traction in the highly-publicised Canadian case of *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR, 2004 SCC 13, where Justice McLachlin observed (at para 48), that the fair dealing exception, “like other exceptions in the Copyright Act, is a user’s right”, and warned against deeming exceptions as mere defences to an action of copyright infringement. Earlier writers such as Patterson and Lindberg had advocated for a similar position. See Patterson and Lindberg *The Nature of Copyright*, generally. However, neither international copyright law nor the laws of most jurisdictions (or perhaps all other jurisdictions) make provision for a “user’s right”.

Reference was made above to section 39(1)(c) of the Constitution, which provides that, when interpreting the Bill of Rights a court, tribunal or forum *may* consider foreign law. Section 39(1)(b) provides that, under similar circumstances the court, tribunal or forum *must* consider international law. Further to this, section 233 of the Constitution provides that when interpreting any legislation any reasonable interpretation consistent with international law *must* be preferred to any inconsistent interpretation. In this regard it is important to note that it has often been observed that there is, as such, no system of *international copyright*, there being no “single code governing protection across national borders, nor a unitary multi-national property right”; and that what exists is in fact “a complex of copyright *relations* among sovereign states, each having its own copyright law applicable to acts within its territory”.⁸⁴ Nevertheless it is submitted that it remains correct to refer to copyright as being part of a system of international law in the sense of treaty law or rather “a body of rules made by states in their interactions with each other.”⁸⁵ Such a construction is, it is submitted, consistent with the provisions of section 231 of the Constitution, which recognises “international agreements” as being part of international law.

In the area of copyright the most important international agreements are the Berne Convention⁸⁶ - the “most widely adhered to international law treaty in the sphere of copyright”⁸⁷ - and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), recognised as being “the most comprehensive international instrument on intellectual property rights” by the scope of its coverage.⁸⁸ There are a number of ways in which the current Copyright Amendment Bill as introduced in parliament would be in conflict with international copyright law. As an example, the newly-introduced provisos in the Bill to the section 6, 7 and 8 rights make it mandatory for authors who have assigned their rights, to share in fifty percent of the royalties attributable to the use of the works concerned. This can be seen as reducing rights in copyright to Rome Convention-type remuneration rights, in spite of the fact that such rights are, in terms of the Berne Convention minimum standards, exclusive in nature. More relevant to the current discussion is the introduction of an expanded exceptions regime and in particular, the introduction of a US-style fair use exception, been hailed as being crucial for technological developments by some.⁸⁹ Doing

⁸⁴ Baumgarten “Primer on International Copyright” 470 – 471. National courts have also emphasised the territorial nature of copyright. See for example *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* [2011] 1 All SA 449 (SCA) at paras 15 – 17.

⁸⁵ Definition of “international law” in Du Bois Wille’s *Principles* 108. See also Von Lewinski *International Copyright Law* 3 – 4 and Ruse-Kahn *Intellectual Property in International Law*, generally, for the recognition of intellectual property law as forming part of international law.

⁸⁶ Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1886; revised at Berlin on November 13, 1908; revised at Berne on March 20, 1914; revised at Rome on June 2, 1928; revised at Brussels on June 26, 1948; revised at Stockholm on July 14 1967; revised at Paris on July 24, 1971 and amended on September 28, 1979 (“the Berne Convention”).

⁸⁷ Fraser 1997 *J. Marshall J. Computer & Info. L.* 762.

⁸⁸ See Correa *Intellectual Property Rights and Developing Countries* 1. With regard to substantive protection the Berne Convention remains the most important agreement and its provisions have accordingly been incorporated within the TRIPs Agreement. However the TRIPs Agreement deals with other provisions relating to principles of protection, enforcement mechanisms, dispute prevention and settlement, and miscellaneous provisions relating to developing countries and institutional provisions. See in this regard Part II of the TRIPs Agreement and more specifically, Articles 9 – 14 thereof. By being part of the WTO dispute settlement system however the TRIPs Agreement remains the most forceful global framework on intellectual property rights.

⁸⁹ See the Google submission in respect of the Bill, available at https://libguides.wits.ac.za/ld.php?content_id=33934566 (date of use: 29 April 2018).

this without having conducted a proper assessment of the impact of doing so on the livelihoods of rights-holders would, it is submitted, runs foul of the requirements of the three-step test embodied in both the Berne Convention and the TRIPs Agreement.⁹⁰ In this regard it is instructive to indicate that doubts have been cast as to the compliance of the fair use system with the three-step test.⁹¹

The three-step test requires that limitations and exceptions to the exclusive rights granted in terms of copyright must only be imposed (i) in certain special cases; (ii) that do not conflict with a normal exploitation of the work and (iii) do not unreasonably prejudice the legitimate interests of the author. In a WTO Dispute Resolution Panel decision⁹² which concerned exceptions introduced under the US Copyright Act⁹³ the Panel, relying on article 13 of the TRIPs Agreement, observed that “[t]he three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied”, so that “[f]ailure to comply with any of the three conditions results in the Article 13 exception being disallowed. ...”⁹⁴ In this regard the Panel further observed:

It may be noted at the outset that Article 13 *cannot have more than a narrow or limited operation*. Its tenor, consistent as it is with the provisions of Article 9(2) of the Berne Convention (1971), discloses that *it was not intended to provide for exceptions or limitations except for those of a limited nature*. ...⁹⁵

After analysing each of the three conditions in respect of the exceptions concerned the Panel found that an exception which exempted a broad range of retail and restaurant establishments (the so-called *business exception*) from liability for the public performance of musical works by means of communication of radio and television transmissions, contravened article 13 of the TRIPs Agreement and Article 9.2 of the Berne Convention. There is no indication that in introducing the expanded exceptions regime the drafters of the current Copyright Amendment Bill 2017 have

⁹⁰ The three-step test is provided for in Article 9 of the Berne Convention (1971), in particular Article 9(2)). Article 9 of the Convention provides the following: “(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works *in certain special cases*, provided that such reproduction *does not conflict with a normal exploitation of the work* and *does not unreasonably prejudice the legitimate interests of the author*.” (Emphasis added). The highlighted phrases constitute the Berne three-step test. The TRIPs Agreement contains similar provisions in Article 13 thereof but is broader in the sense that the application of the test is not only limited to the reproduction right, as is the case under Berne.

⁹¹ See for example Burrell R “Reining In Copyright Law: Is Fair Use the Answer?” 2001 I.P.Q. (4), who casts doubt as to the compliance of the fair use defence with the three-step test (at 384 – 385).

⁹² WTO Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000: VIII, p. 3769.

⁹³ The exceptions were introduced through the Fairness in Music Licensing Act of 1998, which amended s 110(5) of the US Copyright Act 1976. The amendment dealt with two exceptions, which have been called the *home-style exception* (introduced by sub-paragraph (A)), and the *business exception* (introduced by sub-paragraph (B)). Both exceptions dealt with the public performance of music in bars, shops, restaurants etc by means broadcasts, regardless of whether or not the broadcasts were original over-the-air or satellite broadcasts, rebroadcasts by terrestrial or satellite means, cable retransmission of original broadcasts, or original cable transmissions or other transmissions by wire. The *business exception*, which the Panel dealt with first, permitted certain food, drink and retail establishments conforming to certain size requirements and equipment limits to play non-dramatic musical works transmitted through radio or television broadcasts without payment of a royalty, provided the establishment concerned did not charge directly for the transmission and did not display the service beyond the boundaries of the establishment concerned. The *home-style exception*, which applied to smaller establishments in respect of “communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes”, unless a direct charge is made to see or hear the transmission or the transmission is further transmitted to the public.

⁹⁴ WTO Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000: VIII, p. 3769, at para 6.97.

⁹⁵ *Ibid.* Emphasis added.

carefully assessed their adherence to the three-step test.⁹⁶ It is submitted that if many of the newly-introduced exceptions or limitations were subjected to a rigorous three-step test as exercised by the WTO Panel they would be found wanting. Thus we find that on at least three fronts, namely (i) deprivation of the property rights provided under section 25 of the Constitution; (ii) lack of proper consultation and (iii) non-adherence to the three-step test, the Copyright Amendment Bill 2017 would, if passed into law, fail to pass constitutional muster.

8.2.3 BitTorrent and Other New Generation P2P Networks – The Pirate Bay

The legal challenges faced by and ultimate demise of *Napster*, *Kazaa* and *Grokster* did not as such deter users from making use of P2P file-sharing technologies. This prompted rights-holders, in particular through the agency of the Recording Industry Association of America (RIAA), to initiate a much-criticised process of instituting legal proceedings against a reported thirty thousand-odd individual offenders, “includ[ing] children, grandparents, unemployed single mothers, college professors”.⁹⁷ This initiative too did not yield the desired results, prompting the RIAA to announce, after reaching agreement with several internet service providers (ISPs), that it would cease the initiative and instead cut off subscribers’ connections if they ignored warnings to stop their infringing activities.⁹⁸ On their part the technologists sought for new ways to continue making use of the file-sharing technology while eliminating detection “or seeking to make the task of the content industry significantly more difficult in trying to prevent their activities.”⁹⁹ The BitTorrent technology, with its ability to eliminate the use of central servers, has been such technology.

In this newer or next generation of P2P systems the focus has been on concealing the sources from which the shared files emanate by masking the detection of the individual’s “cyber footprint”.¹⁰⁰ In this regard BitTorrent technology is described as “a communications protocol of peer-to-peer file sharing ... used to distribute large amounts of data and electronic files over the internet”, enabling a user to download files from (or uploaded them to) multiple users simultaneously, rather than from a single source.¹⁰¹ This is done using software termed a BitTorrent Client, which is used to access a Torrent *file* which can be downloaded or uploaded simultaneously by a group of users (termed a “swarm”) and contains information about various files and their location.¹⁰² No central server is needed to do this as the P2P file-sharing is facilitated through the use of BitTorrent trackers or

⁹⁶ None of the newly-introduced exceptions in the Bill in fact specifically provide that the exceptions shall be subject to the application of the three-step test.

⁹⁷ See https://www.eff.org/wp/riaa-v-people-five-years-later#footnote17_zj5o0ql (date of use: 30 April 2018).

⁹⁸ See <https://www.wired.com/2008/12/riaa-says-it-pl/> (date of use: 30 April 2018).

⁹⁹ Dean & Dyer *Introduction to Intellectual Property* 434.

¹⁰⁰ Goldschmied *Digital Music Piracy v Music Industry* 103.

¹⁰¹ <https://www.techworm.net/2017/03/seeds-peers-leechers-torrents-language.html> (date of use: 28 April 2018); also Dean & Dyer *Introduction to Intellectual Property* 434.

¹⁰² *Ibid.* Sometimes so-called “magnet links”, “which identify the content of a torrent file and refer to it through a digital fingerprint” are used in the place of torrent files. See *Stichting Brein v Ziggo BV, XS4ALL* [2017] EUECJ C-610/15, at para 11.

indexes (e.g. The Pirate Bay) and the files are shared between users connected to the swarm through their computers, who either have the entire file or portions thereof.¹⁰³

The *modus operandi* of the BitTorrent technology has been explained as follows:

Users (called 'seeders') who wish to make a file on their computer available to other users (called 'leechers') have to create a torrent file through the BitTorrent client. Torrent files refer to a central server (called a 'tracker') which identifies the users available to share a particular torrent file as well as the underlying media file. These torrent files are uploaded by the seeders to an online sharing platform ... which then proceeds to index them so that they can be found by the users of the online sharing platform and the works to which those torrent files refer can be downloaded onto the users' computers in several segments through their BitTorrent client.¹⁰⁴

The Pirate Bay ("TPB"), a Swedish company founded in 2003, has been perhaps the best exemplifier of the essence and notoriety of BitTorrent technology. Despite having been subjected to a number of legal challenges, including the blocking of its domain name in several jurisdictions, the raiding of its offices by law enforcement agents, the hacking of its servers and the personal prosecution of its founders, TPB has somehow had a way of reinventing itself – in particular through the use of different domain names and "frequently replac[ing] its iconic pirate ship logo".¹⁰⁵ TPB has also made use of the practice of "bulletproof hosting", namely moving its operations to jurisdictions that would permit the operations, or hosting its websites through ISPs that would be unlikely to stop these operations.¹⁰⁶ TPB's furtive manners may however, be nearing the same fate faced by Napster, Kazaa and Grokster before it, following a recent ruling of the Court of Justice of the European Union (CJEU) (the "Pirate Bay" case).¹⁰⁷

8.2.3.1 The Pirate Bay case

The *Pirate Bay* case was a referral from the Supreme Court of the Netherlands to the CJEU, for a preliminary ruling to determine, in the main:

¹⁰³ Ibid. Another appeal of BitTorrent is the ability to share files in segments, so that "[b]y splitting the file and send[ing] one part to each peer, and let[ting] the peers download the part they are missing from each other, both download time and load on the server is reduced." Johnsen, Karlsen and Birkeland 2005 <http://web.cs.ucla.edu/classes/cs217/05BitTorrent.pdf> 4 (date of use: 28 April 2018). See also *Metro-Goldwyn-Mayer Inc. v Grokster* 545 U.S. 913 (2005) 1 – 2, where it was observed in respect of peer-to-peer networks that, "Because they need no central computer server to mediate the exchange of information or files among users, the high-bandwidth communications capacity for a server may be dispensed with, and the need for costly server storage space is eliminated." Users of the BitTorrent protocol are known by different names. A "seed" or "seeder" is someone who has downloaded 100% of a Torrent file and is no longer downloading but sharing (or "seeding") the file; a "leecher" is a user who is both downloading and uploading a file (i.e. he shares what he has already downloaded from the Torrent file and downloads what others have already uploaded); a "peer" is someone who is downloading a file but others can also download portions of the file that the peer has already downloaded. Johnsen, Karlsen and Birkeland *ibid.*

¹⁰⁴ *Stichting Brein v Ziggo BV, XS4ALL* [2017] EUECJ C-610/15 at para 10.

¹⁰⁵ See <https://torrentfreak.com/the-pirate-bays-rebellious-history-in-doodles-180429/> (date of use: 02 May 2018). The website is informational in this regard and incorporates various logos used by TPB over the years, "to send a message".

¹⁰⁶ See Dean & Dyer *Introduction to Intellectual Property* 435.

¹⁰⁷ *Stichting Brein v Ziggo BV, XS4ALL* [2017] EUECJ C-610/15.

*Whether there was a communication to the public within the meaning of Article 3(1) of the EU Directive of 2001,^[108] “by the operator of a website, if no protected works are available on that website, but a system exists ... by means of which metadata on protected works which are present on the users’ computers are indexed and categorised for users, so that the users can trace and upload and download the protected works on the basis thereof”.*¹⁰⁹

In this regard the case followed the trend of other European decisions in which the question of digital infringement was approached on the basis of an infringement of the right of communication to the public, unlike the American cases dealt with above where the matter was approached from the basis of the infringement of the right of reproduction and distribution.

The applicant in the current case sought relief in the form of an order compelling the respondents to block the domain names and IP addresses of TPB to prevent them from being used to infringe the copyright and related rights of rights-holders represented by the applicant. It was acknowledged by the referring court that the actions of TPB made protected works available to the public without the rights-holders authorisation and thus infringed the rights-holders copyright and related rights. The referring court nevertheless sought clarity as to whether in doing so, TPB was communicating such works to the public within the meaning of the 2001 EU Directive.¹¹⁰ The CJEU encapsulated the legal question as requiring it to determine if the concept of communication to the public should be interpreted as

covering ... the making available and management, on the internet, of a sharing platform which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.¹¹¹

The court observed that the concept of “communication to the public” had to be interpreted broadly, seeing that the objective of the EU Directive of 2001 was “to establish a high level of protection for authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public.”¹¹² The court further observed that the concept of “communication to the public” within the meaning of the 2001 Directive required an individual assessment involving two cumulative criteria, namely (i) an act of communication of a work and (ii)

¹⁰⁸ The Information Society Directive 2001/29/EC. The article provides the following: “Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.” This of course aligns with article 8 of the WIPO Copyright Treaty (WCT) of 1996, part of the so-called “WIPO Internet Treaties”, the other one being the WIPO Performances and Phonograms Treaty (WPPT), 1996. Clause 4(a) of the Copyright Amendment Bill 2017 (version B13B-2017) approved by both houses of Parliament and awaiting the signature of the President seeks to introduce a version of this right through an amendment of s 6 of the Copyright Act. For a critical analysis of this proposed provision see *infra* at Chapter 7. For the Bill see <https://pmg.org.za/bill/705/> (date of use: 13 July 2019).

¹⁰⁹ The second question, which the court did not have to answer, was whether, if the first question was answered in the negative, there was a scope within the 2001 and 2004 EU Directives for obtaining an injunction against an intermediary if such intermediary facilitates the infringing acts of third parties in the manner referred to in the first question.

¹¹⁰ See *Stichting Brein v Ziggo BV, XS4ALL* [2017] EUECJ C-610/15 at paras 15 – 16.

¹¹¹ *Id* at para 18.

¹¹² *Id* at para 22.

and the communication of the work to “a public”.¹¹³ In determining whether an act of communication to the public has taken place one has to consider the “deliberative nature” of the user’s intervention. Thus where the user intervenes, knowing fully the consequences of his action, to give access to a copyright-protected work to his customers, “particularly where, in the absence of that intervention, those customers would not be able to enjoy the broadcast work, or would be able to do so only with difficulty”, an act of communication would have taken place.¹¹⁴ “Public” refers to an indeterminate number of potential viewers and implies “a fairly large number of people.”¹¹⁵

Further to the above, for a protected work to satisfy the requirements of “communication to the public” the work must have been communicated using “specific technical means” different from those previously used; or else it must have been be communicated to a “new public” – i.e. “a public that was not already taken into account by the copyright holders when they authorised the initial communication of their work to the public”.¹¹⁶ Having considered relevant case law the court concluded that the making available and management of an online sharing platform, where the user, with full knowledge of the facts, provides its customers with access to copyright-protected works, amounted to an act of communication to the public within the meaning of the EU Directive of 2001.¹¹⁷ In providing its reasons the court made the following observations:

(1) Although the users and not the platform operators themselves had placed the works online,

the fact remains that those operators, by making available and managing an online-sharing platform ...intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network.¹¹⁸

In this way the operators played an *essential role* in making the works concerned, available;¹¹⁹ and

(2) The operators were not merely providing physical facilities for enabling or making a communication.¹²⁰ In addition to providing a search engine TPB provided an index “classifying the works under different categories, based on the type of the works, their genre or their popularity ... with the platform’s operators checking to ensure that a work has been placed in the appropriate category”; and also deleting obsolete or faulty files and actively filtering content.¹²¹

Regarding the question whether the communication was a communication to “a public” the court noted that the concept of “public” involves a *de minimis* threshold and thus excluded from the

¹¹³ *Id* at paras 23 and 24.

¹¹⁴ *Id* at para 26.

¹¹⁵ *Id* at para 27.

¹¹⁶ *Id* at para 28. The court also observed that the profit-making nature of the communication was not irrelevant. See *id* at para 29.

¹¹⁷ *Id* at paras 34 and 39.

¹¹⁸ *Id* at para 36.

¹¹⁹ *Id* at para 37.

¹²⁰ The mere availing of such physical facilities would be exempted in light of recital 27 of the 2001 Copyright Directive.

¹²¹ *Stichting Brein v Ziggo BV, XS4ALL* [2017] EUECJ C-610/15 at para 38.

concept “groups of persons ... which are too small or insignificant.”¹²² In order to determine the sufficient number the *cumulative effect* of making the works available to potential recipients had to be taken into account: thus not only the number of persons having access to the same work at the same time is to be considered, but also “how many of them have access to it in succession”.¹²³ This observation clearly captured the BitTorrent *modus operandi* and, as the court observed, “all of the platform’s users” were thus included within the concept of “a public”; since “[t]hese users can access, at any time and simultaneously, the protected works which are shared by means of the platform” (fulfilling the requirement of an “indeterminate number of potential recipients” involving a large number of persons”).¹²⁴ This public was furthermore a public that the copyright holders had not taken into account when they authorised the initial communication, particularly because “a very large number of torrent files [on the TPB platform] relate to works published without the consent of the rightholders.”¹²⁵

8.2.3.2 Conclusion

Important lessons can be learnt from the manner in which the European Union has dealt with the interpretation of the concept of “communication to the public”, especially since South Africa does not know such a concept in respect of musical works.¹²⁶ This observation is even more relevant in view of the fact that the Copyright Amendment Bill 2017 seeks to incorporate exceptions relating to temporary acts of reproduction that clearly emanate from article 5(1) of the EU Directive of 2001¹²⁷ (albeit haphazardly). Some of the CJEU’s elaboration on the ambit of the right of “communication to the public” have been based on an interpretation of the effect of the exceptions introduced in terms of article 5(1) of the EU Directive of 2001.¹²⁸ It is submitted that if South Africa wants to introduce a truly-effective exception based on EU law, the South African legislature must, in enacting the legislation in question, take into account (i) all the considerations made by the EU in introducing such an exception; and (ii) the latest developments in relation to the legislative status and the judicial interpretation of the said exception in EU law. This will prevent the occurrence of issues that have been ascribed to the unfettered use of foreign law, namely:

[a] fixation on legal rules and concepts and a neglect of legal culture and context; considering foreign legal rules and judgments in isolation and failing to situate them within a larger legal system and

¹²² *Id* at para 41.

¹²³ *Ibid*.

¹²⁴ *Id* at para 42.

¹²⁵ *Id* at paras 44 and 45. The court also referred to the fact that the communication was intended for profit as the platform generated considerable advertising revenues. *Id* at para 46.

¹²⁶ South Africa know a limited concept of “communication to the public” in terms of s 9(e) of the Copyright Act, but the courts have not as yet provided clarity as to what this right fully entails. Dean *Handbook of South African Copyright Law* 1-54 at n 4 opines that the right has its genesis from the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). It is however submitted that this is dubious as the right is, in its expression (as merely “communicating the sound recording to the public”) is more aligned to the provisions of art. 7(1)(a) of the Rome Convention 1961, than it is to the provisions of the two WIPO Internet Treaties (it being nevertheless acknowledged that the right provided for under the Rome Convention is not as such, expressed as an exclusive right).

¹²⁷ Information Society Directive 2001/29/EC. See in this regard clause 12 of the Bill, purporting to introduce a new s 13A into the Copyright Act. See also *infra* Chapter 7 for a further discussion of this proposed exception.

¹²⁸ See for example the recent case of *Stichting Brein v Wullems* [2017] EUECJ C-527/15.

tradition; using foreign law as authority for a certain standpoint rather than as a basis for comparison and a source of constitutional arguments ...¹²⁹

In relation to the foregoing the use of the communication right in EU law to counter the possible adverse application of the temporary reproduction exception provided for in article 5(1) of the EU Directive of 2001 would be something worth considering if the temporary reproduction exception is introduced in South African copyright law.¹³⁰ In this regard the deference to EU law would not only be justified by the fact that the proposed temporary reproduction exception in question is based on EU law. More than this, it would be justified on the ground that the UK position, which South African courts would generally refer to due to South Africa's historic connection to UK copyright law,¹³¹ is, in relation to this matter, now consonant with the EU position.¹³² It is in this regard acknowledged that the UK is in the process of withdrawing from the EU through the "Brexit" decision. Nevertheless, intellectual property law is likely to assume the status of "retained EU law", together with other types of EU law that currently applies directly in the UK.¹³³

With regard to the foregoing it needs to be noted that the current interpretation of the concepts of "public", "the public" or "in public" by South African courts in relation to the public performance of copyright works is based on earlier English law.¹³⁴ In these earlier English decisions it was held that the reference to "public" in this case is a reference to the copyright owner's public,¹³⁵ i.e. it "must be considered in the light of the relationship between the audience and the owner of the copyright and not in the light of the relationship between the audience and the performer".¹³⁶ Dean argues that this interpretation would equally apply in respect of the use of the term "public" in the definition of

¹²⁹ Goitom 2010 *The Law Library of Congress* <https://www.loc.gov/law/help/domestic-judgment/impact-of-foreign-law.pdf> 74, referring to a presentation by Henk Botha. (Date of use: 02 May 2018). The haphazard manner in which the proposed importation of the provisions of art 5(1) of the EU Directive of 2001 has been carried out is demonstrated by the fact that whereas, in the EU Directive, art 5(1) is subject to the three-step test provided for in art 5(5), the proposed exception in clause 12 of the Copyright Amendment Bill 2017 is not subjected to this test.

