

Opinion

Title: **Unpacking the argument of the SAMPRA “Mobile DJ (Featured music)” License**

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The Argument

In South Africa from a DJ's perspective, there are eight factors that set, define, affect and regulate the landscape when a DJ performs, namely:

- The Laws¹
- The State
- The Collecting Society
- The Record Labels
- The Performers
- The Venues/Facilities/locations
- The Promoters/Producers/event managers, party planners
- Compliance with the above 5 (five) points

In essence, 5 (five) parties, compliance, the laws and the State; The State sets the laws and enforces compliance of the 5 (five) parties with the laws as applicable

An argument has arisen recently by the attempt of a Collecting Society to make a DJ an interested party and responsible (under the Collecting Society's view of the law) for purchasing from the Collecting Society of a "Mobile DJ (featured license)" in order for the DJ essentially to ply his or her trade, playing music to others.

The argument arose in particular because of one the one hand of the surprise and lack of knowledge of the professional DJ community of the requirement (or demand depending which way one considers it) of the Collecting Society and more importantly by the thought of interrupting a prospective career with a copyright infringement charge, a serious issue for any DJ who's choice of a career identifies them as 'public goods' and where the ability to travel across borders (integral to a professional DJ career) is dependent on a clean record.

Additional factors exacerbating the argument were the facts that the many professional DJ's are also owners and performers (i.e. they wear many hats) and were not from those points of view never mind as DJ's, aware of how their respective rights were being deployed by the Collecting Society, in this instance against them; Many DJ's are also venue owners, where they are responsible for a host of health, safety, liquor, food, insurance and other licenses (and compliances) they can

¹ There are four laws namely The Copyright Act 98 of 1978, Copyright Regulations,1978, The Performers Protection Act 11 of 1967 and the Collection Society Regulations 2006.

understand as venue owners, including a license from a Collecting Society to have music played at their facility; much of the important logic of the Collecting Society is unpublished and subjective.

Notwithstanding the Collecting Society's license requirement and demand of a "Mobile DJ" to have a "Mobile DJ (featured music) license, which the Collecting Society alleges is legal, many DJ's being owners and performers have wondered where the money for the licenses goes given that there is no set-list or indication what tracks have been performed.

How exactly is the R1 714.47 + VAT annual flat fee tariff demanded from a DJ going to be split amongst which labels (and their performers) they ask, never mind the legitimate, but extremely controversial and sensitive question as to why the Collecting Society decided (without consultation) to disappear the Producer from the revenue share equation flowing from such licenses.

Those with access to knowledge have dug deeper and found themselves wondering how the Collecting Society received the respective rights from the copyright owners the Collecting Society claims to possess, in the first place. Reviewing their paperwork, conspicuous by its absence is any grant of rights agreement with the Collecting Society, or any other representative organization, an issue addressed later in this opinion.

What does the law say?

Sound recordings (records or tracks) are works protected by copyright, and the author (also called the owner) of the sound recording, being "***the person by whom the arrangements for the making of the sound recording were made***"², is vested with (owns) exclusively a number of rights with respect to the sound recording. In particular law "***vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic***"³ in the owner of the sound recording copyright which "***acts***"⁴ include:

(c) broadcasting the sound recording;

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

(e) communicating the sound recording to the public"

The law goes on to affirm that a royalty must be paid if any of the above three acts are exercised (by any person)

² Copyright Act 98 of 1978 – Ch 1 Sec 1 (1) (iv) (c)

³ Copyright Act 98 of 1978 – Ch 1 Sec 9

⁴ Copyright Act 98 of 1978 – Ch 1 Sec 9 (c) (d) and (e)

“In the absence of an agreement to the contrary, no person may broadcast, cause the transmission of or play a sound recording as contemplated in section 9(c), (d) or (e) without payment of a royalty to the owner of the relevant copyright.”⁵

The law clarifies the meaning as to the owner of the copyright:

“Subject to the provisions of this section, 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”⁶

When it comes to determining the royalty that would be due and payable as well as the parties to that determination the law advises:

“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”⁷

This is reaffirmed elsewhere in the law albeit from the point of view of the performer which at first glance may appear to be contradictory but after a closer read is entirely consistent

“The amount of any royalty contemplated in subsection 1(b) shall be determined by an agreement between the performer and the person who broadcasts or transmits, or causes communication of, the performance, as the case may be, or between their representative collecting societies”⁸

When it comes to how the royalty is shared the law advises:

“The owner of the copyright who receives payment of a royalty in terms of this section shall share such royalty with any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act No. 11 of 1967)”⁹

This is again reaffirmed elsewhere in the law albeit from the point of view of the performer which at first glance may appear to be contradictory but after a closer read is entirely consistent:

“The performer's share of the royalty shall be determined by an agreement between the performer and the owner of copyright, or between their representative collecting societies”¹⁰

Considering that a creator is synonymous with an ‘author’ and a ‘performer’ and the output their respective efforts being synonymous with a ‘work’ and a ‘performance’ and considering the

⁵ Copyright Act 98 of 1978 – Ch 1 Sec 9A (1) (a)

⁶ Copyright Act 98 of 1978 – Ch 1 Sec 21 (1) (a)

⁷ Copyright Act 98 of 1978 – Ch 1 Sec 9A (1) (b)

⁸ Performers Protection Act 11 of 1967 - Sec 5 (3) (a)

⁹ Copyright Act 98 of 1978 – Ch 1 Sec 9A (2) (a)

¹⁰ Copyright Act 98 of 1978 – Ch 1 Sec 9A (2) (b)

references in the laws to words/phrases such as “**determined**”, “**by an agreement**” and “**representative collecting societies**” the law makes deliberately clear as to other aspects such as:

“Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law”¹¹

And

“No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicense, the exclusive sublicensor, as the case may be”¹²

And

“A licence granted in respect of any copyright by the person who, in relation to the matters to which the licence relates, is the owner of the copyright, shall be binding upon every successor in title to his interest in the copyright, except a purchaser in good faith and without notice, actual or constructive, of the licence or a person deriving title from such a purchaser, and any reference in this Act to the doing in relation to any copyright of anything with or without the licence of the owner of the copyright shall be construed accordingly”¹³

In other words the law makes clear that a copyright is a property right and also makes clear how the property right is transferred (i.e. granted) to another added to the fact it is binding on successors.

The law also goes on to give creators additional rights¹⁴:

“In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title”¹⁵

And

“In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor

¹¹ Copyright Act 98 of 1978 – Ch 1 Sec 22 (1)

¹² Copyright Act 98 of 1978 – Ch 1 Sec 22 (3)

¹³ Copyright Act 98 of 1978 – Ch 1 Sec 22 (7)

¹⁴ These two rights, along with the Collection Society Regulations 2006 allowing for the accreditation of a society to represent performers give life to a second Collecting Society “The Performers’ Organisation of South Africa Trust”. POSA as it is called was formed by SAMRO and disagreements between POSA (read SAMRO) and SAMPRA are the primary reason