¹³⁰ In this regard it was held in the case of *Stichting Brein v Wullems* [2017] EUECJ C-527/15 that the marketing of a multimedia player by the respondent in which the respondent had pre-installed "add-ons" that specifically enabled purchasers to have access to copyright-protected works published, without the consent of the rights-holders, on streaming sites and enabled the purchasers to watch the works on their televisions screens, amounted to an unauthorised communication of those works to the public. Accordingly the court held, at para 70, that, "as a rule, temporary acts of reproduction ... of copyright-protected works obtained from streaming websites belonging to third parties offering those works without the consent of the copyright holders are such as to adversely affect the normal exploitation of those works and causes unreasonable prejudice to the legitimate interests of the right holder, because ... that practice would usually result in a diminution of lawful transactions relating to the protected works, which would cause unreasonable prejudice to copyright holders".

¹³¹ See for example *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81, at para 103, where Berger AJ observed: "... I must be cautious in considering foreign law because each jurisdiction has its own history and, in many cases, is bound and influenced by statutory precepts. I therefore intend, for historical reasons, to focus on English authority."

¹³² This was with effect from 31 October 2003 as part of implementing the Information Society Directive of 2001. See Garnett, Davies and Harbottle *Copinger and Skone James* 502 – 503.

¹³³ This is as a result of the so-called *Withdrawal Bill* current serving before the UK Parliament. See in this regard https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678329/Factsheet_2_-_Converting_and_Preserving_law.pdf (date of use: 4 May 2018).

¹³⁴ See the case of *Southern African Music Rights Organisation Ltd v Svenmill Fabrics (Pty)(Ltd)* 1983 (1) SA 608 (C), where the court relied on a number of UK decisions to interpret the meaning of these concepts. At para 36 Berman AJ made the following observations: "Now the object of the copyright legislation in the United Kingdom is the same as that of the Copyright Act in this country, and has long been so. The language employed in the enactments on this topic of the two countries is largely similar and, regard being had to the paucity of authority in South Africa ... no apology is required for calling in aid the English cases dealing with the point under consideration. ..."

¹³⁵ See *Jennings v Stephens* [1936] Ch. 469.

¹³⁶ See *Southern African Music Rights Organisation Ltd v Svenmill Fabrics (Pty)(Ltd)* 1983 (1) SA 608 (C) at para 33.

“broadcasting” in our Copyright Act.¹³⁷ It must be observed that such a view would be in conflict with position applicable under the Berne Convention, which makes a distinction between the broadcasting right and the public performance right.¹³⁸ Thus the correct position regarding the meaning that must be accorded to the term “public” within the context of the broadcasting right can be determined from how this concept is understood within the purview of the Berne Convention. In this regard Goldstein and Hugenholtz have, with regard to the right of broadcasting or communicating a work to the public provided for in article 11 *bis*(1)(i) of the Berne Convention, made the following observation:

It is central to this right, as to the other aspects of the broadcasting right, that some form of receiver intermediate between the performer and the audience. But, for conduct to fall within the right, *it is necessary only that signals be emitted; “it is immaterial whether or not they are in fact received.” Thus, even if no single member of the public views or hears the signal, it will nonetheless constitute a broadcast to the public.*¹³⁹

In this regard it must be noted that, in like manner, UK copyright law has also always made a clear distinction between the treatment of the public performance right and the right to broadcast a work;¹⁴⁰ and that this is in fact a position that has been followed under South African copyright law.¹⁴¹ This position has been retained in current UK copyright law, where the concept of “public” in respect of the act of public performance differs from the concept as it is used in respect of the act of broadcasting (as subsumed within the concept of communication to the public under EU law). Thus while the traditional test used in *Jennings v Stephens*¹⁴² still applies in respect of the concept of “public” in relation to the act of public performance; other considerations apply in respect of the use of the concept in relation to the act of communication to the public (which, as indicated,

¹³⁷ See Dean *Handbook of Copyright Law* 1-64B n 2. The learned author further argues that the broader meaning accorded to the concept of “broadcasting to the public” in Australian copyright law as a result of the case of *Australasian Performing Right Association v Telstra Corp Ltd* (1997) 38 IPR 294 (HC of A), would equally apply in respect of the concept of “reception by the public” as used in the definition of “broadcasting” in the South African Copyright Act. See Dean *id* at 1-16.

¹³⁸ See Reinbothe and Von Lewinski *WIPO Treaties on Copyright* 130.

¹³⁹ Goldstein and Hugenholtz *International Copyright* 330. Emphasis added. The position where a similar test would be used with regard to determining the “public” with respect to both the right of broadcasting the work and the right of public performance would thus be more consonant with US law rather than UK law. See in this regard the recent US Supreme Court case of *American Broadcasting Companies, Inc. v Aereo, Inc.* 573 U.S. __ (2014), 14 – 17, where it is clear that the right of public performance in US law encompasses the right of broadcasting a work, and where the concept of “the public” was defined in a manner similar to the *Jennings v Stephens* case (see *supra* n 135). Thus it was observed in the *Aereo* case (at 14 - 15) that ‘... the subscribers to which Aereo transmits television programs constitute “the public”. ... The Act ... suggests that “the public” consists of a large group of people outside of a family and friends’. See in this regard § 101 of the US Copyright Act 1976, where it is provided that to perform a work publicly means, *inter alia*, “to perform ... it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered”. In contrast, in the UK case of *ITV Broadcasting Ltd and Others v TV Catch Up Ltd* [2010] EWHC 3063 (Ch), which dealt with facts that were similar to those dealt with in the *Aereo* case, the UK High Court (Chancery Division), relying on the ECJ’s ruling in the SGAE case (*Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SL* [2006] EUECJ C-306/05), considered the concept of public within the framework of the right of communication to the public (which, in UK law, encompasses the right of broadcasting), and held that the right had to be “interpreted broadly so as to cover all communication to the public not present where the communication originates” (at para 15).

¹⁴⁰ See Garnett, Davies and Harbottle *Copinger and Skone James* 503.

¹⁴¹ Thus s 1(6) of the Copyright Act 1965, which was patterned after the British Copyright Act of 1956 (for which ...) specifically provided that broadcasting was excluded from the definition of “performance”. S 1(1) of the current Copyright Act makes a similar provision in respect of the definition of “performance”.

¹⁴² [1936] Ch. 469, referred to *supra* at n 135.

encompasses the act of broadcasting). Such considerations include the consideration as to “[whether] the communication is made by a broadcaster other than the original one, and to a public which is different from the public to which the original broadcast was addressed.”¹⁴³ Thus even if South African courts were to continue to refer to UK law post-Brexit, the *current* EU position with regard to the treatment of the right of communication to the public would in all likelihood, still apply.¹⁴⁴ Accordingly, the observation made above regarding finding assistance in EU law in relation to the right of communication to the public would still be relevant.¹⁴⁵

8.3. The Traditional Music Market and the Role of Copyright in Organising the Market

8.3.1 Understanding the Traditional Music Market

The concept of a “value chain”¹⁴⁶ has been used conveniently both to describe and make sense of the various activities and complex relationships that exist within the music industry and to properly

¹⁴³ See Garnett, Davies and Harbottle Copinger and Skone James 499 – 502; 510 – 511. For the genesis of this “new public” test in European copyright law see *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SL* [2006] EUECJ C-306/05 and *Football Association Premier League & Others v QC League & Others; Murphy v Media Protection Services Ltd* [2011] EUECJ C-429/08_O.

¹⁴⁴ See the factsheet regarding the Withdrawal Bill, where it is noted with regard to existing case law of the CJEU that “[r]etained EU law will be interpreted by domestic courts in accordance with relevant pre-exit CJEU case law and any retained general principles of EU law”, which will have the same precedential effect as “that of the UK Supreme Court or the High Court of Justiciary.” See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678329/Factsheet_2_-_Converting_and_Preserving_law.pdf (date of use: 4 May 2018).

¹⁴⁵ The *current* EU-influenced UK case law position must nevertheless be distinguished from the position provided for in the new Directive on Copyright in the Digital Single Market adopted by the EU Parliament on 17 April 2019, as such position may not form part of UK copyright law, depending on when Brexit takes place. See for the discussion under paragraph 8.4.2.4 (a) below.

¹⁴⁶ The idea of the value chain was first developed by Michael E. Porter in the 1980’s. See Porter *Competitive Advantage*. The value chain, which “shows the chain of activities that a product goes through in order to reach consumers with added value”, with each part adding “something that the previous part could not” (Shaw *South African Music Business* 33 – 34), plays a pivotal role in the music industry. In the present context the word “product” can be replaced by the word “work”. A value chain operates in relation to a particular entity (e.g. the value chain of musical works controlled by a publishing company), and various value chains (such as those of publishing companies, record companies and film companies) lead to a *value system*, which consists of “a sequence of stages, each of which describes a distinct and economically significant activity, at which value is added to the value created at earlier stages, eventually adding up to the value held by the final product”, thus describing “the path a product takes, with the initial supplier of primary input at one end, and the final consumer at the other.” Mol and Wijnberg 2002 <http://www.rug.nl/research/portal/files/3057878/02B62.pdf> 2 (date of use: 23 June 2016). See further in this regard Rogers *et al* 2004 <http://eprints.gut.edu.au/2422/> 7 (date of use 23 June 2016). In the present case the “initial supplier of primary input” would be the composer of a musical work and / or the author of music lyrics. The composer / author is thus a part of the first value chain in this value system. This first value chain also involves the process of the publication (or distribution) of the musical works, which would be carried out either by the composer / author himself, or, as is often the case, by engaging the services of a music publisher. This first value chain may involve exploiting or *licensing* the musical work by way of printing, inclusion in sound recordings or inclusion in films or other audio-visual works (e.g. home videos, television programs, games, advertisements etc.). This licensing stage is a *de facto* value chain relating to the right of publication, in that it is a “distinct and economically significant activity” which has given rise to the multi-billion dollar global music publishing industry. The process of recording the musical work in a sound recording gives rise to another value chain, namely that relating to the recording industry, another billion-dollar industry. The same applies with regard to the use of the musical work in films or other audio-visual works. The music business value system then extends to other, more “downstream” value chains – all billion-dollar industries - such as those relating to the activities of collecting societies and the live music promotion industry, making the music industry one of the most prolific “money-spinners” in the world economy. See for some numbers in this regard Billboard (a leading music business magazine) 2015 <http://www.billboard.com/articles/business/6805318/25-billion-global-music-industry-not-everything> (date of use: 23 June 2016). Having indicated this, it needs to be noted that while this *Porterian* understanding of “how value is added along a product’s production and distribution path” would fit well in the traditional (so-called “first tier”) music market, it may not always fit well in “second tier” music markets dominated by independent, often unsigned-artists and producers, as those “are increasingly able to sell their work independent of the traditional value chain, due to technological and cultural changes.” See Rogers *et al* *ibid*.

delineate the essential market segments that exist within the industry. The three main market segments within the music industry are (a) songwriting and music publishing; (b) music recording and (c) live performances.¹⁴⁷ Traditionally the music business value system was rather clear-cut and straightforward,¹⁴⁸ straddling between these three main market segments. In the songwriting and music publishing segment one would, for example, find, *upstream*, songwriters and music publishing companies and *downstream*, collecting societies; in the music recording segment one would find *upstream*, recording artists, recording studios and record labels, and *downstream*, music distributors and music retail stores;¹⁴⁹ and in the live performance segment one would find performing artists, music managers, talent agents, venues and concert promoters.¹⁵⁰ This clear-cut music industry segmentation also gave rise to distinct, defined royalty streams associated with each of the various music market segments, which the participants in such markets would have a legitimate expectation to receive once the work or performance would have been commercially exploited.

One of the features of the traditional music market segmentation was its reliance on intermediaries, where the author or performer of music needed intermediaries such as music publishers, record labels and music retail stores to get his or her work or performance to be commercially exploited. This dependence on intermediaries gave rise to a gigantic and sprawling, inter-connected global industry which fed off a constant supply of “hit songs” and rousing performances from an equally seemingly incessant queue of would-be “hit makers”. The concept of a value chain has, until recently, been useful in deciphering this inter-connected and inter-dependent system comprising the “music industry”. The digital revolution has however, arguably disrupted this neat, straightforward structure of the music industry and given rise to a condition that can largely be described as “market disintermediation”.¹⁵¹ In this regard it has been suggested that digital technology has brought about a shift from a value chain to a *value network* in the music industry, making the value chain for the *new media* music industry much more complicated.¹⁵² This phenomenon is well-captured in the following observation:

Traditional music publishing can be presented as a linear value chain of content creation (produce), production (manufacture), distribution and consumption The supply chain was structured to distribute and sell media content through a simple distribution network, at fixed time windows. However, the rise of digital platforms like the Internet and devices like MP3 players, smart phones and

¹⁴⁷ See in this regard Simon 2012 <http://ftp.jrc.es/EURdoc/JRC69816.pdf> at 21 – 29 (date of use: 21 May 2017).

¹⁴⁸ When for example, compared to the value chains that exist in technology licensing.

¹⁴⁹ And more recently, collecting societies (e.g. needle-time societies).

¹⁵⁰ See further below for an elaboration on the concepts of *upstream* and *downstream* markets. It is not easy to delineate between upstream and downstream markets in respect of live performances but one would think of formal concert and tour performances as constituting the upstream market, and activities like corporate and private party gigs, and the new trend of live streaming, as constituting the downstream market.

¹⁵¹ In the context of the music industry market disintermediation, or “cutting out the middleman”, is the notion that the digital revolution has resulted in, or facilitated, the elimination of traditional intermediaries in the music industry such as record labels, music publishers and collecting societies (or at least rendered them somewhat redundant), by making it possible for the music creator and performer to directly disseminate or exploit his or her work through direct access to digital technology and by using the services of digital service providers. See generally in this regard Bernardo F “Dodging the Middleman: Insights on Disintermediation in the Independent Music Sector”, in Guerra and Moreira *Underground Music Scenes* at 337 – 348; McConn *Disintermediation Effects of the Internet* and Pitt *Direct Licensing and the Music Industry*.

¹⁵² See Simon 2012 <http://ftp.jrc.es/EURdoc/JRC69816.pdf> 55 (date of use: 21 May 2017).

tablets and the resulting change in consumer behaviour, have changed the relations in the value chain. Traditional business models became insufficient for the digitalized music market. Especially the roles of intermediaries have changed. Functions such as A&R, marketing and promotion have partly been migrated to the internet. Functions like manufacturing and distribution have partly been replaced by digital technologies like home recording, downloading and file sharing It became possible for a whole set of companies – which were traditionally not involved in the music industry – such as ISPs, consumer brands, ICT companies and digital intermediaries for rights clearance or online billing, to play a role in the music industry¹⁵³

Lastly, it would be useful, in considering the value chain that exists from the first stage of exploitation of musical works (e.g. as printed works or as works recorded in sound recordings) to advanced levels of exploitation (e.g. public performances and broadcasts of music records), to consider the concepts of *upstream* and *downstream* usages and / or markets which exist within the value system of the music industry. These concepts are used often when dealing with economic activities in which royalties are paid as compensation generally, and with reference to intellectual property licensing in particular.¹⁵⁴ In this regard reference is made to “the phenomenon of dependent markets” comprised of an “upstream licensing market” and a “downstream goods market”.¹⁵⁵ The “upstream” market is essentially the *supply* market, involving authors who must create works that must then be exploited either through licensing them to others or through a transfer of rights; and the “downstream” market relates to the *distribution* and making available to the public of products and other media embodying the works (whether through record sales, digital distribution, public performance, broadcasts etc.).¹⁵⁶

¹⁵³ Simon *id* at 55 – 56. One of the new non-music entities that entered the music industry as a result of the digital revolution is iTunes, a digital media platform owned by Apple, that is now “comfortably the largest music retailer in the world.” <https://www.theguardian.com/technology/2013/apr/28/itunes-10-years-old-best-idea-apple-ever-had> (date of use: 26 June 2016). iTunes revolutionised the way in which music is consumed through the iPod and digital downloads and now through streaming. <http://www.macworld.com/article/2932738/apple-music-turns-itunes-into-a-streaming-service.html> (date of use: 26 June 2016).

¹⁵⁴ For the usage of these concepts in respect of oil and gas royalties see Colson 1999 *U. Colo. L. Rev.*, generally; in respect of patent licensing see Lowe and Marquis *European Competition Law* 312 – 325; Rey and Salant 2012 *Int J Ind Organ* 518 - 527 and in respect of copyright see Drexel *Research Handbook on Intellectual Property* 58 – 62 and Jiang *China and EU Antitrust Review* 92- 111. It is possible to learn and benefit from the principles applicable to patent licensing when dealing with issues relating to upstream and downstream markets in relation to copyright works (which are, essentially, competition issues). In this regard see Gallini 2011 *RERC* 6, who reasons that a uniform (rather than IP-specific) competition policy would apply equally in respect of both patent pools and “copyright collectives”, because their “efficiency implications” are qualitatively similar in circumstances where members “(1) are vertically integrated into the downstream (product) market; (2) face competition in the upstream (input) market and (3) and own downstream products that do not require a license on the pooled IP but compete with products that do.”

¹⁵⁵ Drexel *id* at 60.

¹⁵⁶ See Hoeg-Guldberg and Lets 2005 http://culturaldata.arts.gov.au/sites/www.culturaldata.gov.au/files/A_Statistical_Framework_for_the_Music_Sector.pdf (iv) - (v) (date of use: 25 June 2016). Dealing with these concepts within the field of filmmaking (in the French context) Benhamou and Peltier 2011 *Revue d'économie industrielle* VII observe: “The author of an audiovisual work (or fictional film) receives compensation in two stages. He or she collects incomes prior to the first distribution of the work (upstream compensation) and afterwards (downstream compensation).” In this regard a statement made by Jajbhay J in *Feldman NO v EMI Music Publishing SA (Pty) Limited, Feldman NO v EMI Music (Pty) Limited* [2007] ZAGPHC 294 (albeit without elaboration), is apt. In the matter, after observing that the law regulating music in South Africa is largely regulated through copyright law, and after mentioning all the works that are protected by copyright in terms of s 2(1) of the South African Copyright Act, Jajbhay J then notes (at para 5): “These works have an impact on the ultimate musical product.” He then mentions the various ways in which a musical work can be exploited in terms of s 6. This is an apt characterisation because alludes to the fact that musical works, through the acts provided for in s 6, can find exploitation through the other works protected under the Copyright Act. The exploitation of musical works in one or more of those works gives rise to the music copyright market, whether upstream or downstream / primary market or secondary market.

The concepts of “upstream” and “downstream” markets are related to the concepts of *primary uses / markets* (also termed “first-generation” uses / markets) and *secondary uses / markets* (also termed “second-generation” uses / markets), with the creator or owner of copyright involved with the licensing of primary uses and another agency, e.g. a collecting society, involved with the licensing of secondary uses, generally after the work has already been published.¹⁵⁷ An understanding of these concepts can be of great assistance in understanding the licensing regimes applicable in the music rights value system.¹⁵⁸ The relationship between value chains and upstream / downstream markets in intellectual property licensing is well captured by O’Connor¹⁵⁹ in the following manner:

... [V]alue chains are increasingly central to commercialization and delivery of products in a global economy. But their complexity and the need for IP rights to flow through them in a controlled manner, mean that specialized licensing systems had to be developed. The scope and structure of any particular licenses will depend quite a bit on the location of the license in the value chain. For example, if there will only be one manufacturing step between an IP rights holder and the sale of goods to end users, then the rights holder will not have to worry as much about controlling the IP as when the value chain is longer and multiple manufacturing steps will be involved In the latter case, different interests will arise as between ‘upstream’ and ‘downstream’ players in the value chain, and IP will exist (and newly arise) at many points along the chain. The key question is how far down the chain an upstream player’s IP-based control should reach. ...

An understanding of the concepts of upstream and downstream uses / markets is also helpful in understanding the various royalty “streams” that are available to rights-holders in respect of the exploitation of their works. It is common practice for authors of works of original authorship¹⁶⁰ to

¹⁵⁷ See in this regard Towse and Handke *Digital Creative Economy* 275 – 276. See further for these concepts Thomas and Leonard *Beyond the Lens* 37 - 39 (in respect of photographic works) and Hooijer and Baloyi *Collective Management Organizations* 11 – 12 (in respect of sound recordings). Having indicated this, the reference to primary and secondary uses here should not be confused with what has been termed the “hierarchical” distinction between primary and secondary uses contemplated in US copyright law within the context of limitations and exceptions (as contemplated in art 13 of the TRIPs Agreement), where, it is submitted, the US’s application of the regime for limitations and exceptions contemplates ‘a hierarchical order between “important” and “unimportant” rights’. In this regard it is said that the contested US view suggests a distinction between ‘ “primary” performance and broadcasting’, which are considered to be “the most important forms of exploitation”, and ‘ “secondary” uses of broadcasts’, apparently considered less important because rights holders obtain ‘only a minor part [of their remuneration] from “secondary” uses’. See in this regard Ginsburg and Trepozz *International Copyright Law* 460 – 461.

¹⁵⁸ Internationally certain legal rulings have dealt with issues relating to *value chain licensing* in primary and secondary markets (i.e. in respect of upstream and downstream usages). Notable in this regard are two copyright cases decided by the European Court of Justice (ECJ), namely *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd v Commission of the European Communities* ECJ, Joined Cases C-241/91 P and C-242/91 P [1995] (popularly known as the “Magill case”) and *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* ECJ, Case C-418/01 [2004]. The US Supreme Court ruled on similar issues in respect of patents in *Quanta Computer, Inc., et al. Petitioners v LG Electronics, Inc.* 553 U.S. 617 (2008). For the usage of the phrase “value chain licensing” see Litan *Handbook on Law* 294.

¹⁵⁹ O’Connor S “Controlling the Means of Innovation”, in Litan *Handbook on Law* 294.

¹⁶⁰ The expression “works of original authorship” is used here to refer to works whose authorship can be attributed to a natural person, such as literary works, musical works and artistic works, as distinguished from so-called “entrepreneurial works” (giving rise to entrepreneurial rights), i.e. works whose authorship is usually attributed to someone (usually a corporate entity) other than the original author, e.g. sound recordings, films, broadcasts, published editions etc. See in this regard Torremans *Intellectual Property Law* (2016) 217 - 223 and generally. This distinction between works of original authorship and entrepreneurial works is more vivid in UK copyright law, where s 1(1) of the UK Copyright Act distinguishes between “*original literary, dramatic, musical or artistic works*” and other works, e.g. sound recordings, films and typographical arrangement of published editions. (Emphasis added). While the distinction between *works of original authorship* and *entrepreneurial works*, as a *descriptive method*, is useful and can thus be used safely within the South African context, an important, inexorable distinction between UK and South African law needs to be highlighted here: The distinction between original works and entrepreneurial works envisaged in UK law goes further than merely providing a descriptive method. In the UK scenario, the requirement of originality is limited to those works considered to be original

assign the copyright in their works to others such as music publishers, usually as a result of not having the resources to exploit the works themselves and in the hope that the latter will exploit the work for their mutual benefit. In this regard reference can be made to *upstream compensation* and *downstream compensation*. Upstream compensation, which is generally subject to negotiation between the parties, “falls within the context of *individual rights* management” and is paid directly to the author by the party to whom the rights have been assigned (e.g. the music publisher) based on the transfer of rights agreement.¹⁶¹ On the other hand, downstream compensation is paid “after commercialization of the work” and may be based on individual rights management (e.g. in the case of commercialisation of a sound recording or film, or the making of adaptations of the work), or on collective management of the rights, as in the case of broadcast mechanical rights and performing rights.¹⁶²

The distinction between upstream, primary markets and downstream, secondary markets is often highlighted in relation to competition issues where issues relating to the abuse of a dominant position are raised. Hayashi and Wu highlight this in respect of collective management of copyright in the following manner:

A music copyright collecting society is a platform acting as an intermediary between two markets: an upstream market where it carries on business of managing music copyright entrusted by copyright holders, and a downstream market where it carries on business of licensing managed musical works associated with broadcast use. ... Once a collecting society signs license agreements with most of the broadcasting organizations in the downstream market, competitors’ market entry in the upstream market will be hindered because of indirect network effects. Subsequently, in the upstream market, incentives for copyright holders to entrust their works to other collecting societies will be reduced or even eliminated. ...¹⁶³

The bundle of rights that exists in respect of copyright works becomes the stretched threads used to weave the colourful tapestry of the full value chain licensing system and / or footprint, from upstream to downstream markets. The following section seeks to explore how the copyright system has been used historically to organise the music value chain system.

8.3.2 *The Role of Copyright in Organising the Traditional Music Market*

works (i.e. literary, dramatic, musical and artistic works) and does not extend to entrepreneurial works. See Torremans *id* at 223. See also Garnett, Davis and Harbottle *Copinger and Skone James* 137; 159 – 160. It was argued in the UK situation that “lack of originality in content for such works was irrelevant, and all that was required was to exclude copyright to the extent that the work was taken from an existing work”. Garnett, Davis and Harbottle *id* at 159 – 160 at n965. This is clearly not the position in South African law, as s 2(1) of the Copyright Act requires that all works protected under the Act must be original to be “eligible for copyright”.

¹⁶¹ Benhamou and Peltier 2011 *Revue d'économie industrielle* VII. (Emphasis in text).

¹⁶² See also Benhamou and Peltier *id* at VII – VIII. The expression “broadcast mechanical rights” refers to the mechanical rights applicable when musical works are reproduced in the process of broadcasting such works.

¹⁶³ Hayashi and Wu 2015 http://ascola-tokyo-conference-2015.meiji.jp/conference_working_papers.html (date of use: 26 June 2016).

The role and efficacy of copyright as an organising instrument for the music market arose from its characteristic as a “bundle of rights”.¹⁶⁴ This means that in many cases, copyright in a work does not only involve one restricted act but a number of restricted acts, which the copyright owner has exclusive rights to perform or authorise.¹⁶⁵ It has been said that this enables the copyright owner to license “less than her entire bundle of rights to a licensee ...”¹⁶⁶, if the owner chooses to do so. This gives rise to the phenomenon of *fragmentation of rights*, namely the fact that various authorisations are required in respect of various types of usages of a particular copyright work – further compounded by the fact that “each right in the bundle ... can be divided contractually by territory, language, type of media etc.”¹⁶⁷ Thus the bundled nature of copyright and its susceptibility to fragmentation or fragmented usages lent itself to its pliability as an organising mechanism for music markets and value chains.

The efficacy of copyright as an organising tool for the music industry arises not only from the fact that copyright in respect of a particular work (e.g. musical works) can be fragmented into various exclusive rights in respect of that work (e.g. the reproduction right, the publishing right and the performing right in respect of musical works, as provided for in section 6 of the South African Copyright Act¹⁶⁸); but also from the fact that any of the individual rights forming part of the bundle may, themselves, be further fragmented into specific, market-determining “sub-rights” (e.g. the reproduction right can be further fragmented into mechanical rights, print rights, synchronisation rights etc., relating to a mechanical rights *market*, print rights *market*, synchronisation right *market* etc., respectively). Furthermore, the copyright owner may not only assign *any* of the fragmented rights in the bundle of rights, but also *any* of the sub-rights separately, while retaining the copyright in the rest of the fragmented rights and / or sub-rights.¹⁶⁹ Thus it has been noted that the divisibility

¹⁶⁴ This has sometimes been referred to in a number of ways, e.g. “an abstract bundle of legal relations”; “a cluster-right”; “a complex aggregate of rights”; “a range of ownership rights along the ownership spectrum”; “a bundle of distinct and specific monopolies” etc. See Zemer *The Idea of Authorship* 49 – 51. See further in this regard Dean *Handbook of Copyright Law* 1-81.

¹⁶⁵ Some copyright works may only have one restricted work, e.g. copyright in programme-carrying signals and copyright in published editions in Sections 11 and 11A of the South African Copyright Act. In the majority of cases however two or more restricted acts are involved.

¹⁶⁶ Lemley 1999 *Cal.L.Rev.* 144.

¹⁶⁷ Gervais *Collective Management of Copyright* (2016) 3 – 4. See also Zemer *The Idea of Authorship* 50, who asserts that “[t]he bundle of rights in copyright is highly fragmented and covers many different entitlements that affect the delicate stability of the system.” In the same vein Gervais *ibid* refers to the “apparent paradox of copyright” which, while aiming to maximise the creation and dissemination of new works, imposes restrictions on the *creation* of new works based on existing works (i.e. derivative works), and similarly grants copyright owners exclusive rights to prevent the *dissemination* of the works (by preventing users from copying, performing or communicating the works to the public).

¹⁶⁸ Act 98 of 1978 as amended. (the Copyright Act).

¹⁶⁹ This is the doctrine of the subdivision of copyright. Unlike the 1909 Act which specifically prohibited the subdivision of copyright, the current US Copyright Act (17 U.S.C. §§ 101 et seq.) specifically gives recognition to the doctrine of subdivision of copyright in s 201(d)(2), where it is stated that “[a]ny of the exclusive rights comprised in a copyright, *including any subdivision of any of the rights specified by section 106*, may be transferred and owned separately.” Emphasis added. See further on the doctrine as applied in the United States, *Michael Gardner and Bien Licensing Agency, Inc., v. Nike, Inc.*, 279 F.3d 774 (9th Cir. 2002). In the UK s 90(2)(a) of the Copyright, Designs and Patents Act 1988 (c 48) states that “[a]n assignment or other transmission of copyright may be partial, that is, limited so as to apply ... to one or more, but not all, of the *things* the copyright owner has the exclusive right to do”. (Emphasis added). However s 16, dealing with the exclusive rights of the owner of copyright in a work, makes reference to “acts” and not “things”. In this regard Garnett, Davies and Harbottle *Copinger and Skone James* note (at 299): ‘The word “things”, rather than “acts”, was used in s.90(2)(a) with the intention of making it clear that an assignment of copyright may be limited to narrower classes of exploitation than these principal categories of “acts”. So, as well as divisions into such rights as the reproduction, public performing or broadcasting right, further subdivisions are possible, for example the right to reproduce a work on records (often referred to as the “mechanical right”), broadcast by satellite, and so on.’ Like the UK, the South

of copyright permits “a considerable amount of flexibility to a copyright owner in the commercial exploitation of the rights in issue.”¹⁷⁰ Rand J, remarking on the scope of copyright in musical works under Canadian law, noted:

It is distributed into a number of interests both "vertical" and "horizontal". By s. 3 of the statute the copyright holder has the sole right "to produce, reproduce", say, a song in sheet form for ordinary sale; to perform it in public; to make a record of it by means enabling it to be performed mechanically; to adapt and present it publicly by cinematograph or radio communication. These rights, again, may be limited to sale or production or performance in specified areas of specified countries and they may be exclusive to one person or open to the market.¹⁷¹

In this regard Lee¹⁷² has noted that copyright fragmentation (or copyright divisibility) occurs on various levels, including *market structure*. It has likewise been observed that copyright fragmentation enables “the market to determine each work’s [optimal] modular structure”.¹⁷³ This market-facilitating nature of the divisibility of copyright also arises from the fact that the various rights and sub-rights comprising the bundle of copyright in a particular work “can be granted simultaneously and

African Copyright Act makes reference to “acts” when referring to the individual exclusive rights that form part of the bundle of copyright in respect of a particular work. The difference with the UK Copyright Act is that while the UK Act makes reference to “things” when dealing with the partial assignment of copyright, the South African Act continues to make reference to “acts” in this regard, providing in s 22(2) that “[a]n assignment or testamentary disposition of copyright may be limited so as to apply to some only of the acts which the owner of the copyright has the exclusive right to control”. (Emphasis added). Does this imply that South African copyright law does not provide for the subdivision of copyright? It is submitted that the contrary is true. Garnett, Davies and Harbottle *ibid* make reference to the case of *British Actors Film Co Ltd v Glover* [1918] 1 K.B. 299, decided under the British Copyright Act of 1911 (the so-called Imperial Copyright Act), in which the court held that a partial assignment can be made of the right to perform a work “professionally”. The Imperial Copyright Act was incorporated as a schedule to the South African Patents, Designs, Trade Marks and Copyright Act 9 of 1916 and thus formed part of South African copyright law. In dealing with the scope of copyright in a work the Imperial Copyright Act referred to copyright (in s 1(2)) as a “sole right” to perform certain acts, without specifically using the expression “acts” but by actually mentioning the various acts forming part of the sole right comprising copyright (e.g. “the sole right to produce or reproduce the work ..., to perform ... the work ... in public; ... to publish the work ...” etc.). In s 5(2) the Act provided that “[t]he owner of the copyright in any work may assign the right either wholly or *partially*”, and in s 5(3) it provided: “Where, under any partial assignment of copyright, the assignee becomes entitled to any *right comprised in copyright*, the assignee as respects the *right* so assigned, and the assignor as respect the *rights* not assigned, shall be treated ... as the owner of the copyright ...”. It is submitted that despite the non-mention of the expression “acts”, the usage in these sections is consistent with the usage in our current Copyright Act with respect to the “exclusive right to do or to authorize the doing” of certain “acts”. (See for example in this regard ss 6 and 9 of the Copyright Act in respect of music copyright). Garnett, Davies and Harbottle have asserted that the Imperial Copyright Act had the same effect in respect to partial assignment of copyright as the 1988 UK Act, and that the *Glover* decision referred to above “seems to have been to the same effect.” See Garnett, Davies and Harbottle *id* at 299 – 300 and n 369 in Chapter Five. Another support for this position can be found in Canadian copyright law. The current Canadian Copyright Act (R.S.C., 1985, c. C-42), although it has incorporated many modern provisions, is still in many respects based on the Imperial Copyright Act. See in this regard Gendreau *Emerging Intellectual Property Paradigm* 298, who asserts that the Canadian Copyright Act of 1921, based on the Imperial Copyright Act, “still forms the basis of today’s legislation.” In this regard it is noteworthy that the provisions of s 5(2) and (3) of the Imperial Copyright Act, which, as highlighted above, have been interpreted to give rise to the doctrine of divisibility to the extent contemplated in the UK Copyright Act of 1988, are repeated, almost verbatim, in s 13(4) and (5) of the Canadian Copyright Act. Furthermore, s 3 of the Canadian Copyright Act still mimics “the three general rights” of reproduction, public performance and publishing contained in s 2 of the Imperial Copyright Act. Accordingly, and inevitably one would add, the Canadian courts have asserted the applicability of the doctrine of divisibility of copyright in Canadian law. See in this regard *Euro-Excellence Inc. v. Kraft Canada Inc.*, [2007] 3 SCR 20, at para 117, where the Supreme Court of Canada held: “Vertical and horizontal divisibility is, arguably, a hallmark of copyright ...”, and further that “the economic objectives of copyright law are furthered through the transferability of either full or partial copyright interests.” See further in this regard *Canadian Performing Right Society v Famous Players Canadian Corp. Ltd* (1927) 60 O.L.R. at 280 and 614, where the transferability of the performing right was recognised.

¹⁷⁰ See in this regard McKeown JS *Fox Canadian Law of Copyright and Industrial Designs* (Thompson Reuters Toronto 2012) at 19-1(e)(ii).

¹⁷¹ *Muzak Corp. v. Composers, Authors, and Publishers Association of Canada* [1953] 2 S.C.R. 182, at 188 – 189.

¹⁷² Lee J-A, “Overlapping Rights in Different Business Models”, in Liu and Hilty *Remuneration of Copyright Owners* at 18.

¹⁷³ Notes 2011 *Harvard Law Review* at 1758 – 1759.

independently.”¹⁷⁴ In this regard it has been noted that the rights in the copyright bundle often overlap so that it would sometimes be necessary to infringe more than one right in the bundle for an infringement claim to arise.¹⁷⁵ Furthermore, the fragmentation of copyright helps to organise music markets and the music value system by enabling copyright owners “to fully capture the value of copyright work [sic] with the help of others.”¹⁷⁶ Thus fragmentation both facilitates and enhances the music value system. In this regard fragmentation exists within different music value chains and in the music value system as a whole. This is expressed through an elaborate value system or copyright exploitation footprint comprised of primary / upstream and secondary / downstream value chains reflecting the full panoply of bundled music rights (namely songwriting / publishing, recording and live performance rights).

It is true that copyright fragmentation or divisibility is not always viewed positively. One of the criticisms levelled against copyright fragmentation is that it leads to increased transaction costs and the so-called “tragedy of the anticommons”.¹⁷⁷ A contrary view points to provisions in copyright law itself that provide a “safety valve” against excessive transactions costs created by fragmentation, and reduce “the social costs of inefficient divisions of rights.”¹⁷⁸ It has furthermore been argued that

¹⁷⁴ Lee 2016 *AM. U. INT’L L. REV.* at 119.

¹⁷⁵ *Perfect 10, Inc., v Google Inc.* 508 F.3d 1146 (9th Cir. 2007) at 1161. The US 9th circuit here mentioned the example of the making of a derivative work (i.e. an adaptation of a copyright work), that would not infringe copyright unless it “incorporate[s] a protected work in some concrete or permanent ‘form.’”. It is submitted that this is in line with the position under South African law that the restricted act of adaptation in respect of a work shall only occur if the work is transformed “in such a manner that its original substantial features remain recognisable.” Dean and Karjiker *South African Copyright Law* 1-73. This overlapping of the rights in the copyright bundle of rights thus facilitates the use of copyright works through new means, in the process creating new markets for the work.

¹⁷⁶ Lee 2016 *AM. U. INT’L L. REV.* 123.

¹⁷⁷ In this regard Lee J-A, “Overlapping Rights in Different Business Models”. in Liu and Hilty *Remuneration of Copyright Owners* notes (at 18) that “[a]lthough divisibility has provided flexibility for copyright owners’ utilization of their works, it creates significant costs for copyright transactions and enforcement.” See also in this regard Perritt 2011 *Vand. J. Ent. & Tech. L.* generally; Lee 2016 *AM. U. INT’L L. REV.* 117 – 163 generally; Macmillan *Copyright Law* at 285 (where high transaction costs are deemed to be a “malfunction’ in the market”).

¹⁷⁸ Notes 2011 *Harvard Law Review* 1761 – 1762. Here the author refers to three regimes within copyright law that create a safety valve against high transaction costs, namely the “first sale” doctrine; the prohibition of “copyright servitudes”, and, to a limited extent, the “first use” defence. It is admitted that all these regimes are of American origin and do not have any particular relevance in South African law. We elaborate on these three safety valve cases below, with a focus on their impact, if any, on South African law. (i) The South African Copyright Act does not currently incorporate the **first sale doctrine** (also known as the *exhaustion of rights doctrine*), although the Copyright Amendment Bill 2017 (version B13B – 2017), approved by both houses of Parliament and currently awaiting the President’s signature, and available at <https://pmg.org.za/bill/705/> (date of use: 13 July 2019), proposes such a doctrine with international reach (so-called *international exhaustion*; see the proposed s 12B(6) of the Bill). It is also worth noting that the TRIPs Agreement avoids dealing with the exhaustion of rights (see art. 6 of the TRIPs Agreement); (ii) The prohibition against **copyright servitudes** is a prohibition against the imposition of a condition in copyright licences “that further works incorporating the licensed material be made available on the same terms ... [where] these terms of openness are detailed and potentially conflict with later visions of openness” (e.g. the Wikipedia GNU Free Documentation Licence). See Ayotte and Smith (eds) *Economics of Property Law* at 119. Another example would be where the owner of intellectual property issues a licence to a firm without at the same time extending such licence to the firm’s customers. See *Quanta Computer v LG Electronics, Inc.* 128 S. Ct. 2109 (2008). It appears that US law prohibits copyright servitudes just as it prohibits chattel servitudes (i.e. servitudes in respect of movable goods.). See Calboli and Lee (eds) *Research Handbook on Intellectual Property* 56 – 63; although Robinson argues that, both in respect of chattel and intellectual property the prohibition on servitudes is not absolute, noting in the case of the latter that, “in the field of intellectual property ... the now ubiquitous use of restrictive licensing agreements has created the functional equivalent of personal property servitudes.” Robinson 2004 *The University of Chicago Law Review* generally and at 1452. The prohibition against chattel servitudes, which is said to exist both in European and American law, is generally justified on the ground that servitudes “can seriously impede the use and transferability of property”. Vaver (ed) *Intellectual Property Rights* 285. The relevance of the position regarding the prohibition against chattel servitudes to intellectual property in general and copyright in particular is in view of chattels that embody copyright works and patented inventions. Under such circumstances “IP owners argued that their exclusive rights should give them extra power to control downstream resale and use of the embodiments of their intangible property.” Calboli and Lee (eds) *Research Handbook on Intellectual Property* 56. It is submitted that in South Africa this line of argument is *non-sequitur* because South African law recognises personal servitudes in respect of movable goods. See in

copyright fragmentation is “legally confusing in the digital market”.¹⁷⁹ All this cannot however counter the role that copyright fragmentation has played in organising the traditional music business market. The ensuing discussion considers how the advent of the internet digital technology has threatened to disrupt this traditional role of copyright fragmentation in facilitating the structuring of the traditional music market into clearly-defined primary and secondary music value chains.

8.4 Blurring the Lines – “Safe Harbour” and the Disruption of the Value Chain

8.4.1 Introduction

Music rights-holders have often complained about the “safe harbour” provisions in digital copyright laws,¹⁸⁰ which, it is argued, “[allow] digital providers the opportunity to profit from the unauthorized use of copyrighted music without paying licensing fees.”¹⁸¹ In this regard it has been argued that due to the Digital Millennium Copyright Act (DMCA) in the United States, “there’s nothing you can

this regard Du Bois (gen. ed) *Wille’s Principles* 604; Zimmermann and Visser (eds) *Southern Cross* 809. By recognising personal servitudes in respect of movable goods South African law does not however, need to entertain the question whether or not a personal servitude would be permissible in respect of movable goods embodying copyright works; such a question is best left to the determination of *the validity of the contract* creating the relationship between the parties (see the discussion below). It is common cause that for an assignment of copyright or exclusive licence to take place there has to be a valid, underlying contract reflecting an intention to transmit rights by offer and acceptance. Thus “even if on the face of it the requirements set forth in the Act have been met”, if there is no agreement satisfying the requirements of a valid contract no assignment or exclusive licence can take place. Dean and Karjickger *Copyright Law* 1-144 and 1-150 – 1-151. Even in those jurisdictions in which there is a general prohibition against chattel servitudes (and by implication, copyright servitudes) it has been acknowledged that “... by means of contract, a seller can retain rights against the initial purchaser, with whom he is in privity of contract.” Vaver (ed) *Intellectual Property Rights* 285. Thus in South African law any terms in a contract dealing with the licensing of items embodying copyright works (e.g. a contract dealing with the licensing of music sound recordings) which seek to impose any restrictive or limiting conditions in the nature of a servitude can be easily dealt with in two manners: (a) they could be seen to constitute *justus error*, thus rendering the terms invalid on the ground that they constitute a stipulation (namely the imposition of a servitude) that cannot normally be expected to form part of an agreement transmitting copyright. See in this regard *Frocks Ltd vs Dent and Goodwin (Pty) Ltd* 1950 SA 717 (C) at 725; *Du Toit vs Atkinson’s Motors Bpk* 1985 (2) SA 893 (A) and *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) 471, quoted with approval in *Accesso CC v AllForms (Pty) Ltd* 677 JOC (T) at 686. This defence would however, only succeed if the licensee or assignee’s attention was not specifically drawn to such stipulation. If the licensee / assignee’s attention was drawn to such terms, (b) the terms might still fall foul of the constitutional standard relating to the validity of contracts, where the position is that “courts [can] decline to enforce contractual terms that are in conflict with the constitutional values [found in the Bill of Rights] even though the parties may have consented to them.” *Barkhuizen v Napier* (5) SA 323 (CC), at para 30; and (iii) With regard to the **fair use doctrine** the South African equivalent is the *fair dealing* doctrine. The South Gauteng High Court has recently given a ruling that provides the first South African case law clarity on the scope of the fair dealing defence, in *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81. In para 113 Berger J stipulated a non-exhaustive list of factors that need to be taken into consideration when determining if the use of a work falls within the fair dealing defence. These factors, given not in any order of priority, seem to emphasise the publication of the two works (the parent work and the work using the parent work), with a consideration of the time lapse between the publication of the two works, the amount of the parent work used and whether the use is acknowledged. The factors thus seem to provide an opportunity for the two legitimate usages of the works, namely, commercial exploitation of the work and fair dealing with the work. It is submitted that a proper interpretation of the court’s ruling in this regard is that the owner of the copyright in the parent work needs to be afforded a reasonable time to exhaust at least the primary markets for the use of the work, after which fair dealing in the work should almost invariably be permissible in such markets. This, it is submitted, will create a proper balance between the rights of the copyright owner and fair dealing in the work, and will be in line with the three-step test that requires that limitations to the copyright owner’s exclusive rights will be permitted (a) *in certain special cases*, provided that the use (b) *does not conflict with a normal exploitation of the work* and (c) *does not unreasonably prejudice the legitimate interests of the author* (see art. 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (1967 version).

¹⁷⁹ Lee 2016 *AM. U. INT’L L. REV.* 125. See in this regard paragraph 8.4 below dealing with the challenges confronting copyright law in the digital environment.

¹⁸⁰ Such as those contained in s 512 of the US Digital Millennium Copyright Act 1998, article 14 of the EU E-Commerce Directive of 2000, or ss 70 – 81 of the Electronic Communications and Transactions Act (ECTA) 25 Of 2002 in South Africa.

¹⁸¹ See US Copyright Office 2015 <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> at 79. (Date of use:14 September 2017).

realistically do to stop your songs from appearing on YouTube.”¹⁸² Some have referred to ‘an impossible game of “whack-a-mole”’, in which content removed as a result of the notice-and-takedown regime of the DMCA “is frequently reposted, requiring the owner to serve another takedown notice” – thus affording digital companies the opportunity to freely exploit infringing content “unless and until a notice is sent” .¹⁸³

The foregoing has resulted in music industry representatives bemoaning the existence of a “value gap”, defined as the current state in the digital exploitation of music “where fair revenues are not being returned to those who are creating and investing in music”; and “the growing mismatch between the value that user upload services, such as YouTube, extract from music and the revenue returned to the music community”.¹⁸⁴ The value gap is considered to be “the fundamental flaw in today’s music market” and the greatest threat to its future sustainability.¹⁸⁵ It has in this regard been asserted that creating “a level playing field for the digital market” is the industry’s “single highest legislative priority”, and is crucial for securing the future of the music industry.¹⁸⁶ To best understand the theory or notion of a value gap in the music industry one would need to understand the traditional segmentation and / or categorisation of the music industry in terms of “value chains”, as dealt with above. As indicated, the best analysis in this regard is to see the music industry as having been comprised of a “value chain system” - namely a system comprised of several value chains.¹⁸⁷ These include the music publishing value chain, the music recording value chain, the live music value chain etc.¹⁸⁸ In this regard it is postulated that the advent of digital technology and the digital

¹⁸² *Id* at 80.

¹⁸³ *Ibid*.

¹⁸⁴ IFPI Global Music Report 2017 <http://www.ifpi.org/downloads/GMR2017.pdf> at 24 – 25. (Date of use: 14 September 2017).

¹⁸⁵ *Ibid*

¹⁸⁶ IFPI Global Report *id* at 24. Both in the US and in the EU there has been concerted lobbying to influence the amendment of the safe harbour scheme in favour of rights-holders. See in this regard <https://www.copyright.gov/policy/section512/> in respect of the US (date of use: 19 May 2017) and Rosati 2016 *EIPR* in respect of the EU.

¹⁸⁷ See the discussion *supra* under paragraph 8.3. See also See Hoeg-Guldberg and Lets 2005 http://culturaldata.arts.gov.au/sites/www.culturaldata.gov.au/files/A_Statistical_Framework_for_the_Music_Sector.pdf 33 - 34 (date of use: 25 June 2016).

¹⁸⁸ Ambert 2003 http://www.ilo.org/empent/Publications/WCMS_117682/lang--en/index.htm 10 - 26 (date of use: 23 June 2016) attempts to circumvent this complexity by making reference to “five phases ... or segments” of the music industry value chain, namely, that relating to *beginnings* (music education and training etc.), *production* (songwriting, recording etc.), *circulation* (promotion, collective management, distribution etc.), *audience reception and feedback* (market and audience development, competitions and awards etc.) and *delivery mechanisms* (retail outlets, internet, broadcasting etc.). Apart from the fact that some activities are repeated in the different segments mentioned, it is appropriate to say that this is effectively a contrived characterisation as (i) the various designated segments do not actually reflect sequential stages giving rise to a “chain”, and (ii) the various recognised industries constituting what can be termed “the music sector”, e.g. the publishing industry, the recording industry, the live music industry etc. are indeed veritable, stand-alone industries clearly reflecting distinct value chains within themselves. In this regard it is however necessary to note that the phrase “music sector” is not often used and “music industry” is preferred by many, while it is recognised that the various components of this “industry” are themselves separate “industries”. In the present case the phrase “music sector” is used from the perspective that “[w]hen breaking down the economy, the first groups are sectors which describe a general economic activity. Then all of the companies that fall into that sector are categorized further into industries”. Langager <http://www.investopedia.com/ask/answers/05/industrysector.asp> (date of use: 24 June 2016). In grappling with the choice between whether to refer to a “music industry” or a “music sector”, the Australian Cultural Ministers Council’s Statistics Working Group (SWG) preferred using the phrase “music sector”, observing: “The music industry approach tends to concentrate on recording and basically sees performers and songwriters as inputs into an economic product. The music sector view originates in what makes music possible in the first place – the individual creators and performers of music and the bands, orchestras and other groups they form.” Hoeg-Guldberg and Lets 2005 http://culturaldata.arts.gov.au/sites/www.culturaldata.gov.au/files/A_Statistical_Framework_for_the_Music_Sector.pdf iv (date of use: 25 June 2016). This is a view that is consonant with what is proposed here.

distribution of music, with its related complications (e.g. user-generated content; uncertainty as to the party / parties liable to rights-holders for the exploitation of works etc.) has to a large extent eliminated the “traditional gatekeepers” and disrupted the traditional value chain system.¹⁸⁹

8.4.2 *Dealing with Difficult Questions in the Digital Environment: Stopping the Internet, or Stopping Copyright?*

8.4.2.1 Introduction

As highlighted, the digital era, in particular that ushered in by MP3 (and MP4) technology coupled with internet technology has given rise to new problems and questions regarding the status of the internet vis-à-vis the protection of copyright. Since the nature of the internet is its ability to easily disseminate information and content across borders,¹⁹⁰ should copyright law be used to curb the operations of this technology? One technology that has brought this matter to a head is “linking” technology, which ensures ease in the embedding and sharing of audio, video and other multimedia content in the internet environment. It is this technology that has enabled YouTube, the Google video-content channel, to thrive and to become a very successful business model for Google, enabling the production of user-generated content while simultaneously causing much consternation for copyright owners.

The embedding of music videos or other copyright material on a website, sometimes termed “inline linking”, is a controversial and hotly-debated issue internationally. In particular, the question as to whether linking in general, whether in the form of simple hyperlinking, so-called deep linking, inline linking, framing and system caching constitutes copyright infringement is answered divergently in different jurisdictions. There is no international treaty dealing specifically with this issue and much depends on the local copyright laws of each jurisdiction. The fact therefore, that a form of linking is acceptable in one jurisdiction does not mean that it would be acceptable in another jurisdiction, just as national copyright laws often have different provisions with regard to acts that infringe copyright, particularly in relation to digital and other new media usages of copyright.¹⁹¹

8.4.2.2 Unravelling Linking Technology

It would be important to first provide some explanation of the various forms of linking in order to gain understanding of the acts involved and as a way of seeking answers to the question whether such acts would constitute an infringement of copyright. The first form of linking to consider in this regard is so-called *hyperlinking*. Section 1 of the Electronic Communications and Transactions Act defines a “hyperlink” as “a reference or link from some point in one data message directing a browser or

¹⁸⁹ See in this regard OECD 2007 <http://www.oecd.org/sti/38393115.pdf> 21 on the disruption of traditional value chains through the making of user-generated content. (Date of use: 26 June 2016). For a detailed analysis of the copyright issues arising from user-generated content see Hetcher 2008 *Vanderbilt Journal of Entertainment and Technology Law* generally.

¹⁹⁰ See in this regard the decision of the Canadian Supreme Court in *Crookes v Newton* [2011] 3 SCR 269 where it was held that links are at the core of how the internet operates and that the internet cannot function as intended without them.

¹⁹¹ In this regard it has been observed that “the international case law picture is patchy and sometimes inconsistent”. <http://www.fieldfisher.com/media/2372324/Embedded-linking.pdf> (date of use: 06 September 2016).

other technology or functionality to another data message or point therein or to another place in the same data message.”¹⁹² Essentially *hyperlinking*, or so-called simple, normal or ordinary linking (also “out linking”), refers to highlighted or otherwise accentuated text (termed a “hypertext”) using some internet code such as HTML, appearing on one website (“the linking website”), which, when tapped, clicked on or hovered over, enables the user to access or transfer to another website (“the target website”), usually landing on the home page of the target website.¹⁹³

Deep linking follows the same process but rather than landing on the home page of the target website, the user is enabled to land on some other page on the target website.¹⁹⁴ *Inline linking* on the other hand, occurs when material from a different website (“the host website”) is placed on a web page of the linking website, usually through a coded image such as JPEG or Gif.¹⁹⁵ Regarding inline linking it has been said that when the link to the image on the viewer’s website is an `img-src` link, the web page concerned only “appears to contain the image”, i.e. the image only “seems to be present” as a part of the Web page being viewed, when in fact “... [the] presence of the image is only virtual ... in the sense that the image file is not physically present at the server for the Web site being viewed.”¹⁹⁶

Framing occurs when the screen of a web page is broken up into multiple, juxtaposed but non-overlapping windows, with each window containing a display from a separate HTML file (e.g. a web page from another web site fetched by automatically hyperlinking to it).¹⁹⁷ Lastly, *system caching* involves the “automatic and interim storage of material” on a web page, “with a view to making the onward transmission of [such] material to third parties or subscribers more efficient.”¹⁹⁸

8.4.2.3 Legal Questions around Linking – General Observations

As indicated, whether linking amounts to copyright infringement is dependent on the particular laws of each country as there is no international framework dealing with the issue. Furthermore, where infringement is said to have occurred, one often also needs to determine what type of infringement has taken place. In this regard it needs to be stated that copyright infringement can be *direct*,

¹⁹² Electronic Communications and Transactions Act (ECTA) 25 Of 2002.

¹⁹³ See Roarty 1999 *Fordham Law Review* 1014 – 1015; 1017; also Dean and Karjiker *Handbook of Copyright Law* 1-71. Simply expressed, a hyperlink is an element in an HTML document that constitutes an interface “that links a source to a target”, i.e. either to another portion of the HTML document or another document altogether. See <http://www.techopedia.com/definition/5175/hyperlink> (date of use: 17 July 2019).

¹⁹⁴ See <http://www.techopedia.com/definition/23356/deep-linking> (date of use: 17 July 2019); Dean and Karjiker *Handbook of Copyright Law* 1-71.

¹⁹⁵ See Roarty 1999 *Fordham Law Review* at 1017 – 1018.

¹⁹⁶ See Roarty 1999 *Fordham Law Review* 1014 – 1015; https://en.wikipedia.org/wiki/Copyright_aspects_of_hyperlinking_and_framing (date of use: 07 September 2016). See further Stewart DR (ed) *Social Media and the Law - A Guidebook for Communication Students and Professionals* (Routledge, New York: 2013) at 79, where it is observed: ‘The method used for *framing* content, “inline linking”, is commonly used today to display images or embed videos on a site without having to copy the files. It allows a video to be played and viewed on a website while the actual video file remains on another server, such as YouTube. Visitors viewing the video on the website have no indication that it is not part of the site ...’ It is thus clear that inline linking in fact uses framing technology. See also Roarty *id* at 1018, who asserts that “[f]raming is analogous to and IMG link”.

¹⁹⁷ *Ibid.*

¹⁹⁸ Dean and Karjiker *Handbook of Copyright Law* 1-72. Compare s 1 of the ECTA, where “cache” is defined as “high speed memory that stores data for relatively short periods of time, under computer control, in order to speed up data transmission or processing”.

indirect, contributory or vicarious. Direct infringement occurs when a person infringes any of the restricted acts in respect of a copyright work (e.g. those relating to the bundle of rights related to the work concerned, such as those provided for in section 6 of the Copyright Act). *Indirect infringement* occurs in certain limited cases provided for in the copyright statute (e.g. the importation of infringing copies of copyright works). *Contributory infringement* occurs when a person “aids and abets” (i.e. assists) the commission of a copyright act by another, where the person doing so *knew* or *had reasons to believe* that the acts he aided and abetted constituted an infringement of copyright.¹⁹⁹ *Vicarious liability* occurs where a person who is in a position of authority, i.e. a person who has the right and ability to supervise another, *instigates* or *instructs* the commission of an act that infringes copyright. In South Africa vicarious liability for copyright infringement can take the form of what is termed *causal infringement*.²⁰⁰

An observable trend internationally is not to treat linking as amounting to *direct* copyright infringement. This is mainly because it is said that no reproduction takes place in cases of linking.²⁰¹ Nevertheless if a case of linking can be seen to amount to a reproduction of the linked image (i.e. where the image is not merely indexed or bookmarked, but is actually embedded on the viewed web page), this would be seen as amounting to an unauthorised reproduction.²⁰² This would, for example be the position where a case of *inline linking* is in fact, similar to or effected through *framing* or *system caching*, where the material linked is *actually* embedded on the webpage rather than *merely appearing to be embedded*. Framing and system caching would thus almost invariably be considered to give rise to direct copyright infringement.

Having indicated this, the fact that no direct infringement of copyright exists does not mean that infringement would not exist completely in cases of linking. The internet service provider may still be held liable for *contributory infringement*; i.e. even if the linked material may not be actually embedded on the service provider’s webpage, the service provider may be held liable for aiding and abetting another person to commit copyright infringement, where the internet service provider knew or had reason to believe that the use of the linked material would amount to an infringement of copyright (i.e. the service provide knew or had reasons to believe that using or accessing the copyright material was not authorised and thus would amount to copyright infringement). It is on the basis of contributory infringement that internet service providers have mostly been held liable for copyright infringement.

8.4.2.4 How the Problems Arising from Linking have been dealt with Internationally

(a) *The European Union*

¹⁹⁹ See in this regard Dean and Karjiker *id* at 1-88 – 1-90.

²⁰⁰ *Id* at 1-90 – 1-91. Causal infringement is in fact, a form of direct infringement and thus, although guilty knowledge is required generally in cases of joint wrongdoing, there is no such requirement in respect of causal infringement. *Id* at 1-89 – 1-90.

²⁰¹ *Id* at 1-71; Roarty 1999 *Fordham Law Review* 1017 – 1018.

²⁰² See in this regard Dean and Karjiker *id* at 1-72, who note, generally: “The storage of extraneous material by a service provider in its system, which material is obtained from third parties, constitutes reproduction of that material and the unauthorised storage could thus give rise to copyright infringement.”

In the European Union (EU) the question as to whether linking (both with regard to normal linking and embedded linking) constitutes an infringement of copyright has been clarified in recent times by the Court of Justice of the European Union (CJEU). An earlier case in this regard was *Svensson and Others v Retriever Sverige AB*,²⁰³ decided in 2014. This decision dealt with the question whether the use of hyperlinks by the linking site which redirects internet users to copyright protected works in the host site amounted to copyright infringement. In this case Retriever Sverige operated a website which provided hyperlinks which enabled users to access newspaper articles published by a newspaper by redirecting the users to the newspaper's website. The hyperlinked articles were freely available and accessible on the newspaper's website, but Retriever Sverige had not obtained permission from the claimants, who were the journalists who wrote the articles, to link the articles on its website. The question brought before the court was whether providing a simple link to articles in another website amounted to a "communication to the public", a restricted act belonging solely to the copyright owner and which would thus infringe upon the rights of the copyright owner under EU law.

In its ruling, the CJEU held that Retriever Sverige had not violated the authors' copyright, finding that permission from the copyright owners was only necessary if the hyperlinks are directed at a "new public". The court defined a "new public" as one that "was not taken into account by the copyright holders when they authorised the initial communication to the public". The court then concluded that, since the articles were freely accessible on the target site, the users of the linking site did not constitute a "new public" and thus Retriever Sverige had not infringed any copyright. The court further held that this position was correct even if the users had "the impression that [the work] is appearing on the site on which that link is found, whereas in fact that work comes from another site".²⁰⁴

The second decision of the CJEU, also made in 2014, concerned the question whether *embedding* a video in which copyright subsisted amounted to copyright infringement, where the source video was uploaded without the permission of the rights holder. This was in the case of *BestWater International GmbH v Michael Mebes and Stefan Potsch*²⁰⁵ In this case the defendants had embedded a promotional YouTube video of the claimant on their websites through inline framing, apparently in order to point out their disagreement with a statement made in the video. The video had been uploaded on YouTube without the claimant (Bestwater)'s permission. In its ruling the court held that the embedding in a website of a copyright work that is publicly accessible on another website through a link using framing technology "does not by itself constitute communication to the public within the meaning of [the EU Copyright Directive]", where the act of communication was not done through a technical means that is different from the one used in the initial communication, it could only be a communication to the public if it was communicated to a "new public" (as held in the *Svensson* case above).²⁰⁶ In this regard the court further argued that it did not matter that the source

²⁰³ CJEU (C-466/12), 13 February, 2014.

²⁰⁴ *Id* at para 29; see also paras 24 – 32 generally.

²⁰⁵ CJEU (C-348/13), 21 October, 2014.

²⁰⁶ See *id* at para 10.



video was itself uploaded without permission. The ruling did not change the copyright breaching status of the original upload but merely protected internet users from liability where they embed copyright materials from other websites.

Following the above rulings another case came before the CJEU, where the CJEU had the opportunity to clarify its earlier decision in the *Svensson* and *Bestwater* cases. The case in question was *GS Media BV v Sanoma Media Netherlands and Others*²⁰⁷, a 2016 ruling referred by the Supreme Court of the Netherlands. In the case the appellant had created a hyperlink to another website, where certain nude photographs whose copyright was controlled by the respondents had been posted without the respondents' authorisation. Internet users were able to use the hyperlink to have access to those photographs. The pertinent question before the CJEU was whether GS Media's action constituted an unauthorized communication of the photographs to the public.

In clarifying its earlier decisions the court held that, although in principle creating a link to illegal content does not amount to a communication to the public in EU law, where a person creates a link to a website where copyright material was posted without the authorisation of the copyright owner, such act would infringe the copyright owner's right of communication to the public. In its judgement the court asserted the fact that the expression "communication to the public had to be interpreted broadly, taking into account the objective of establishing a high level of protection for authors, "allowing them to obtain an appropriate reward for the use of their works".²⁰⁸ After assessing the facts the court came to this conclusion:

... [I]t cannot be inferred either from the judgment of ... *Svensson and Others* ... or from the order of *BestWater International* ... that posting, on a website, hyperlinks to protected works which have been made freely available on another website, but without the consent of the copyright holders of those works, would be excluded, as a matter of principle, from the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29. ...²⁰⁹

In this regard the court considered three factors that lent themselves to the conclusion that the creation of a hyperlink under such circumstances amounted to an unauthorised communication to the public: (a) Where the person creating such a hyperlink knew or ought to have known that the hyperlink created access to a work that was illegally placed on the internet; (b) where the link "allows users of the website on which it is posted to circumvent the restrictions taken by the site where the protected work is posted", in order to allow access only to its subscribers, and (c) where the posting was carried out for a profit.²¹⁰

The above analysis makes the EU position regarding the issue of normal linking and embedded linking very explicit: In Europe both acts do not constitute copyright infringement unless the linked copyright material is communicated to a "new public", i.e. a public other than that intended by the

²⁰⁷ Case C-160/15, 8 September 2016.,

²⁰⁸ *Id* at para 30.

²⁰⁹ *Id* at para 43.

²¹⁰ *Id* at paras 49 – 51.

copyright owner. The ruling in the *GS Media BV* case has then clarified the circumstances under which a communication would be deemed to constitute a communication to such new public. It needs in this regard to be highlighted that these CJEU decisions do not imply that courts elsewhere, or the South African courts in particular, will follow this approach. It is also important in this regard to highlight that in the EU itself, member states of the EU had divergent approaches to dealing with this issue before the above-mentioned CJEU rulings²¹¹ The considerations made in the *GS Media BV* case are interesting and appear to be sound considerations to make in such cases, even though the EU obsession with the concept of “a new public” may not be one that is appealing to other jurisdictions.

It would also be necessary, in considering the EU position, to also take account of recent sweeping developments in the EU aimed, amongst others, at addressing the problem of the “value gap” and are calculated to drastically change the legal position in this regard. These relate to a recent vote of the European Parliament, in favour of the adoption of the Directive on Copyright in the Digital Single Market,²¹² following the so-called “trilogue negotiations” between the European Commission, the Council of the European Union and the European Parliament. The value gap is particularly dealt with in article 17 of the Directive, which in essence settles the question with regard to what constitutes a communication to the public in the online environment. Critical to article 17 is paragraph (1) thereof, which provides that giving access to copyright-protected works and other protected subject-matter is an act of communication or making available to the public and thus requires the authorisation of the rights holders. It would seem in this regard that the questions that gripped the attention of the CJEU with respect to whether a communication is a communication to a “new public” or not, are no longer relevant.

More importantly, paragraph 3 of article 17 limits the ability of internet service providers to rely on the safe harbour (i.e. notice and takedown) provisions of article 14(1) of the EU Electronic Commerce Directive (Directive 2000/31/EC), by providing that such provisions “shall not apply to the situations covered” by article 17. Article 14(1) of the Electronic Commerce Directive essentially absolves internet service providers from liability for the use of unauthorised copyright-protected material on their platforms, if they had no knowledge, whether actual or constructive, of such unauthorised use, and if, having been made aware of such unauthorised use, they acted expeditiously to remove the unauthorised material.²¹³ In this regard this article fulfils a similar objective to that of section 512 of the US Digital Millennium Copyright Act, 1998 and sections 70 – 81 of the Electronic Communications and Transactions Act (ECTA) 25 of 2002 in South Africa.

²¹¹ See in this regard <http://www.fieldfisher.com/media/2372324/Embedded-linking.pdf>, generally. (Date of use: 15 October 2017).

²¹² Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN> (date of use: 17 July 2019). The Directive came into force in June 2019 and will be implemented two years after coming into force.

²¹³ For the interpretation of art. 3 of Directive 2000/31/EC by the CJEU see the *Google v Louis Vuitton*, joined cases C-236/08 to C-238/08, 23 March 2010; and *L’Oreal SA and Others v. eBay International and Others* case C-324/09, 12 July 2011.

Article 17 of the Copyright in the Digital Single Market Directive is perhaps the most-controversial part of the Directive, with critics arguing that it will lead to the introduction of what has been termed “upload filters”, for purposes of scanning content before it is uploaded in order to remove material that is likely to infringe copyright.²¹⁴ Opponents of the Directive have thus decried the provision, arguing that it has signalled “a dark day for the open web”.²¹⁵ On the other hand proponents have hailed the Directive as being capable of “clos[ing] the value gap and boost[ing] investment into new ... music and other content” and ushering in a new era of “a fair and sustainable internet”.²¹⁶ It remains to be seen what the full effect of this provision will turn out to be, but generally the principle of safeguarding the interests of rights-holders in the digital environment is something to be welcome.

(b) The United Kingdom

The position in the United Kingdom (UK) before the CJEU decisions is particularly important for our purposes. This is because South African copyright law is historically based on UK copyright law and thus our courts would be inclined to follow the position of the UK courts on a matter in which our law is silent, rather than that of the EU in general. This is particularly important when considering the manner in which the UK has dealt with the issue of linking outside of the influence of EU law. This is evident in the UK decision of *PRCA Ltd v NLA & Ors (Meltwater)*.²¹⁷ In this case Meltwater provided its clients with hyperlinks to newspaper articles formed from the headline of the articles so that when users clicked on the hyperlink, they were taken to the article on the publisher’s website. In classical UK copyright law style the lower courts had held that Meltwater’s actions would amount to copyright infringement in that when clicking on the link and viewing the webpage content, a user would also make a copy of the webpage on the user’s computer and Internet cache. This would make the owner of the linking site liable for copyright infringement as a secondary infringer (i.e. on the basis of contributory infringement). Moreover, where the hyperlink in itself had sufficient copyright character to constitute a protectable work,²¹⁸ making use of the link without authorization could in itself amount to copyright infringement.

In arriving at this decision the UK lower courts had given an interpretation that accorded with traditional UK copyright law jurisprudence. This ruling of the UK lower courts was however, rejected by the UK Supreme Court, relying on article 5(1) of the EU Copyright Directive. This article creates an exception to the general rule that reproducing a copyright work without the authorization of the copyright owner, in any manner or form, constitutes copyright infringement. Article 5(1) creates an exception to this position by permitting temporary acts of reproduction of works if the reproduction is (i) transient or incidental; (ii) is an integral and essential part of a technological process and (iii) its

²¹⁴ Some have argued that such filters will be error-prone, ineffective and expensive, which could thus produce the opposite effect. See in this regard <https://www.theverge.com/2019/3/26/18280726/europe-copyright-directive> (date of use: 17 July 2019).

²¹⁵ Ibid; also See <https://www.billboard.com/articles/business/8461920/european-parliament-copyright-licensing-reform-value-gap> (date of use: 04 December 2018).

²¹⁶ See <https://www.musicbusinessworldwide.com/european-parliament-sides-with-music-industry-in-crucial-copyright-vote-which-could-close-the-value-gap/> (date of use: 04 December 2018).

²¹⁷ (2013) UKSC 18.

²¹⁸ In view of the fact that a newspaper headline may, at times, in itself be eligible for copyright.

sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful purpose. Relying on this exception, the UK Supreme Court held that Meltwater had not infringed the copyright in the news articles.²¹⁹ Having indicated this it needs to be noted that, even on the basis of the *Meltwater* decision, *inline linking* entailing the unauthorized embedding of copyright material would not ordinarily be a permissible act in UK law. This is because in the *Meltwater* decision the UK Supreme Court ruled that downloads do not constitute a temporary copy. Thus clicking on a link to download material would constitute copyright infringement.²²⁰

(c) Canada

Canada, like South Africa, developed its copyright law from English copyright law and has largely adhered to this tradition in its jurisprudence. Regarding normal linking it was recognized in the Canadian Supreme Court case of *Crookes v Newton*²²¹ that links are at the core of how the internet operates and that the internet cannot function as intended without them. In the case it was further observed (at paragraph 30) that hyperlinks are similar to a footnote or a reference in that they “[b]oth communicate that something exists, but do not, by themselves, communicate its content.” In *Warman and National Post v Fournier*²²² the Canadian federal court went further in this regard by suggesting that the owner of copyright in a work gives an implied licence to use the work by posting it on his or her website.²²³ Thus no communication to the public or reproduction takes place through the use of a simple hyperlink (e.g. providing a link to a photograph accessible on a photographer’s website), and therefore no copyright infringement takes place by providing such a link.²²⁴

With regard to embedded links and framing, the position is outlined in *Century 21 Canada Ltd. Partnership v. Rogers Communications*, where it was held that embedding copyright-protected material would generally not amount to copyright infringement *if the copyright holder made the material available online and the medium chosen to make the material available does not prohibit embedding or framing in its terms of service.*²²⁵ However where a “terms of use” agreement (such as the so-called “browse-wrap” or “click-wrap” licences) prohibits the embedding of the material, and such agreement is found to be valid, embedding the material would constitute a breach of such agreement and thus amounts to copyright infringement.

(d) United States

²¹⁹ This ruling was upheld by the CJEU in *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd & Others* (C-360/13), 5 June 2014.

²²⁰ See further in this regard the UK Court of Appeal case of *Football Dataco v Stan James, Sportradar & Ors* [2013] EWCA Civ 27, where it was held that the linking site would be held liable for copyright infringement as a secondary infringer if, by clicking on a pop-up link on the linking site, the users would unlawfully access a copyright work. These UK Supreme Court decisions would however, be at odds with the subsequent CJEU *Bestwater International* case (while consonant with the new EU Directive on Copyright in the Digital Single Market). They do however reflect classical UK copyright law philosophy, which South Africa continues to follow.

²²¹ [2011] 3 SCR 269.

²²² 2012 FC 803.

²²³ In the case the applicant had posted the particular work on his personal website. The court held that “the communication of the [work] occurred by creating a hyperlink to the applicant’s own website ... [and] thus the applicant authorized communication of the [work] by posting it on his website and therefore there is no infringement.” At para 37.

²²⁴ See also paras 24 and 28.

²²⁵ *Century 21 Canada Ltd. Partnership v. Rogers Communications*, 2011 BCSC 1196, 96 C.P.R. (4th).

In US copyright law hyperlinking, including deep-linking, where no copying is involved does not amount to copyright infringement. This position was confirmed in the case of *Ticketmaster Corp, and others v Tickets.com, Inc.*²²⁶ However, for copying to be held not to exist the link must refer the user to the “genuine web page”, to prevent deception, and that “[t]his is analogous to using a library’s card index to get reference to particular items, albeit faster and more efficiently.”²²⁷ Furthermore, it was held that the defendant could also rely on the fair use doctrine, which can be relied upon in particular cases to exempt a user from copyright infringement, e.g. where what was copied related to factual information, which, according to the doctrine, is non-protectable. The position is however not so clear with regard to embedded linking. In *Leslie A Kelly v Arriba Soft Corporation*²²⁸ it was held that embedding or framing images from another site on a linking site violated the rights-holder’s exclusive right of public display. However in *Perfect 10 v Google*²²⁹ it was held that the framing of photographs by Google in its image search results did not amount to copyright infringement, since the framed photographs were in fact links enabling users to view on Google part of a webpage which had originally posted the photographs.

Similarly in *Flava Works v Gunter dba myVidster*²³⁰ the Seventh Circuit Court of Appeals held that the framing of third party content by websites did not amount to copyright infringement. In this case the actual videos belonging to a third party were displayed on myVidster.com, but the videos were not hosted on myVidster.com but were “linked and framed” from other parts of the internet. It needs to be understood further that in this case, the videos were posted by the users themselves and not by myVidster, and myVidster only provided the linking and framing technology. Users who intended to make available streams of the videos would “bookmark” them on myVidster. Upon receiving the bookmark, myVidster would then automatically request the video’s embed code from the hosting server.²³¹ Using this embed code, myVidster would then automatically create a webpage that makes the video to appear to be on myVidster’s site. When another user visited the webpage the videos embedded on the webpage appeared as thumbnails, i.e. miniature pictures of a video’s opening screen shot. A click on the thumbnail activated the video’s embed code, connecting the visitor’s computer to the hosting server, in this way enabling the visitor to watch the video. The visitor would in fact watch the video through a frame created by myVidster around the video, containing ads. While the visitor might think that he or she was watching the video on myVidster, in fact the video was being transmitted directly from the server in which the video was stored, to the visitor’s computer.

The District Court had held that myVidster users were guilty of *direct infringement* of Flava’s copyrights by posting and making back-up copies of its videos on myVidster, i.e. infringing the

²²⁶ 54 USPQ2d 1344 (District Court of Central California), 27 March 2000., at para 2. The court defined hyperlinking as “electronic transfer to the particularly numbered interior web page” of the applicant. *Ibid.*

²²⁷ *Ibid.*

²²⁸ 280 F.3d 934 (9th Cir. 2002) withdrawn, re-filed at 336 F.3d 811 (9th Cir. 2003).

²²⁹ 508 F.3d 1146.

²³⁰ 2012 WL 3124826 (7th Cir. August 2, 2012).

²³¹ The embed code contains the video’s web address together with technical instructions on how to display the video.

reproduction right; and by displaying its videos on myVidster without Flava's permission. Secondly, the District Court held that myVidster itself was guilty of *contributory infringement* by materially contributing to the infringing activity. The Appeal Court overruled the decision of the District Court. It is however important to understand the rationale of the Appeal Court in overruling the decision of the District Court. The Appeal Court did not rule that the embedding of videos from another site does not constitute copyright infringement: it merely ruled that in this particular case there was no admissible evidence of copyright infringement. The court in fact confirmed that generally, a user who uploads and bookmarks a video on myVidster infringes copyright when the video is watched by the public. Furthermore, when a website operator provides an inline link to an infringing video, the website operator can be held liable for contributory infringement of copyright for facilitating the unauthorized public performance of the video. In this particular case however the court did not find admissible evidence to support such a conclusion.

A recent development in the United States involving BMG Rights Management, a music publishing company and Cox Communications, the third largest ISP in the United States, is worth noting. BMG filed suit against Cox Communications alleging copyright infringement on the part of Cox. This was on the basis of contributory liability for the infringement of its copyrights by subscribers to Cox's internet service. The US Court of Appeals for the Fourth Circuit held that Cox could not rely on the safe harbor provisions provided for in section 5(12)(a) of the Digital Millennium Copyright Act for failing to implement its policy in a consistent and meaningful manner, "leaving it essentially with no policy".²³² The court nevertheless found that the district court had erred in giving responsibility to the jury to determine the intent necessary to establish contributory infringement, thus affirming the decision of the district court in part, reversing it in part, vacating it in part and remanding it for a new trial. It has in this regard been reported that the parties reached a "substantial settlement" in favour of BMG, avoiding a retrial.²³³

Just like the EU, the USA underwent a major development in its copyright law in 2018, particularly in relation to the music industry. This took the form of the Music Modernization Act,²³⁴ which was signed into law on 11 October 2018. The Act seeks to modernize US copyright law with respect to making and distributing records ("phonorecords") of nondramatic musical works through "digital phonorecord delivery", e.g. digital streaming. The focus however is not in dealing directly with issues relating to the liability of online service providers; rather it is to extend the mechanical compulsory licensing system to the digital environment and in this regard, to ensure that rights-holders duly receive royalties for such uses.

²³² *BMG Rights Management (US) LLC and Another v Cox Communications, Incorporated and Another* No. 16 – 1972 (4th Cir. 2018), at 20. Cox Communications made use of BitTorrent technology and in this regard the court observed that what differentiates this technology from normal peer-to-peer technology is that "it allows a user to download a file from multiple peers at the same time ... [which] makes sharing via BitTorrent particularly fast and efficient." *Id* at 7.

²³³ See <https://www.digitalmusicnews.com/2018/08/24/bmg-settlement-cox-communications/> (date of use: 17 February 2019).

²³⁴ H.R. 1551, Pub.L. 115–264 (2018, USA), available at <https://www.congress.gov/115/bills/s2823/BILLS-115s2823rs.pdf> (date of use: 20 July 2019).

8.4.2.5 How would South African Courts deal with the Matter?

(a) The form of Infringement applicable

Having provided the above analysis it would be useful to consider directly what the position is, under our own law. It is important in this regard to note that the Copyright Act has not been amended to take into account the technological developments that were ushered in by the digital revolution that started in the 1990's, which has completely changed the manner in which creative works are created and consumed. The Copyright Amendment Bill 2017 has been touted as introducing changes that take into account digital developments. However, in respect of rights holders such changes are not far-reaching and are largely limited to provisions relating to the introduction of the rights of communication to the public and making available in sections 6, 7, 8 and 9 of the Act.

In providing a guideline as to how to deal with issues relating to the internet in light of this shortcoming in our law, the leading authority on copyright law in South Africa, Owen Dean, makes this observation:

When applying copyright law to the internet it is important to dissect the process of the dissemination of the subject matter material and then to apply basic copyright principles to the various steps involved in the process. The mystique which surrounds the internet can to a large extent be avoided if the basics are applied in a step by step analysis of the manner in which information bearing materials are dealt with.²³⁵

As highlighted above, copyright infringement takes the form of direct infringement, indirect infringement, contributory infringement and causal infringement (the last two constituting cases of "joint wrongdoing"). The discussion below is concerned with the element of direct infringement and contributory infringement, as these are the main forms of infringement in terms of which infringement cases in the online environment are dealt with.²³⁶

(i) Direct Infringement

Direct infringement involves an infringement of the restricted acts, namely the bundle of rights that the Copyright Act stipulates as being subject to the exclusive rights of the copyright owner, r by doing such acts, authorising another to do such acts, and as Dean and Karjiker add, causing the doing and causing the authorisation of the doing of such acts.²³⁷ In respect of musical works the restricted acts are provided for in section 6 of the Act, in respect of music videos this is provided for

²³⁵ Dean and Karjiker *Handbook of Copyright Law* 1-72.

²³⁶ The case of causal or vicarious infringement, i.e. causing, instigating or instructing someone to commit an infringing act would not normally apply in respect of the online service provider's relationship with the general public, as this relates to instances where the person held liable for such infringing has the ability to control the actions of the person who commits the infringing act (e.g. where an employer allows or encourages its employees to install copies of an unlicensed software for use by the employees at the workplace.) In South African copyright law causal infringement is a form of direct infringement and thus no guilty knowledge is required for holding a person liable on this basis. See in this regard Dean & Dyer *Introduction to Intellectual Property* 432; Dean and Karjiker *id* at 1-90

²³⁷ Dean and Karjiker *ibid*.

in section 8 of the Act,²³⁸ and in respect of sound recordings this is provided for in Section 9 of the Act. Of the various restricted acts dealt with in these sections, the most relevant act with regard to the question of copyright infringement is the act of reproduction, provided for in section 6(a) in respect of musical works,²³⁹ in section 8(a) in respect of cinematograph films²⁴⁰ and in section 9(a) in respect of sound recordings.²⁴¹ The essence of the manner in which the reproduction right is expressed in these sections is that the right is not limited to one form of reproduction but includes reproduction “in any manner or form”, or “directly or indirectly”, which connotes the same meaning.

Expressing the reproduction right in this manner has greatly assisted South African copyright law with regard to exploitation of copyright works in the digital environment in light of the general “digital vacuum” in the Act, because any manner of reproduction, whether in a material or a non-material form, (and the making of any record of a sound recording in which a musical work is embodied, whether directly or *indirectly*), would constitute an infringement of the work concerned.²⁴² Moreover, the ambit of the reproduction right is made wider by the fact that not only a direct copy, but also a copy of a copy (the so-called indirect copying) is covered by the definition of reproduction.²⁴³ This wider application of the expression “reproduction” makes it applicable without any hindrance in the digital environment.

In the writer’s view, it could be concluded that cases of normal linking (including deep linking) would *not* constitute copyright infringement under the South African Copyright Act because a feature of these forms of linking is that the link merely refers the user to another site, the target site, where the copyright material is stored, and does not itself result in a copy being stored in the server of the linking site, i.e. it does not result in the reproduction of the work on the linking site.²⁴⁴ The same cannot however, be said of embedded or inline linking, where material from a different website is placed on a web page of the linking site. In such cases it has been argued that a reproduction is in fact made.²⁴⁵ This would also be the case when understood from the position taken by several European courts prior to the *Svensson* and *BestWater* decisions of the CJEU (discussed above), as

²³⁸ This section deals with “cinematograph works”. The definition of “cinematograph works” is nevertheless broad and includes not films in the strict sense but music videos also.

²³⁹ In this section the act is expressed as “reproducing the work in any manner or form”. There could be challenges with asserting the performing right in the online environment because of the fact that the Copyright Act currently has no rights of communication to the public and making available, although the Copyright Amendment Bill 2017 now proposes to introduce these rights.

²⁴⁰ In this section the act is expressed as “reproducing the film in any manner or form, including making a still photograph therefrom”.

²⁴¹ Apart from s 6 the other sections mentioned here are being mentioned mainly because musical works are embodied in films and sound recordings and would rarely be infringed online if not embodied in these mediums (with the exception of the reproduction of sheet music).

²⁴² Dean and Karjiker *Handbook of Copyright Law* 1-68A – 1-68B.

²⁴³ Paragraph (c) of the definition of “reproduction” in s 1 of the Copyright Act. See also Dean and Karjiker *id* at 1-68B – 169.

²⁴⁴ See also Dean and Karjiker *id* at 1-71.

²⁴⁵ *Id* at 1-71 – 1-72, when discussing framing and system caching. Writing on framing Dean observes: “‘Framing’ entails the actual incorporation in a web page of a second website [or a webpage from a second website]. In other words, the first web page is augmented or extended by incorporating in it material which is carried by a second website. In this situation the user is not transferred to the second website but remains linked to the first website into which material from the second website is absorbed. This process involves reproduction of material on the second website and a website owner framing a second website or material comprised therein in fact reproduces the material from the second website onto the first website. This process does give rise to reproduction of material, and if unauthorised, can constitute copyright infringement.”

well as what can be understood as the classical UK copyright law position before the influence of EU law (as reflected in the decisions of the lower courts in the *Meltwater* case discussed above),. Under such circumstances the embedding of copyright material from a host website to a linking website without permission of the copyright owner, would, where the hyperlink in itself has sufficient copyright character to constitute a protectable work (e.g. where it is in fact a copy of the music video), constitute copyright infringement.

Returning to the UK Supreme Court ruling in the *Meltwater* case, it is submitted that a South African court would have given a ruling that is more in line with the decision of the UK lower courts in this matter (holding that the act concerned constituted copyright infringement), since South Africa does not *currently* have an exception similar to that provided for in article 5(1) of the EU Copyright Directive. In this regard the following general principle espoused by Dean and Karjiker in this regard, is worth noting:

The storage of extraneous material by a service provider in its system, which material is obtained from third parties, constitutes reproduction of that material and the unauthorized storage could thus give rise to copyright infringement.²⁴⁶

If the conclusion is that a reproduction takes place when a copyright work (e.g. a music video) is embedded on a website the question to ask is who is responsible for this direct infringement of copyright? It is submitted that this would be dependent on who actually placed the copyright material on the internet service provider (ISP)'s website. In the *myVidster* case discussed above users posted the videos themselves through a process of bookmarking, and myVidster only supplied the linking and framing technology to embed the videos on its website. Thus it can be concluded that the person who posts the copyright material on the ISP's website through a similar process (e.g. a subscriber) would be guilty of direct copyright infringement. However, where the ISP actively encourages the subscribers or other users over which it has control, to post and / or share files and content, even if the ISP does not itself posts them, the ISP could be held liable for direct infringement of copyright for causing or authorising the making of reproductions of the music video (i.e. for *causal* or *vicarious* infringement).

The above would accord with the *Warman* decision of the Federal Court of Appeal of Canada, where it was held that for an internet service provider or platform to be held liable for copyright infringement, "... [the] platform must first be held to have authorized such reproduction." Authorisation would occur where the ISP gives the impression to the users that it has the right to permit the posting of the music videos on its platform. To avoid this the ISP should take precautions,

²⁴⁶ Dean and Karjiker *Handbook of Copyright Law* supra at 1-72. As examples of what would constitute reproduction "in the electronic age and in e-commerce" Dean and Karjiker mention loading software and data into a computer, operating a computer program, downloading material from the internet, displaying material on a computer screen, including material sourced from the internet, and incorporating material on a website. *Id* at 1-69.

e.g. in its “Terms of Use”, to make it explicit that the ISP does not authorise users to post unauthorised copyright material on its website. The conclusion is therefore that to avoid a claim for direct infringement the ISP should not embed any copyright material (e.g. music videos) on its website, nor should it authorise others to do so, without first obtaining permission to do so from the owners of copyright in such works or ascertaining that such permission was obtained. Where the ISP neither posts the music videos itself, nor can be said to have “authorised” users to do so, the question left would be whether the ISP, although not guilty of direct infringement of copyright, would nevertheless be guilty of contributory infringement as dealt with further below.

It needs to be understood that many times in the music industry artists are not the copyright owners of the music videos in which they feature, and the copyright often belongs to the record label or some other financial sponsor who financed the making of the music video. In this regard the ISP needs to be careful regarding the material posted on its website and not merely assume that because an artist has posted a music video in which he features, the copyright in such music video accordingly belongs to him. It needs furthermore to be also understood that where, in the case of a music video, an unauthorised reproduction takes place, not only the copyright in the music video concerned (i.e. the cinematograph film as contemplated in section 8 of the Copyright Act) is infringed, as the copyright in the sound recording embodied in the music video, and the copyright in the musical and literary works embodied in the sound recording, would also be infringed. Thus the ISP may find itself liable for copyright infringement against various parties, namely the owner of the copyright in the music video, the owner of the copyright in the sound recording (and sometimes the owner of the performer’s right also), and the owner of the copyright in the underlying musical work.

Having indicated this, it needs to be mentioned that clause 13 of the Copyright Amendment Bill 2017²⁴⁷ seeks to insert a new section 12C to the Copyright Act, which introduces a temporary reproduction and adaptation exception that mimics (although it can also be distinguished from) article 5(1) of the EU Copyright Directive. The proposed section 12C provides the following:

12C. Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process and the purpose of those copies or adaptations is—

- (a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or
- (b) to adapt the work to allow use on different technological devices, such as mobile devices, as long as there is no independent, economic significance of these acts.²⁴⁸

²⁴⁷ Version B13B-2017, approved by both houses of Parliament and currently awaiting the President’s signature, available at <https://pmg.org.za/bill/705/> (date of use: 13 July 2019).

²⁴⁸ Article 5(1) of the EU Copyright Directive 2001 on the other hand provides the following: “Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or

In light of the above, if the Copyright Amendment Bill 2017 becomes law and retains the proposed section 12C, it is submitted that our courts shall in view of this be compelled to follow the decisions of the UK Supreme Court and the CJEU in the *Meltwater* case,²⁴⁹ rather than that of the court a quo as submitted above. Having indicated this, it needs to be mentioned however that there is a problem in the manner in which the temporary reproduction exception has been introduced under the Copyright Amendment Bill. In the first instance while the EU right is only concerned with “temporary acts of reproduction”, the South African version extends to “adaptations of a work”. In this regard the South African version is overly expansive, and entails as it were, a “double dipping” into the exclusive rights of copyright owners. It is not clear why it was felt that the exception needed to extend to the right of adaptation.

Further to the above, while in the EU Copyright Directive this exception is specifically subjected to the three-step test,²⁵⁰ this has not been done in the proposed introduction of this right under the Copyright Amendment Bill. It is clear therefore that the proposed introduction of this exception under the Copyright Amendment Bill was either done haphazardly, or with the clear intent of favouring users at the expense of rights-holders.

What was said above is limited to the infringement of the right of *reproduction* through the embedding of copyright-protected works.²⁵¹ In the cases that have come before the courts (including some of the cases discussed above, such as the EU cases of *Svensson*, *BestWater* and *GS Media BV*, and the Canadian case of *Warman*) the right of *communication to the public* (and in the US the public performance and public display right also) has been the subject of infringement cases arising from the unauthorised embedding of copyright material. In South Africa the right of communication to the public is not well developed except in respect of sound recordings.²⁵² In respect of other works such as musical works and cinematograph films the Act still refers to the restricted act of *broadcasting* the work. In view of this, the decisions that dealt with the question of communication to the public would, it is submitted, not have much relevance in the current South African context. It also needs to be observed that the argument given by the CJEU in respect of the question why it believed that the embedment of works did not infringe the right of communication to the public - namely the submission that because the copyright owner had already made his or her copyright work available online, the embedment of such work on a linking website would not constitute copyright infringement because the work was disseminated to the same public and not a “new public” - is controversial and it is submitted, foreign to our law, as this would amount to an unjustified

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic independence, shall be exempted from the reproduction right provided for in Article 2.

²⁴⁹ *PRCA Ltd v NLA & Ors (Meltwater)* (2013) UKSC 18 and *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd & Others* (C-360/13), 5 June 2014, respectively.

²⁵⁰ Article 5(5) of the EU Copyright Directive 2001 specifically provides the following: “The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”

²⁵¹ With the Copyright Amendment Bill 2017 extending this to the right of adaptation.

²⁵² Section 9(e) of the Copyright Act. Dean and Karjiker *Handbook of Copyright Law* 1-64B – 1-64C assert that this right is concerned primarily with making works available online.

exhaustion of the right of communication to the public.²⁵³ It is submitted that this is a uniquely European invention and though current UK law has been influenced by this, our courts should not follow such a position.

(ii) Contributory Infringement

As indicated, contributory infringement occurs when a person “aids and abets” the commission of an infringing act by another (i.e. assists another to commit an infringing act), while knowing, or having reason to believe that the act which he aids and abets constitutes an infringing act. Contributory infringement is a form of joint wrongdoing as known in the common law of delict.²⁵⁴ On this basis, even where the ISP has not itself used the copyright materials or authorised others to do so, the ISP may still be held liable for assisting the infringers to commit copyright infringement. The difference between authorising another to commit an infringing act and assisting them (i.e. aiding and abetting them) to do so is that in the former case, the person authorising another to commit an infringing act creates the impression to the other that he or she has authority to permit such an act, while in the case of aiding and abetting, the person concerned creates the means, or makes it easy or possible, for another to commit copyright infringement.²⁵⁵ Contributory infringement has traditionally been the basis upon which internet service providers have been held liable for copyright infringement.

Providing the means for another to commit copyright infringement often happens through the making available of a technological device, means or platform which makes it easy for another to commit copyright infringement. In the case of *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd & Others*²⁵⁶ it was held that one Coetzee assisted the first and second respondents to infringe the appellant’s copyright in a Data Explorer program “by providing the source code in respect of the search function and also the source code required to incorporate the graphics server.” In this regard the court observed:

In the premises Coetzee made common cause with the first and second respondents and co-operated with them in so far as the infringement by them of the appellant’s copyright ... in South Africa is concerned. By doing so Coetzee himself infringed the appellant’s copyright in the Data Explorer program in South Africa.²⁵⁷

Another case decided by our courts in this regard is the *Atari*²⁵⁸ case. In this case the respondent had sold a device which was primarily aimed at making reproductions of the applicant’s copyright-protected computer games. The applicant argued that the respondent instigated or facilitated the making of unauthorised copies of the applicant’s computer games by third parties by means of selling the device in question and promoting sales of the device by drawing the purchasers’ attention

²⁵³ See in this regard also Hugenholtz and Van Velze 2016 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811777 generally and on paragraph 4.3 particularly. (Date of use: 9 September 2016).

²⁵⁴ See Dean and Karjiker *Handbook of Copyright Law* 1-88 – 1-91.

²⁵⁵ *Ibid.*

²⁵⁶ 2006 (4) SA 458 (SCA).

²⁵⁷ *Ibid.* p. 20. Emphasis added.

²⁵⁸ *Atari, Inc. and Another v JB Radio Parts (Pty) Ltd*, unreported Case No. 17419/83, TPD.

to the device's capabilities. The court agreed with the applicant in the case and issued an interim interdict against the respondent.²⁵⁹ As Dean and Karjiker have observed, "In this instance the respondent was held to have infringed copyright even though there was no evidence of any actual reproduction of the applicant's games."²⁶⁰

In view of the above, it is clear that an ISP can be found liable for contributory infringement of copyright, where users unlawfully upload copyright material such as music videos on the ISP's website, on the basis of aiding and abetting these users to infringe the copyright in the copyright material by providing the linking and framing technology that enabled the users to do so. The ISP would of course only be liable if it knows or have reasons to believe that assisting others to post the copyright material on its website (or to post an embedded link to such music videos) would enable them to commit copyright infringement. This would be the case where the primary or direct act of infringement (e.g. the posting of the music videos) would have been committed by the users, with the ISP only providing the technology to do so. Where however the ISP would itself have posted the music videos then if such posting was not authorised, then the ISP would be liable for direct infringement of copyright and there would be no question of contributory infringement.

The form of wrongdoing required on the part of a person who aids and abets the commission of an infringing act is intention, i.e. *dolus*.²⁶¹ The person *must know* or *have reasons to believe* that assisting the third party concerned will result in the third party committing copyright infringement. In this regard it needs to be understood that *dolus* does not have to be *dolus directus* ("direct intention" or intention in its grammatical sense) but can also include *dolus eventualis* ("legal intention"), and there are also "different gradations" of wrongdoing that can be inferred from this.²⁶² *Dolus eventualis* involves two components, namely (for current purposes): (i) a *cognitive component*, which involves foreseeing the possibility that the act in question would result in infringing conduct; and (ii) a *conative* or *volitional component*, which involves recklessness notwithstanding, i.e. recklessly accepting that the infringing conduct may take place (and not refraining from the act leading to such infringing conduct).²⁶³ This means that, to avoid being guilty of contributory infringement not only must the ISP show that it had no knowledge and had no reason to believe that providing the linking and framing technology would assist users to post infringing copyright content, but it must also show that it did not foresee the possibility of this happening. It is submitted that, in many cases it would be difficult to prove this.

(b) Possible Defences available to an Internet Service Provider

²⁵⁹ In America a similar ruling was made in the case of *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984) and in the case of *MGM Studios, Inc v Grokster, Ltd.* 545 U.S. 913 (2005).

²⁶⁰ Dean and Karjiker *Handbook of Copyright Law* 1-91.

²⁶¹ Dean and Karjiker *id* at 1-90.

²⁶² See in this regard *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 (2) SA 608 (W), at 620H-621A.

²⁶³ See Hoctor 2008 *Fundamina* at 15.

Although this work is not generally concerned with a consideration of the provisions relating to the infringement of copyright, concerned as it is with providing the context within which copyright in musical works is protected, it would be useful to briefly consider the defences that an ISP may have for either itself embedding copyright material that is found to constitute copyright infringement, or aiding and abetting others to do so. In this regard the ISP may make use of two defences, firstly, argue that the act concerned was not an infringing act either because no copyright subsisted in the work concerned or because the necessary authorisation to use the work was obtained. Secondly, the ISP can argue that the act concerned was an act permitted by law because it falls within the scope of the exemptions (“limitations and exceptions”) granted in relation to such a work.²⁶⁴

A defence based on the ground that no copyright subsisted in the work would rely on the argument that the claimant did not satisfy all the requirements for the subsistence of copyright in the work, as provided for in copyright law. This includes alleging that the work is not an original work, that the claimant is not the copyright owner, that there was no reproduction of a substantial part etc. The defendant may also claim that he had authorisation to use the work. Authorisation would arise from the various ways in which copyright can be disposed of or conferred upon another, e.g. through assignment, through the issuing of a licence, through a will etc. A licence can be either an exclusive licence or a non-exclusive licence, and may even be an *implied / tacit licence*.

Perhaps the issue of an implied licence deserves further attention. An implied licence is essentially a non-written contract which can be implied or deduced from the conduct of the parties, i.e. if the copyright owner by his conduct gives the impression that he has given permission for the work to be used, then an implied licence may be deduced from such conduct.²⁶⁵ The Federal Court of Appeal of Canada took this approach in the *Warman* case (discussed under paragraph 8.4.2.4 above) when it held (in the case of hyperlinking), that, because links are at the core of how the internet operates and the internet cannot function as intended without them, no infringing communication to the public or reproduction takes place through the use of a simple hyperlink and that in fact, the copyright owner of a work linked to gives an authorization (in essence an implied licence) to use the work by posting it on his or her website.

It is submitted that the Canadian approach with regard to implied licences in respect of linked works is very liberal and would not be applicable to South Africa under the current Copyright system. In this regard it has been observed that, under the South African copyright law, “before an implied contract can be found by the court to exist it must be convinced that there are relevant facts which cannot be interpreted in any other way save that an implied agreement has come into existence.”²⁶⁶ In this regard it can be said that the fact that linking is an essential part of internet technology does not mean that the link must link to a work that is protected by copyright. In South Africa a defence based on an implied licence is similar to the defence of abandonment, which is to the effect that a

²⁶⁴ See generally in this regard Dean and Karjiker *Handbook of Copyright Law* 1-123 – 1-125.

²⁶⁵ See Dean and Karjiker *id* at 1-148.

²⁶⁶ *Ibid.*

rights holder has, by his conduct (e.g. public utterances) abandoned his right to claim copyright infringement.²⁶⁷ In an abandonment defence the onus / burden of proof to prove that the rights holder has abandoned or waived his right to claim under copyright is that of the defendant, and this onus must be discharged on a balance of probabilities.²⁶⁸ In this regard Dean and Karjiker have observed that, “[i]n assessing the probabilities, the factual presumption that a person is not likely deemed to have waived his or her rights must be borne in mind.”²⁶⁹ In view of this, it is clear that it would not be easy in South Africa (as it seems to be in Canada), to mount up an argument to the effect that, because a rights holder has made his or her works available on the internet, he has given an implied licence to link to such works.

Regarding the defence that the act concerned is exempted from being an infringing act because it falls within the scope of the limitations and exceptions provided for in the copyright law, this is similar to the defence used in the UK-CJEU ruling in the *Meltwater* case, where the linking and embedment of copyright works was seen to be permissible on the basis of article 5(1) of the EU Copyright Directive. Article 5(1) of the EU Copyright Directive constitutes a limitation and exception to the general rule that reproducing a copyright work without the authorisation of the copyright owner amounts to an infringement of copyright. It is of course common cause that the system of limitations and exceptions derives from the provisions of the Berne Convention itself – the international convention providing international minimum standards for the protection of copyright.²⁷⁰ In South Africa limitations are currently provided for in sections 12 – 19B of the Act, which include the fair dealing defence. Since however, South African copyright law does not currently have a limitations and exceptions provision similar to article 5(2) of the EU Copyright Directive, internet service providers could not rely on such a defence in South Africa. In America, where the fair use defence is used, this was relied upon in the *Ticketmaster Corp* case dealt with above, to remove the infringing nature of the act concerned.

8.4.2.6 The Provisions of the Electronic Communications and Transactions Act

A consideration of the impact of technological developments would not be complete without commenting on the provisions of the Electronic Communications and Transactions Act (ECTA).²⁷¹ The ECTA “makes provision for the recognition and regulation of electronic transactions and media in modern commerce ... [and] deals with the internet and the legal implications and considerations which flow from the use of the internet in modern commerce.”²⁷² Relevant for our present purposes are the provisions of Chapter XI (Sections 70 – 81) of the Act, which deal with “Limitation of Liability of Service Providers”. “Service Provider” is defined broadly to include “any person providing information system services”, thus including website operators, hosting service providers, access

²⁶⁷ *Id* at 1-124.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ See for example in this Article 9(2) of the Berne Convention. This also concomitantly introduces the “three-step” test, which the exception contemplated in this article must be subjected to before it can be recognised.

²⁷¹ Act 25 of 2002.

²⁷² Dean and Karjiker *Handbook of Copyright Law* 1-104.

providers and virtually anyone who offers information services on the internet. For any service provider to be able to benefit from the exemptions granted to service providers under Chapter XI of this Act the service provider needs to be a member of an *industry representative body* (IRB) recognised by the Minister of Trade & Industry, and must have adopted and implemented the code of conduct imposed by such representative body. Some recognised IRBs include the Internet Service Providers' Association (ISPA), Wireless Access Providers' Association (WAPA) and the Wireless Application Service Providers' Association (WASPA).

The service providers that are eligible to obtain exemption from liability granted to service providers in terms of Chapter XI are categorised into four groups, namely: (i) those acting as mere conduits of information (section 73), (ii) those involved with information caching (section 74), (iii) those involved with information hosting (Section 75) and (iv) those involved with the provision of "information location tools" (Section 76). "Information location tools" include "a directory, index, reference, pointer, or hyperlink". Under section 77, a person who complains of unlawful activity can, in writing, notify the service provider or designated agent of the unlawful activity, setting out the right which has been infringed and the location or nature of the infringing material or activity under the control of the service provider. The service provider would, upon receipt of the notice, expeditiously remove the infringing content or disable access to it. In terms of section 78 there is however no general obligation on a service provider to (a) monitor the data which it transmits or (b) actively seek facts or circumstances indicating an unlawful activity.

Additional requirements apply if a service provider wishes to avail itself of the limitation of liability provided for in the ECTA. In terms of section 76, limitation of liability would only apply if the ISP:

- (a) does not have actual knowledge that the data message or an activity relating to the data message is infringing the rights of that person [who alleges that it does];
- (b) is not aware of facts or circumstances from which the infringing activity or the infringing nature of the data message is apparent;
- (c) does not receive a financial benefit directly attributable to the infringing activity; and
- (d) removes, or disables access to, the reference or link to the data message or activity within a reasonable time after being informed that the data message or the activity relating to such data message, infringes the rights of a person.

The phrase "data message" as used above is defined as "data generated, sent, received or stored by electronic means and includes ... a *stored record*".²⁷³ "Stored *record*" clearly includes a sound recording, and since what is covered in section 76 is "data message or *an activity relating to the data message*", a music video would also qualify as "an activity relating to [a sound recording]".

²⁷³ Section 1, ECTA, emphasis added.

It is submitted that the above-mentioned requirements (particularly in respect of (a) and (b)), accord with the requirements for contributory infringement dealt with above. If a service provider cannot satisfy these requirements it can be said to have known, or to have had reasons to believe that the activity it is permitting would give rise to copyright infringement. It would for example be very difficult for an ISP to assert, with regard to the embedding of music videos that are later proved to infringe copyright, that it *was not aware of facts or circumstances from which the infringing activity or the infringing nature of the data message was apparent*. It needs in this regard to be remembered that the requirement of *knowing* or *dolus*, (and by extension *dolus eventualis*) relates not only to knowing in the ordinary sense but also *foreseeing the possibility of something happening*. In view of this, it can reasonably be argued that the mere fact that the infringement of copyright works is rife on the internet could be seen as placing the ISP in a position where it foresees the possibility that such an infringement could happen on its website also, thus making it necessary that the ISP would not facilitate (aid and abet) the posting of such videos on its site (by making the linking and framing technology necessary to do so readily available for this purpose).

8.5 Conclusion

This chapter was concerned with an exploration of the implication of digital technology on the protection of copyright works in the digital environment. As highlighted in this work, technological developments have presented ongoing challenges for the protection of copyright works. Many times the emergence of new, disruptive technology has been seen as threatening the very legitimacy of the copyright system. However, starting with the threat imposed upon rights-holders from the advent of print technology, which made it easy to copy multiple works, copyright law has, for over two hundred years, held out as the ultimate Protector of the interests of authors and other copyright owners.

The advent of digital technology nevertheless ushered in so many problems and disruptions that some legitimately believed that this would spell the death knell for the copyright law system as we know it. In this regard many voices have been heard, including those calling for a system of “users’ rights” to replace the system of copyright in the digital environment. In South Africa this movement seems to have gained in ascendancy, as demonstrated by the fierce lobbying that has taken place with regard to the Copyright Amendment Bill currently before Parliament. It seems that the users’ rights camp has gained the higher ground in the South African environment, with gains such as the proposed introduction of a far-reaching exceptions regime undergirded by a US-style fair use defence, which, itself, is poised to turn South African copyright law on its head, looking at US law for guidance rather than the long-established tradition of relying on English law.

However, this loss of splendour of the copyright law system is thankfully not the norm everywhere. In the European Union it can be said that rather than diminishing in strength, copyright law is poised to conquer the mountain of the value gap which became the by-product of the disruption of the traditional music value chain. The European Parliament’s support of proposals to amend the EU

Copyright Directive in order to adequately protect the interests of rights-holders in a disrupted digital environment has awakened the hope that copyright law can, in fact, survive any technological onslaught, where the policy makers display a strong resolve to uphold the principle of the protection of authors' rights.

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Chapter 9: Conclusion

“The future has several names. For the weak, it is impossible. For the fainthearted, it is unknown. For the thoughtful and valiant, it is ideal.” – Victor Hugo

“Where law ends, tyranny begins.” – William Pitt

9.1 Summary

This thesis was concerned with providing an exposition of the world of music rights protection, with a focus on unravelling the meaning of, and the context of the protection afforded to musical works. The work sought to do so by properly juxtaposing the copyright protection of musical works within the milieu of historical and contemporary developments. It was shown how music has been a powerful and gripping force in a period spanning about three centuries, and how copyright law has been its strengthening power throughout this period.

Part 1 of the research was mainly concerned with the historical development of music copyright in England and France and later in the USA, and highlighted how music copyright law (and copyright law in general) weathered the storms of technological developments by asserting its enduring rights and legitimacy, in spite of such challenges. Thus where print technology arose, threatening to obliterate the legitimate expectations of rights-holders, copyright law overcame this by asserting its *print rights*. When recording technology sought to assert its dominance, copyright law countered by asserting *recording rights*, i.e. mechanical rights. Film technology was countered by synchronisation rights, electrical transcription technology was countered by transcription rights, and the mighty three-pronged *performing right*, comprising of the rights of public performance, broadcasting (and / or communication to the public) and transmission by diffusion (including cable transmission rights), has always contended for royalty payments for rights-holders whenever a form of public performance would take place.

The thesis more importantly also attempted a consideration of the historical development of music copyright in South Africa, and in particular how the Imperial Copyright Act shaped modern South African music copyright law. Such an attempt has not, in the writer's awareness, been made before, except in the general field of copyright law where the venerable Owen Dean undoubtedly produced his *magnum opus* in this regard. The writer has drawn inspiration from this work and contextualised it in carrying out the mammoth task of providing an analysis of the historical development of music copyright in South Africa.

Part 2 is concerned with a contextual consideration of the protection of copyright in musical works in the modern era, including a focus in Chapter 8 on a matter fiercely gripping the focus of the music industry today, namely the buffeting force of digital technology, instilling a sense of anxiety as to whether copyright law will finally succumb to the onslaught of technology. Copyright law has held out however, as evident from the tinge of excitement engendered by the news that the European Parliament has taken the first step in asserting the rights of rights-holders in the digital market space. The section also provided a useful, overdue exposition of the general principles applicable to the copyright protection of musical works (Chapter 5) as well as expounding on the legal provisions applicable to modern musical copyright in South Africa. A treatment of the important field of collective management has then ensured a complete picture and treatment of the subject-matter. It is hoped that the reader will be both enriched and empowered by this work and that the work can

contribute to the impartation of skills and knowledge in this arcane area of law. It is submitted that this work contributes to the body of knowledge in South Africa, in the following ways:

(1) It instils a conceptual understanding of the bundle of rights relating to the copyright protection of musical works, including the sub-rights relating thereto, by providing the historical context within which these rights developed;

(2) It provides a useful contextual analysis of the milieu or “world” of music copyright protection, by providing “real life” illustrations of how particular copyright rules and doctrines are applied in practice in the music industry. This is done using the explanatory research method and is evident throughout the thesis;

(3) It provides an essential elaboration of the principles of copyright protection with a focus on their application to the protection of copyright in musical works. No comprehensive analysis had hitherto been done in this regard in South Africa;

(4) A feature of the thesis is its attempt to contribute to the debate on the decolonisation of knowledge by proposing a possible African epistemology of copyright law through the expansion of the concept of “work”.¹ It is, in this regard proposed that a Constitutional interpretation of the right of artistic creativity, while guaranteeing the right to property, would lend itself to the recognition of such an expansion of the concept of “work”; and

(5) It contributes to the current process of copyright reform, by providing a critical analysis of the provisions of the Copyright Amendment Bill 2017 both within the text of the thesis and in the discussion immediately following below, and proposing various amendments in this regard.

In the following section the writer proposes certain recommendations based on an analysis of the particular provisions of the Copyright Amendment Bill 2017 that have a bearing on the protection of copyright in musical works; followed by general recommendations in light of the issues arising from the thesis as a whole.

9.2 Recommendations responding to the Copyright Amendment Bill 2017

This section deals with recommendations based on a consideration of the Copyright Amendment Bill 2017² and focusses on those provisions that have a bearing on musical works and musical literary works (lyrics) and the protection of these rights and the rights-holders thereof. Prior to considering provisions where proposals for certain changes are made it is important to hail the development arising from the introduction of two important rights poised to position South Africa to be more competitive in the digital environment. These are the rights of communication to the public and making available, which add to the panoply of rights given to the owner of copyright in musical and

¹ See the discussion under paragraph 5.3 supra, including the comment in n 110.

² The version of the Bill considered, namely the version approved by both the National Assembly and the National Council of Provinces (NCOP) and awaiting the President’s signature is version B13B-2017 and is available here for ease of reference: <https://pmg.org.za/bill/705/> (date of use: 04 July 2019).

literary works under section 6 of the Act. The rights are introduced through the insertion of a new subsection (eA) and subsection (eB) under section 6 of the Act (clause 4 of the Bill). These rights, which emanate from the WIPO Copyright Treaty of 1996, are crucial to ensure the protection of rights-holders and are long overdue. In this regard South Africa is a late-comer in embracing these rights.

The writer also notes the introduction of a distribution right under a new subsection (eC). It is submitted however, that though several commentators have agitated for this right during the consultation process for the Copyright Amendment Bill, it was not necessary to introduce this right because the right is akin to the right of publishing the work already provided for in section 6(b). While some jurisdiction term this a distribution right, others term it a publishing right and in each case it is concerned with the issuing of copies of works to the public to satisfy the demand of the public.³

9.2.1 Clause 5 – New section 6A(2)

Clause 5 introduces a new section 6A titled “Share in royalties regarding literary or musical works”. The original proposed provisions in relation to section 6A(2) provided that, notwithstanding any assignment of or authorization in respect of copyright in a literary or musical work, “the author shall have the right to share in the royalty received for the execution of any of the acts contemplated in section 6.”⁴ This has now been changed to say “the author shall, subject to any agreement to the contrary, be entitled to receive a fair share of the royalty received for the execution of any of the acts contemplated in section 6.” This is a better, albeit not ideal construction, because it permits negotiation between the parties and in this regard preserves the exclusive nature of copyright.

While the moral basis of the original provision was understandable, its legal rationality was dubious in that the essence of copyright is that it is a “right of property”, albeit in the form of *intellectual*

³ See Baloyi 2012 *SA Merc LJ* 219 – 220, where the relationship between the right of publication (as recognised in the United Kingdom and in South Africa) and the right of distribution recognised in the United States, is highlighted. While it would seem that the UK right of publication / distribution as contemplated in s 175(1)(a) of the UK Copyright Act 1988, read with s 18 thereof, limits the right to a first public issue of previously uncirculated copies of the work, it is submitted that a reading of s 1(5) of the South African Copyright Act does not admit of such an interpretation. Instead, it rather simply refers to the issuing of copies of the work to the public, regardless of whether such an issue is a first issue or not. In this regard the usage of the expression under South African copyright law is similar to its usage in terms of s 1(3) of the Imperial Copyright Act, 1911 where it was likewise defined as referring to “the issue of copies of the work to the public”. In *Klep Valves (Pty) Ltd v Saunders Valve Co. Ltd* 1987 (2) SA 1 (A) Grosskopf JA confirmed (at para 84) that the expression “publication” as used in the Imperial Copyright Act 1911 refers to the issuing of copies of the work to the public; relying on the English decision of *British Northrop Ltd v Texteam Blackburn Ltd* [1974] RPC 57, Grosskopf JA found (at para 85) that the expression “published” or “issued to the public” is also applicable when reproductions of the work have been put on offer to the public and that in this regard, passive availability, without active offering would also suffice. See also *Fichtel and Sachs AG v Laco Partys (Pty) Ltd and Another* 174 JOC (T). The right under the South African Copyright Act is, it is submitted, also akin to the US right of publication or distribution, where “publication” is defined as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending” (s 101 of the US Copyright Act, 1976). In contrast the UK provides for a separate rental and lending right (see s 16(1)(ba) and s 18A of the UK Copyright Act, 1988). For the UK position regarding the distribution / publication right see Garnett, Davies and Harbottle *Copinger and Skone James* 487 – 493. Lastly, even if in introducing a separate distribution right under s 6 of the Copyright Act the intention was to address a perceived deficiency in the current publication right (e.g. relating to the belief that it only relates to a first issue of copies to the public), this objective would have been defeated by the introduction of a far-extending “first-sale” doctrine in clause 13 of the Bill (see paragraph 9.2.7 below); which further demonstrates the haphazard manner in which the Bill was drafted.

⁴ Draft 3 of version B13-2017 of the Bill, available at <https://www.parliament.gov.za/storage/app/media/uploaded-files/Copyright%20Amendment%20Bill%20Draft.pdf> (date of use: 12 July 2019).

property, and ‘[t]he proprietary interest in that object of knowledge *is the ownership of it*, and is called “copyright”’.⁵ Equating copyright to real rights in corporeal property Slomowitz AJ observes:

[Copyright] might just as well be called “ownership”, but we have chosen to call it by another name, reserving “ownership” as the appellation for the proprietary interest in corporeal things, *by way of semantic, but not, as I see it, legal, distinction*. ... Ownership in a thing is ... the right, at common law at least, subject no doubt to frauds, abuse of the rights of others and possibly abuse of the proprietary interest itself, *to do what one pleases with the thing to which it relates, to use it, consume it or exploit it*.⁶

This is the manner in which copyright is perceived internationally, i.e. as a right of property.⁷ At the core of the right of ownership is unencumbered title. Thus where, using the example of corporeal property (“real estate”), the owner of the property says to another, “I transfer full ownership of this property to you. However, whenever you use the property, or authorize another person to use the property, you need to give me a monthly payment of so much”, then clearly this is not an instance of true ownership and instead would be best described as a lease agreement. In the same way it has been observed that where the essence of an agreement in respect of copyright is the payment of royalties to the author, then such an agreement is more likely to be an exclusive licence rather than an assignment of copyright.⁸

The problem therefore, with the initial provision in the Bill was the fact that, at the core of the proposed section 6A(2) was the mandatory requirement for the assignee to pay royalties to the assignor author, which then made the payment of royalties a precondition for the assignment. This implied that the assignment would not be valid without an agreement to pay royalties. Doing this would amount to imposing conditions on the regime of assignment of copyright that are not recognized in international treaty law (whether the Berne Convention or the TRIPs Agreement). The provision would thus be at odds with the principle of *minimum rights* provided for under the Berne Convention, which designates the rights of ownership of copyright to be of an *exclusive* nature. In essence what the initial position in respect of section 6A(2) entailed was that it curtailed the right of the assignee to enjoy full title of the rights transferred to him or her, by imposing conditions on the exercise of the rights, thus in essence reducing the ostensible assignment to a mere licence, albeit

⁵ Slomowitz AJ, in *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Video Parktown North (Pty) Ltd v Shelburne Associates and Others; Video Parktown North (Pty) Ltd v Century Associates and Others* [1986] 1 All SA 1 (T) at 7. Emphasis added.

⁶ *Video Parktown North* case *ibid*.

⁷ See for example in this regard Sookman Mason and Craig *Copyright* 3 and 6, who observe: ‘In order to gain a fuller understanding of the term “intellectual property,” it may be useful to approach it in terms of the notion of “property” in general. The most important feature of property is that *the owner of the property may use it as he wishes*; nobody else can lawfully use his property without his authorization. ... The owner of copyright in a protected work may use the work as he wishes, and may prevent others from using it without authorization. Thus, the rights granted under national laws to the owner of copyright in a protected work are normally “exclusive rights” to authorize others to use the work, subject to the legally recognized rights and interests of others.’ Emphasis added. See also in this regard WIPO *Intellectual Property Handbook* 43, where this position is reiterated.

⁸ See the English decision of *Wrenn v Landamore* [2007] EWHC 1833 (ch), at para 37.

exclusive licence. Another problem with regard to such a provision is that, in terms of the principles of *national treatment* and *minimum rights* forming part of the Berne Convention, such an imposition would only bind assignees who are South African nationals and not those who are foreign nationals.⁹

This however does not mean that legislation could not, as a general principle, make provision for the payment of royalties to authors or stipulate that assignees should pay royalties to authors pursuant to an assignment of rights. Such a provision would indeed not be out of the way as it is indeed customary and in fact commendable and laudable for assignees to pay royalties to authors. However, because copyright is a right of ownership, such provisions should not impose conditions that make it difficult for the author to *do as he or she pleases or wishes* with the work, and furthermore for the assignee, being the new owner of the copyright, to likewise do as he or she pleases or wishes with the work. It needs in this regard to be acknowledged that, instead of a royalty, there are other ways in which the author of a literary or musical work could be compensated for the use of the work.¹⁰ For example, the author might prefer to receive an up-front payment for the work rather than an uncertain future royalty (often called buy-out deals). Such deals are in fact prevalent in the *production-music* (also termed library or mood music) environment, i.e. music for use in films, videos, advertising etc; as well as in certain direct film music deals. Often in that environment a composer is paid an upfront fee rather than sharing in the “synchronization” royalty.¹¹ This phenomenon is illustrated by the words ascribed to the US film trailer composer, Mark Petrie:

US trailer composer Mark Petrie sums it up: “Some of the big libraries in the US buy out the licensing income, paying a good upfront fee (like \$1000 or more per track). That type of deal was a godsend early in my career, when I needed the cash in the short term. These days I’m more willing to take the risk and seek deals where I share the sync fees, in lieu of a significant upfront payment.”¹²

Furthermore, the composer may also wish to selectively give his work for free, in exchange for an opportunity to get exposure and other promotional opportunities. Many artists increasingly use this method in the wake of the digital revolution, especially at the beginning of their careers. This may entail posting their music on social media platforms (e.g. YouTube, Spotify etc.); permitting the use of the music in promotional videos or as part of films at film festivals or as part of music competitions, etc. Another problem with the initial provision is that it was not only concerned with the

⁹ This is because foreign nationals are guaranteed the minimum rights of protection provided for in the Berne Convention, regardless of the provisions of the national legislation, as the principle of national treatment applies in favour of foreign nationals. In this regard it needs to be noted that article 2(6) of the Berne Convention provides that the protection afforded by the Convention “operate[s] for the benefit of the author and *his successors in title*.” Emphasis added. This means that where the foreign nationals become assignees of copyright from a South African author, the restrictions on the assignment of right (through the imposition of a mandatory royalty provision), would not apply to such foreign nationals.

¹⁰ This may include compensation “in kind”, such as the grant of certain goods or facilities that the author may need, in exchange for assigning the right.

¹¹ Despite this arrangement the composer would remain entitled to the royalties paid by collecting societies like SAMRO and CAPASSO (i.e. in respect of the mechanical right and the performing right).

¹² <https://www.soundonsound.com/music-business/all-about-library-music-part-2#para4> (date of use: 28 September 2018).

assignment of copyright but also extended to other forms of “authorization by the author of a literary or musical work of the right to do any of the acts contemplated in section 6”,¹³ thus including the practice of giving music for free for one or other reasons.¹⁴ This would have been seriously problematic in that if royalties were to be paid every time this was done¹⁵ then this could result in the users no longer being willing to provide such promotional opportunities to new composers.

It was thus necessary to amend the proposed section 6A(2) to ensure that both the author, as the original owner of copyright, and the assignee, as the new owner of copyright, are able to exercise their exclusive rights without any limitation. This means, in the first instance, that the composer is not obliged to assign his or her rights, and could grant authorization by way of a licence (whether exclusive or non-exclusive). This also means however, that the author should be able to assign his or her copyright *if he or she so wishes*. In this regard, since an assignment is a transfer of ownership rights, once a decision is taken by the author to transfer ownership in this regard, *ex lege* conditions cannot be imposed upon this right of ownership. The law would in this regard be contradicting itself because on the one hand, it creates a right that by its nature, is a right of ownership with full title, while on the other hand it imposes conditions that are inimical to the exercise of such right.¹⁶ Furthermore, doing this would infringe the copyright owner’s *freedom of contract*, which is now viewed within the prism of the Constitution.¹⁷

Parliament need not be concerned that if it permits the unconditional transference of copyright by an author through assignment, then the author would be taken advantage of. This is because as observed, the constitutional approach to contractual challenges “leaves space for the doctrine of

¹³ Section 6A(2)(b) of the Bill, as then proposed.

¹⁴ It could for example be that the author is happy with his or her music being used for free in church or at a charity.

¹⁵ Although “royalty” is defined as gross profit from the exploitation of the work, it may not always be easy, where the exploitation of the music is only one part of the operations of the entity concerned (e.g. where a composer grants permission for his music to be used for free at a restaurant, as a promotional strategy) to determine what part of the entity’s profit can be ascribed to the use of the music.

¹⁶ Rather than attempting to tamper with the system of assignment of rights, the Committee could also have considered revolutionising South African copyright law by aligning it to the monist system applicable in Germany and other parts of Continental Europe, where copyright is seen as being personal to the author and where the moral right of the author is intertwined with his economic rights, thus rendering it impossible for the author to transfer this right to another. In this regard the following has been observed: “African countries could follow the example of the monist system existing in Germany by not splitting the personal (moral) right from the economic right, and on this basis doing away with the system of transfer of ownership and replacing it with a purely licensing regime (whether through the use of exclusive or non-exclusive licences). Thus rather than assigning their copyright to publishers and record companies African artists would only license the usage of their works, preferably for shorter, renewable periods.” Baloyi 2014 *PELJ* at 40. In this regard the words of Harms JA in *Biotech Laboratories (Pty) Ltd v Beecham Group Plc and Another* [2002] ZASCA 11, at para 12, commenting on the original form of the Copyright Act 98 of 1978, ring a bell: “The present Act, in its original form, *attempted to be kinder to authors*. The concept of ‘copyright’ was replaced with an author’s right, the ‘ownership’ of which vested principally in the author. In this and other regards the object was to move in the direction of Continental law where the emphasis is on the rights (moral or other) of the author and not on the economic rights of employers and entrepreneurs. The good intentions did not last and hardly a year had passed when the Legislature (by amending s 21) reverted, as far as ownership was concerned, to the Anglo-American model where commercial rights tend to reign supreme. ...” Emphasis added. Parliament might consider pursuing this course of action again, but the Bill would then need to be reconsidered holistically to achieve this objective.

¹⁷ See the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) where the Constitutional Court provided a constitutional interpretation to contractual disputes.

*pacta sunt servanda*¹⁸ to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.¹⁹ This, it is submitted, is a better approach (and one that conforms to constitutional requirements) than one where the right of ownership and the freedom to contract (both constitutionally-protected rights) are tampered with. In this regard the Constitutional Court has held that an important constitutional value to consider in determining if contractual terms are to be upheld, is the value of fairness in contracting, which is determined by considering whether or not the particular contractual term is contrary to public policy.²⁰ In this regard the Court has held that the existence of *unequal bargaining* would be an important consideration in determining whether or not the contract was in line with public policy.²¹ There is therefore adequate remedy for an author who would have assigned his or her copyright under circumstances of unequal bargaining. What might be needed, and what Parliament could do, is to empower a more-accessible forum, such as the Copyright Tribunal, to deal with such contractual disputes.

In light of the foregoing, the addition of the phrase “the author shall, subject to any contrary agreement, be entitled to receive a fair share of the royalty received for the execution of any of the acts contemplated in section 6”, is a better and welcome construction.²² In this regard the phrase “subject to any contrary agreement” would counter any arguments regarding the curtailment of the copyright owner’s exclusive rights to deal with the copyright work as he pleases; as well as, in this regard, permit cases where the parties might prefer to agree on an upfront fee rather than a royalty or where the work might be used for free for promotional and other reasons. It safeguards the rights of ownership and freedom to contract (as the outcome is dependent upon the negotiations of the parties), but it does not eliminate the constitutional considerations of “fairness in contracting”, as the courts, or any designated tribunal, can still determine if the contract is fair or not, in light of the requirements of public policy.

9.2.2 Clause 5 – New section 6A(3)

¹⁸ The doctrine of *pacta sunt servanda* is the doctrine of the sanctity of contracts; namely the doctrine that contracts, if they were entered into with the consent of all parties thereto, should be honoured.

¹⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 30. Emphasis added.

²⁰ *Barkhuizen v Napier id* at paras 56; 58 – 59.

²¹ *Barkhuizen v Napier id* at para 59. In the case Ngcobo J, relying on the case of *Mohlomi v Minister of Defence* 1997 1 SA 124 CC para 64, highlighted the fact that the harshness of the provisions under consideration was to be determined with due regard to “the realities that prevail in our country” - realities given to us by our history. Quoting from *Mohlomi* Ngcobo J highlights these realities to include the fact that we are “... a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons”. Ngcobo further observes, “Indeed many people in this country conclude contracts without any bargaining power and without understanding what they are agreeing to. That will often be a relevant consideration in determining fairness”

²² The writer made this submission to the Portfolio Committee as one of a few “technical experts” appointed to advise the committee on the Bill.

The phrase “or between their representative collecting societies” in the fourth and fifth lines of the proposed section requires further interrogation and / or qualification. In this regards it needs to be noted that generally, the author and the publisher would be members of the same collecting society. Reference cannot therefore, in this regard, be made to “their representative collecting societies”. Furthermore, it is usually the default rules of the collecting society (as in the case of SAMRO) that would apply if there is no agreement between the author and the publisher (and not the agreement between representative collecting societies). In view of this, it is submitted that this provision should be amended by (i) putting a full stop after the phrase “subsection 2(b)” in the fourth line of subsection 3(a); and (ii) deleting the rest of the sentence in subsection 3(a) and replacing it with this sentence:

Where no agreement exists between the author and the copyright owner or the author and the person authorized to use the work as contemplated in subsection 2(b), the author's share of the royalty shall be determined by the rules of the collecting society to which the author or both the author and the copyright owner or person authorized to use the work as contemplated in subsection 2(b) belong.

Having made the foregoing recommendations, a *better* construction of the proposed section 6A(3), would, taking into account the totality of the rest of the proposed amendments (i.e. the proposed subsections 6A(4) and 6A(5)), would be the following wording:

6A (3) (a) The assignment of copyright in a literary or musical work, or any authorization contemplated in subsection (2), shall be determined by a written agreement between the author and the assignee conforming to the requirements set out in subsection (5) below or such other requirements as may be prescribed from time to time.

(b) Any further assignment of the copyright in the work by the copyright owner or subsequent copyright owners, or any further authorizations of the right to use the work pursuant to subsection (2)(b) is subject to the agreement between the author and the copyright owner contemplated in paragraph (a) hereof, or the order contemplated in subsection (4).

The rationale for the changes proposed is to eliminate the challenge (including a constitutional and Berne non-compliance challenge) that could be mounted on the ground that the changes proposed in the new section 6A would curtail the right of ownership and freedom of contract, by putting an emphasis on the agreement between the parties and not on the payment of royalties, while highlighting the importance of paying such royalties (through the reference, in subsection (3)(b), to subsection (4)).

9.2.3 Clause 5 – New section 6A(4)

(a) It is proposed that subsection (4) be amended as follows:

The author's fair share of royalty contemplated in subsection (2) shall be as determined by the Minister from time to time by publication in the Gazette, after consultation with representatives of the affected industry: Provided that where, at any time, no such determination has been made, any affected party may refer the matter to the Tribunal for an order determining the author's fair share of the royalty. In making such an order the Tribunal may consider any acceptable practices in the industry concerned, and shall consider the constitutional values of fairness and equal bargaining in contracting.

(b) The rationale for the proposed amendment is as follows: It is best practice where contractual rates are concerned to ensure that broad consultations with the affected industries take place prior to arriving at an applicable rate. It is proposed here that such a rate shall be determined by the Minister after consultation with the applicable industry. In the absence of a strong union culture in the South African entertainment industries (as compared to the United States where minimum contractual rates are determined through union negotiations), a determination by the Minister on this basis would be the most viable alternative. It is only where such a determination is not in place that a referral to the Tribunal would then take place.

9.2.4 Clause 5 – New section 6A(5)

(a) Section 6A(5)(c)

The addition of the phrase “to the author” at the end of subparagraph (c) is unwarranted and makes the sentence incoherent and should therefore be removed.

9.2.5 Clause 5 – New Section 6A(7)

Subsection (7) of the proposed section 6A introduces provisions that make the requirement for a mandatory payment of royalties applicable to assignments of copyright made before the commencement of the Bill where the copyright work concerned falls within the application of the Bill and “is still exploited for profit”.²³ This proposed retrospective application of the Bill in this regard is problematic because it will have the effect of nullifying existing contracts, if for example such contracts made provision for the payment of an upfront fee rather than a royalty, or where authorisation was otherwise given by the author in lieu of payment, where the author benefited from promotional opportunities or in other instances where the author otherwise gave free use to the

²³ Paragraph (c) does indicate that the requirement for the payment of royalties shall, in such cases, apply in respect of royalties received after the Bill becomes law and comes into force.

work. It is submitted that such contracts, enacted before the coming into force of the Bill, are binding based on the constitutionally-recognised doctrine of the sanctity of contracts (*pacta sunt servanda*) and thus cannot be nullified retrospectively. It is submitted therefore that the changes proposed in subsection (7) are unconstitutional. It is acknowledged that the proposed section makes provision for an impact assessment to be conducted and for Parliament to approve the process prior to implementation, but this would not, in the writer's view, change the unconstitutional nature of the proposed changes.

9.2.6 Clauses 13 – 20

These clauses seek to introduce a new set of expansive exceptions and limitations, including the controversial introduction in the proposed section 12A of a *fair use* defence similar to that used in the United States and the repeal of the provisions relating to the defence of *fair dealing*. The most pertinent question to ask here is whether the proposed limitations and exceptions under these clauses were subjected to the three-step test, as required under the Berne Convention, the TRIPs Agreement and other international treaties. In this regard it needs to be reiterated that where the minimum rights guaranteed under international treaties are eroded by national law, such erosion shall only affect the rights of the nationals of the country concerned, and not those of other countries who are members of the same treaty. In this regard the question to ask is why the Legislature would be hell-bent on clipping the wings of South African rights-holders, while foreign rights-holders can fly like eagles.

The three-step test was introduced in article 9(2) of the Berne Convention at the Stockholm conference of 1967 and provides the following:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of ... works *in certain special cases*, provided that such reproduction *does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*²⁴

This test has been incorporated with minor variations in several intellectual property treaties.²⁵ Moreover, most of the substantive provisions of the Berne Convention, including article 9(2) were incorporated in the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement), in terms of article 9(1) thereof. In the only WTO Panel decision relating to the three-step test, taken in the year 2000, the Panel set out what is required in respect of each of three steps

²⁴ Article 9(2) of the Berne Convention, 1886 (Paris Act, 1971).

²⁵ Articles 9, 13, 26(2) and 30 of the TRIPs Agreement, 1995; art. 10(1) and (2) of the WIPO Copyright Treaty (WCT), 1996; art. 16.2 of the WIPO Performances and Phonograms Treaty (WPPT), 1996; art. 13(2) of the Beijing Treaty on Audiovisual Performances, 2012 and art. 11 of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired and Otherwise Print Disabled (Marrakesh Treaty for the Visually Impaired), 2013.

forming part of the test.²⁶ The decision was concerned with whether section 110(5) of the US Copyright Act, (which permitted certain commercial establishments such as bars and restaurants to use non-dramatic musical works without paying royalties) satisfied the requirements of the three-step test provided for in article 13 of the TRIPs Agreement.²⁷ The Panel found that the section contravened all three steps in the test and made the following important findings with regard to the three steps:

(a) With regard to the expression “certain special cases” the Panel held that the expression means that “the limitation exception in national legislation should be clearly defined and should be narrow in its scope and reach.”²⁸ In this regard the word “certain” means that exception or limitation has to be clearly defined, giving rise to “a sufficient degree of legal certainty”, while not necessarily identifying explicitly every possible situation to which the exception would apply.²⁹ With regard to the word “special” the Panel held that this meant that “the exception or limitation must be limited in its field of application or exceptional in its scope”, i.e. narrow in both a quantitative and a qualitative sense.³⁰ On the other hand, the word “case” refers to such considerations as the beneficiaries to which the exception or limitation is to apply; the equipment used; the types of works and other such factors.³¹

(b) With regard to the expression “not conflict with a normal exploitation of the work” the Panel held that its normative connotation implied that, in addition to the forms of exploitation that currently generate “significant or tangible revenue”, consideration must also be had to “those forms of exploitation which, with a certain degree of likelihood or plausibility, could acquire considerable economic or practical importance.”³² An important consideration that the Panel made in this regard is the consideration of whether or not the exception or limitation imposed is likely to fuel economic competition against the rights-holder, e.g. where the works are exploited not only by those who do so because of the existence of the exception or limitation, but also where others are induced to start using the works on the basis that the use is now free.³³

(c) With regard to the expression “not unreasonably prejudice the legitimate interests of the right holder” the Panel held that *one* way of looking at the legitimate interests of the rights-holder is to

²⁶ WTO Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000: VIII, p. 3769.

²⁷ Article 13 of the TRIPs Agreement provides the following: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

²⁸ WTO Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000: VIII, p. 3769, at para 6.112.

²⁹ *Id* at para 6.108.

³⁰ *Id* at para 6.109.

³¹ *Id* at para 6.110.

³² *Id* at para 1.180.

³³ See in particular *id* at paras 6.183 and 6.186. It is submitted that this observation is particularly relevant when one postulate about a case where, for example, a user that is currently paying for the use of a work (e.g. Google in respect of the usages of musical works through its YouTube platforms), could, through the introduction of an expansive fair use exception, find a basis to stop paying for such uses; or where new technology companies may find an opportunity to “enter the space” as a result of the free uses.

consider the economic value of the exclusive rights conferred by copyright, while acknowledging that legitimate interests are not limited to those with economic value.³⁴ The Panel then found that “prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.”³⁵

The above was highlighted to illustrate that, when subjected to the three-step test in line with the interpretation of the WTO Panel in the *USA* case, the expansive exception and limitations regime introduced by the Copyright Amendment Bill 2017 is unlikely to satisfy the requirements of the three-step test.³⁶ In particular the lack of a proper socio-economic impact assessment of the likely effects of introducing such exceptions and limitations, on the affected industries, demonstrates that the above-highlighted three-step considerations would not have been taken into account when introducing the exceptions and limitations.³⁷

9.2.7 Clause 13 – the new Section 12B(6)

(a) The proposed section 12B(6) deserves particular attention, as it controversially seeks to introduce into South African copyright law the so-called “first sale doctrine” (also termed the “exhaustion of rights” principle), which is a part of American law and has never been a part of our law. This proposed introduction is dubbed “controversial” because while the exhaustion of rights can be at a local, regional or international level, the section seeks to introduce this doctrine – which never formed part of our law – at an international level (“in the Republic or outside the Republic”). Furthermore, the scope of application of the doctrine is also befuddled, as reference is made not only to “first sale” but to “other *assignment* of ownership of an *assigned original* or copy”. Firstly, a “sale” is not an assignment and should thus not be equated to such.³⁸ The effect of this new section

³⁴ *Id* at 6.227.

³⁵ *Id* at 6.229.

³⁶ Even those who are inclined to embrace the fair use doctrine are honest enough to voice their doubts regarding the doctrine’s adherence to the three-step test. See in this regard Harms 2013 *PELJ*, at 507 - 508, where the learned former Deputy President of the Supreme Court of Appeal observes: “It is generally accepted that our copyright law is outdated, more specifically if regard is had to the fact that the Act has not been amended to accommodate the internet age. ... In particular, one would have assumed that [the Draft National Policy on Intellectual Property, 2013] would at least also have dealt with fair use and fair dealing where I prefer the US approach even *if it might arguably not be in accordance with the three-stage test in the Berne Convention and the TRIPS Agreement*. If the US can get away with it, we can too. ...” Of course Harms’ statement about getting away with non-compliance with the three-step test ought to be viewed as having been spoken in jest, because it is unimaginable to think that a former justice of the Supreme Court of Appeals would encourage a contravention of the Constitution, which provides in s 39(1) that, in interpreting the provisions of the Constitution the courts “must” consider international and “may” consider foreign law. In this case it is clear that the three-step test is an international law doctrine, while the fair use doctrine is a foreign law doctrine.

³⁷ Although government officials have often spoken about a socio-economic impact assessment having been done in respect of the Bill, industry representatives assert that they have not been properly consulted in respect of this. See for example in this regard Hollis <https://www.adamsadams.com/south-africas-copyright-law-knife-edge/> (date of use: 28 April 2018), who refers to a “perceived lack of proper and meaningful stakeholder engagement ... with the report under the Government’s Socio-Economic Impact Assessment System (SEIAS) not indicating any independent research - or any research at all – on the impact of the Bill, especially its proposed exceptions and the ‘fair use’ clause.”

³⁸ In American law the first sale doctrine is concerned with the sale of physical copies of a work; i.e. once the copyright owner has released copies of the work to the public, the public is authorised to deal with the copies they bought in whatever way, subject to certain exceptions (e.g. the rental of copies of sound recordings is not permitted). Thus the first

is that the act of assignment of copyright is deemed to constitute a first sale, thus exhausting the rights in the work concerned, which is not only absurd but of serious concern.

(b) The correct position regarding the first sale doctrine is that only physical copies of a work are subjected to the doctrine, not the copyright in the work. The first sale doctrine is concerned with the *publication* of copyright works, that is, the distribution of copies of the work to the public in a sufficient amount to satisfy the demand of the public. The doctrine states that once the copyright owner has done this, or authorized another person to do so, any person who has bought such a copy or who has bought mass copies of the work, may do with such copies whatever he or she wants, without the need to obtain authorization from the copyright owner.³⁹ Accordingly, the first sale doctrine provided for in section 12B(6) is poorly, incorrectly and dangerously articulated. More particularly, it does not make it explicit that the first sale or publication of the work must have been authorized by the copyright owner for the doctrine to apply. The essence of this is that even if the first sale or transfer of ownership was unlawful, an importer or distributor would still be permitted to import or distribute the article without the need to obtain permission from the copyright owner, or the need to pay any royalties in this regard.

(c) Further to the above, the fact that the provision applies “notwithstanding any provisions of this Act, the Trademark Act, 1993 (Act 194 of 1993) and the Counterfeit Goods Act 1997 (Act 37 of 1997)” in essence means that it legalizes not only the importation and distribution, without the copyright owner’s authorization, of copyright works, but also legalizes the *piracy* of copyright works, as these Acts have been used so far to combat piracy. With one stroke the provision annuls a body of established case law that has made it explicit that the importation and distribution of copyright works without the authorization of the copyright owner is unlawful.⁴⁰ Thus for example, a person can import film DVDs (from whatever source, whether the manufacturing of the DVDs constituted infringement of copyright or not) or manufacture them himself here in South Africa, and open a video-hire shop, without the need to obtain a licence from the copyright owner (or such copyright owner’s lawful representative in South Africa). In this regard this would overrule the position adopted by our courts in the case of *Mr. Video (Pty) Ltd & Others v Nu Metro & Others*,⁴¹ where such action was confirmed to be unlawful. Not only the usage of the film but also that of the underlying works

sale doctrine is concerned with the physical copies of the work and not with the copyright in the work, which remains with the copyright owner. See in this regard Moser and Slay, commenting on the first sale doctrine in the United States and observing: “The first sale doctrine is based on the idea that ownership of a material object is distinct from ownership of copyright.” Moser and Slay *Music Copyright Law* 102.

³⁹ As indicated, certain limitations may be imposed, such as the position in US copyright law that the rental of copies of a sound recording is not permissible without the authorisation of the copyright owner.

⁴⁰ See example *Paramount Pictures Corporation v Video Parktown North (Pty) Limited* 1983 (2) SA 251 (T); *Video Parktown North (Pty) td v Paramount Pictures Corportion*; *Video Parktown North (Pty) Ltd v Shelburne Associates and Others*; *Video Parktown North (Pty) Ltd v Century Associates and Others* [1986] 1 All SA 1 (T); *Frank & Hirsch (Pty) Ltd v Rooopanand (A) Brothers (Pty) Ltd* [1993] ZASCA 90; *Mr. Video (Pty) Ltd & Others v Nu Metro & Others* [2009] ZASCA 127.

⁴¹ *Ibid.*

(including musical works) would be deemed to be lawful, since there would have been a first distribution of such works (through the usage in the film).

(d) In light of the above it is proposed that section 12B(6) be amended (i) to make it explicit that the doctrine of first sale will only apply where the first sale or publication / distribution was authorized by the copyright owner; (ii) to make it explicit that it only applies in respect of physical copies of a work; and (iii) to make it explicit that it applies only in respect of certain works. An impact assessment would need to be conducted in this regard to determine which works could be subjected to the application of the doctrine. For example in US Copyright law the doctrine does not apply in respect of the rental of copies of sound recordings, musical works and computer programs. Accordingly the following revision of section 12B(6) is proposed:

6. (a) The first sale or other transfer of ownership of a record or other copy of a work in the Republic or certain other designated countries,⁴² by or with the prior authorisation of the copyright owner, shall exhaust the right of distribution in the Republic or such other designated countries, and shall further exhaust the right of importation into the Republic from such designated countries of any such record or copy.

(b) The Minister shall, by publication in the Gazette, designate the countries where the provisions of paragraph (a) shall apply and shall similarly designate the works and acts of exploitation to which the provisions of paragraph (a) shall apply.

Another enigmatic aspect of the first-sale doctrine introduced under the new section 12B(6) is the fact that it is expected to apply “notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 ... and the Counterfeit Goods Act, 1997 ...” This interpolation is rather strange and the intention is not clear. The effect however is: In one stroke of a pen the provision nullifies, for purposes of the first-sale doctrines, crucial provisions of these legislations, in particular those of the Counterfeit Goods Act, which have been said to be “complementary to the Copyright Act in particular to the criminal provisions of that Act and to those provisions dealing with the seizure of goods by the customs authorities.”⁴³ Customs authorities will of course no longer be required to seize these goods because their importation will now be permissible (this being exacerbated by the fact that the “first sale” is not required to have been authorised by the copyright owner). The fact also that this doctrine is to apply “notwithstanding anything to the contrary in *this* Act”, namely the Copyright Act, in essence means that this doctrine, imported from foreign law, has now become the supreme doctrine of our copyright law, as every other provision has to be subjected to its operation.

⁴² It is proposed that rather than pitching the doctrine of exhaustion at the international level, a process of identifying particular countries (e.g. African countries or BRICS countries) where the doctrine shall apply should be put in place.

⁴³ Dean and Karjiker *Handbook of Copyright* 1-202.

This is indeed a very worrying development in our copyright law. The clear recommendation in this regard is therefore that this should be completely excised from the Bill.

9.2.8 Clause 13 – New Section 12C(1)

(a) The proposed section 12C(1) introduces a temporary reproduction exception that mirrors Article 5 of the EU Copyright Directive.⁴⁴ Article 5 of the EU Copyright Directive read with Recital 33 thereof permits transient reproductions where these form part of and / or complete a technological process that produces copies of a limited duration that are thereafter automatically deleted (as in the case of browsing and caching). In this regard it needs to be noted that the EU Directive was enacted in 2001, at the height of the peer-to-peer file-sharing controversies where the illegal *downloading* of copyright works was the main concern of copyright owners in the digital environment. At the time the concern was that illegal downloading of copyright works had taken over the physical sales of these works, thus affecting the ability of copyright owners to benefit from the usage of their works. In this regard the streaming of music was not a major concern yet as its economic value was not yet evident. Accordingly it was considered permissible under certain limited circumstances. (b) The concern of rights-holders today has shifted from music downloads to what has been termed the “streaming revolution”.⁴⁵ This owes to a decline not only in physical music sales but also in music downloads based on the iTunes model.⁴⁶ With the demise of income from the exploitation of physical products of music, and the switch of users’ interests from music downloads to live streaming, a provision that permits live streaming without the need for compensation is calculated to have a negative impact on the growth prospects of the music industry and will ultimately impoverish rights-holders. This is so in particular with regard to subparagraph (a) of the proposed section 13A(1), which permits reproduction and adaptation “to enable the transmission of the work in a network between third parties by an intermediary”. While such transmission was, at the time, the exception in relation to the main form of exploitation, it has now become the rule. What is even more concerning with the proposed provision is that it does not incorporate provisions similar to article 5(5) of the EU Copyright Directive, which subject the provisions of article 5(1) of the Directive to the three-step test.⁴⁷ It is submitted that a proper three-step test would result in the conclusion that musical works and sound recordings should be exempted from the application of the proposed section 12C(1), if the South African music industry is to be given a chance to develop. A similar case can be made for the other entertainment sectors in South Africa. Accordingly, if the proposed provisions are to remain there must at least be a three-step provision in line with article 5(5) of the

⁴⁴ 2001/21/EC.

⁴⁵ See in this regard Hogan 2015 *Colo. Tech. L.J.* 131 - 152, who refers to a shift from physical music sales to an iTunes download-dominated market and now to a Spotify-dominated music streaming market. Available at <https://ctlj.colorado.edu/wp-content/uploads/2015/12/v.Final-Hogan-11.19.15-JRD.pdf> (date of use: 1 October 2018).

⁴⁶ It has in this regard been reported that streaming has for the first time in 2017 overtaken physical sales and digital downloads as the main source of music revenue. See IFPI Global Music Report 2017, available at <http://www.ifpi.org/downloads/GMR2017.pdf> (date of use: 1 October 2018).

⁴⁷ See further in this regard the discussion under paragraph 8.4.2.5(a)(i) above.

EU Copyright Directive to counter the harsh effects of the provisions.

9.2.9 Clause 22(a) and (c) – Proposed amendment to Section 21(1)(c) and introduction of a new Section 21(3)

It is submitted that the amendments proposed in these paragraphs *are sound*. The current provisions of section 21(1)(c) are based on, and mimic the provisions of the now-repealed UK Copyright Act of 1956.⁴⁸ The current UK Copyright Act⁴⁹ does not contain provisions of that nature and thus the ownership of copyright in a commissioned work depends on the terms of the contract concluded by the parties.⁵⁰ The amendments proposed in the Bill are in line with the “minimalist approach” adopted in UK case law in relation to the subject-matter.⁵¹

9.2.10 Clause 23(b) – Proposed amendment to Section 22(3) and (4)

Comments in relation to these sections were made in Chapter 7 above, under paragraph 7.3.2.8. .

9.2.11 Clause 25 – New Section 22B(8)(b)

It is understood that the word “person” used in this new section includes a juristic person.⁵² In that case, the section needs to indicate who the liable person shall be where the collecting society is a juristic person.

9.2.12 Clause 25 – New Section 22C

The use of the expression “indigenous community” here is unfortunate as it can only create confusion, especially because this is the first time that the expression is used under Chapter 1A. A separate section needs to be inserted to deal with the collective management of indigenous or traditional works.

9.2.13 Clause 25 – New Section 22C(2)

⁴⁸ Section 4(3) of the Copyright Act 1956 c. 74.

⁴⁹ Copyright, Designs and Patents Act 1988 c. 48.

⁵⁰ See generally in this regard Garnett Davies and Harbottle *Copinger and Skone James* 16 336 – 339.

⁵¹ The *minimalist approach* is to the effect that, where a decision has to be made as to which of various alternatives should constitute the contents of the term to be implied (where there is uncertainty as to whether an assignment of copyright or a lesser right was intended), the choice must be for the alternative “that does not exceed what is necessary in the circumstances.” The leading UK case in this regard is *Ray v Classic FM Plc* [1998] FSR 622.

⁵² Although it may be useful, at the beginning of the section, to state: ‘The reference to “person” in this section includes a juristic person’, to allay any doubt.

It is recommended that the provisions of paragraph (e) should be at the top of the activities to be carried out by a collecting society (thus should be dealt with under paragraph (a)) to fully capture the sequence of activities, as the negotiation of fees precedes licensing.

9.2.14 Clause 25 – New Section 22C(3)(c)

Section 22C(3)(c) provides that a collecting society may “only make payment of royalties to a collecting society outside the Republic, if there is a reciprocal agreement regarding royalties in place between that country and the Republic.”

It is submitted that this section introduces reciprocity requirements that are at odds with the *national treatment* and *minimum rights* principles embodied in the TRIPs Agreement and the Berne Convention. In this regard it needs to be recalled that the principles of national treatment and minimum rights provide that foreign authors are to be accorded the rights which the laws of member countries of the Berne Convention other than the country of such foreign authors' origin, “do now or may hereafter grant *to their nationals*, as well as the rights specially granted by [the] Convention”.⁵³ Thus, since South African copyright law accords rights to South African nationals which are administered by collecting societies, the foreign nationals of other Berne Convention countries are entitled to be accorded the same rights. Reciprocity thus does not apply, as noted by Nodermann:

... [T]he principle of reciprocity, otherwise extensively applicable in international law, does not hold good within the sphere of the [Berne Convention]. The principle of national treatment and the principle of reciprocity are mutually exclusive.⁵⁴

Furthermore, it is submitted that, subjecting the payment of royalties to foreign nationals for the exploitation of their works in South Africa, to the conclusion of a reciprocal agreement would run afoul of the Berne Convention for another reason: namely the fact that it introduces formalities for the exercise of rights, which are prohibited under the Berne Convention.⁵⁵

9.2.15 Clause 25 – New Section 22D(1)

⁵³ Article 5(1) of the Berne Convention. Emphasis added.

⁵⁴ Nodermann W “The Principle of National Treatment and the Definition of Literary and Artistic Works – Some Remarks on the Correlations between Article 5 of the Berne Convention and Article II of the Universal Copyright Convention” 1989 *Copyright Monthly Review of the World Intellectual Property Organization* (25:10) 300.

⁵⁵ This is the so-called principle of automatic protection, provided for in art. 5(2) of the Berne Convention. Another principle relevant in this regard is the principle of “independence of protection”, also provided for in art. 5(2), which provides that “[the] enjoyment and ... exercise [of the rights provided for in the Convention] shall be independent of the existence of protection in the country of origin of the work.” Thus even if the country of origin of the work concerned does not make provision for the collective management of copyright, South Africa would be obliged to extend the benefits of collective management to the nationals of such country, on the basis that it does so for its own nationals. See further in this regard WIPO *Guide to the Berne Convention* 33 – 34. See also Van Gompel *Formalities in Copyright Law* 166 - 168, who observes that the rule in relation to the prohibition of formalities also applies in relation to rights that are protectable in terms of the principle of national treatment.

What section 22D(1) fails to do is that it does not make provision for the ability of the collecting society to set aside small portions of collected licensing fees into a reserve fund as part of business contingency planning (e.g. the ability to purchase a new rights administration system and the ability to ensure business continuity planning and / or disaster recovery). This should be possible with the approval of members at a general meeting.⁵⁶ Provision should also be made for the collecting society to set aside some funds for members' social security needs and / or for cultural purposes.⁵⁷ SAMRO currently contributes to a retirement annuity fund and a funeral benefit for its members derived from an allocation from royalties. If no provision of this nature is inserted in the Bill, it can safely be said that SAMRO will no longer be authorized to make such contributions.

9.2.16 Clause 25 – New Section 22F(5)

A welcome change effected in the Bill is the introduction of a mandatory provision under this proposed section, requiring the Commission to apply to the Tribunal for the appointment of a competent person to assist it with the administration of a collecting society whose accreditation has been suspended in terms of subsection 3. Previous provisions of the Bill in this regard did not make it mandatory for the Commission to do so, which implied that the Commission could, itself, get directly involved with the operations of the collecting society concerned. It was argued then that this was an untenable situation in light of the fact that the business of collective management of copyright is complex and is not necessarily one which the Commission has expertise in. The proposed section now provides that the person appointed must have skills in collective management and general administration of rights under the Act; or business rescue, administration or liquidation, or “other skills deemed appropriate by the Commission *and* Tribunal.”⁵⁸ It is commendable that the Tribunal shall have a say in the determination of the “other skills deemed appropriate”.

9.2.17 Clause 29 – New Section 28(O)(6)

It is not clear what the objective was to make the provisions of the proposed section 28(O)(6) to be considered in conjunction with the provisions of sections 87, 88 and 89 of the Electronic Communications and Transactions (ECT) Act, especially in light of the proposed amendments to section 27 of the Act, which provide better protection to rights-holders than that provided for in sections 87 – 88 of the ECT Act. The two provisions are clearly incompatible. The danger of making the provisions of the new section 28(O)(6) to apply interchangeably with the said provisions of the

⁵⁶ Practice tools 56 and 57 of the WIPO Good Practice Toolkit for CMOs supports such practice where members authorise this or if the constitution of the collecting society or legislation permits this. See <http://www.wipo.int/copyright/en/management/index.html#cmotoolkit> (date of use: 01 October 2018).

⁵⁷ The current needle-time regulations make provision for this and permit up to 10% of the amount of annual distributions to be used for this purpose. See Regulation 8(5)(c) of the Needle-time Regulations. See also article 12(2) and (4) of the EU Directive on Collective Management, where this practice is recognised. Directive 2014/26/EU, available at <https://ec.europa.eu/digital-single-market/en/collective-rights-management-directive> (date of use: 01 October 2018).

⁵⁸ Emphasis added.

ECT Act is that infringers may seek to avail themselves to the less stringent penalties provided for in section 89 of the ECT Act rather than the harsher provisions under the Copyright Act. In terms of the double jeopardy rule, namely the rule that a person may not be punished twice for the same offence, the infringer, once he or she had subjected him or herself to the penalties provided for under the ECT Act, cannot again be subjected to the harsher provisions of the Copyright Act. In view of this it is recommended that the reference to the ECT Act should be removed by completely deleting paragraph (6) of the proposed section 28(O).

9.2.18 Clause 29 – New Section 28(P)

Since rights-holders need to be afforded adequate rights in the digital environment to survive, as highlighted in Chapter 8, justification must be provided why such rights should be curtailed as proposed in this clause, which seeks to introduce exceptions to the rights given to rights-holders with respect of the use of technological protection measures. Therefore, the provision should specifically state that a circumvention of technological protection measures would only be permitted if it complies with the three-step test.

9.2.19 Clause 33 – Amendment of Section 39

The numbering in the proposed amendment to section 39 needs to be reviewed. It needs to be noted that the Copyright Act in its current form only has paragraph (cA) and does not have paragraphs (cB), (cC), (cD) or (cE). These paragraphs were inserted by the Intellectual Property Amendment Act 28 of 2013, which has not yet come into force.

9.2.20 Clause 34 – New Section 39B

It needs to be noted that the Copyright Act in its current form has no section 39A. Section 39A was inserted by the Intellectual Property Amendment Act 28 of 2013, which, as noted, has not yet come into force.

9.3 Final Recommendations

In conclusion, it goes without saying that this thesis has raised a number of issues relating to the copyright protection of musical works. The writer's main motivation and research objective in writing this thesis was to unravel the generally-mystified world of music copyright protection, with a focus on the protection of musical works, in order to make it easier to approach and deal with the subject-matter. A number of issues have come to light in doing so but the most important, in the writer's view, is the lack of any formal programmes in the law relating to music rights protection, or

entertainment law in general, at South African universities. The writer made this observation at the beginning of his research journey in relation to this thesis;⁵⁹ several years later, at the finalisation of the thesis, it is regrettable that the situation has not changed and may in fact have deteriorated.⁶⁰ Ironically, a Google search for entertainment law firms in South Africa yields many results of those that claim to provide legal services in this area of law. One wonders where such persons gained their knowledge of this area of law, if no university in South Africa offers any courses or programmes in this regard. This is further exacerbated by the fact that there are not many entertainment business companies in South Africa where an aspirant entertainment lawyer can gain experience – which is another way in which a lawyer may gain experience in this regard.

The above-mentioned developments do however, highlight the fact that there is a growing demand for entertainment law services from members of the public, which in itself is a good thing as it is an indication that the industry is growing. In light of the foregoing, the need for universities to introduce programmes in this area of law has become urgent. This will prevent the problem that Du Plessis has highlighted when he refers to a prejudice that may befall songwriters, arguing that this “may not lie in the ability of the courts to make a proper ruling, but in the inability of counsel to argue their cases.”⁶¹ In light of this the following general recommendations are made:

(1) University law schools, especially those offering courses in Intellectual Property Law in general and Copyright Law in particular within their LLB programmes, should start thinking seriously about introducing modules in either Entertainment Law, in which studies in Music Copyright will form an integral part; or rather introducing a stand-alone module in Music Law or Music Copyright Law. The prerequisite for such a module would be a general module in Copyright Law or Intellectual Property Law (in which Copyright Law is a component); and, where the module offered is a module in Music Law, Contract Law may be another prerequisite. Such a module would ideally be offered as an elective module in the final years of the LLB degree;

(2) In addition to the above, law schools should think thinking seriously about introducing focused postgraduate research in the field of Entertainment Law, which would encompass the sub-fields of Music Law; the Law relating to the Film and Television Industries (which could also include aspects of Animation and Gaming); the Law relating to Literary Publishing and the Law relating to Theatre / Dramatic Works. These can be offered as part of an LLM degree, which can be preceded by a Postgraduate Certificate specialising in say, one of these areas, followed by a Postgraduate Diploma offering two of these courses. Those having either a Postgraduate Diploma would then receive credits for the LLM, which itself can be comprised of three modules from those mentioned above, with a short dissertation comprising the final module. An alternative, in line with the scope of

⁵⁹ See Chapter 1 of this thesis generally.

⁶⁰ In Chapter 1 the writer made reference to the fact that at one stage both the University of Johannesburg and the University of Cape Town offered short courses on Entertainment Law. These courses seem to have now been completely phased out however.

⁶¹ See Du Plessis 2007 *TSAR* 2 330 and generally ; also Du Plessis 2007 *TSAR* 1, generally.

this thesis, would be to develop an LLM module on Music Copyright Law and offer it as a specialisation in the university's existing LLM in Intellectual Property Law;

(3) Further to the above universities can also offer short-learning, NQF 5 or 6 level programmes on Entertainment Law in general or Music Law in particular, which can be offered in conjunction with industry. This can, for example, include SAMRO and other important industry bodies within the South African entertainment industry. There is possibly no better way to inculcate practical skills in relation to the entertainment industries than forging relationships with the main industry players, which can create opportunities for students through internships, workshops etc. University law clinics can also partner with the law school in this regard to provide opportunities through the use of moot court competitions and the law clinic's Street Law programmes,⁶² and

(4) Finally, as a way of broadening skills in this regard and as part of programmes aimed at assisting judges in the adjudication of intellectual property disputes, universities can forge relationships with the South African Judicial Education Institute (SAJEI) formed in terms of the South African Judicial Education Institute Act,⁶³ in terms of which such programmes can also include sections relating to the adjudication of cases arising from the entertainment industries in general and the music industry in particular, especially with regard to issues such as the use of expert witnesses, the admissibility of evidence and the determination of questions around the originality of copyright works.

⁶² This model of forging relationships with the industry has been used successfully in the United States and has undoubtedly contributed to the impartation of skills to many entertainment law practitioners in the United States. See for example in this regard the Fashion, Arts, Media & Entertainment Law Centre (FAME) at the Benjamin N. Cardozo Law School of Yeshiva University, available at <https://cardozo.yu.edu/programs-centers/fashion-arts-media-entertainment-law-center-fame> (date of use: 23 July 2019).

⁶³ Act 14 of 2008.

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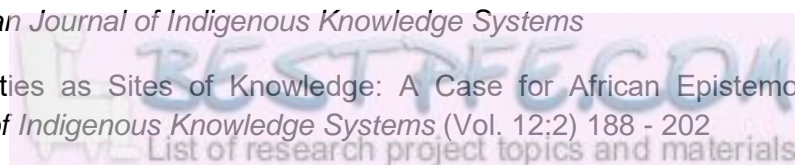
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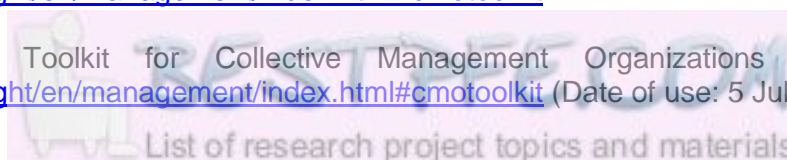
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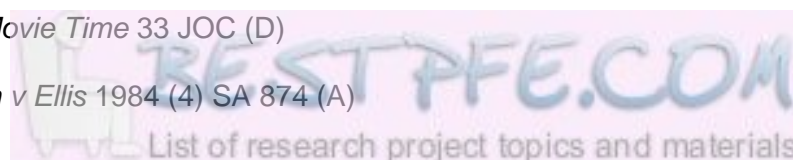
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⁶⁴ The case should actually read *Shapiro and Galeta v South African Recording Rights Association Limited*.

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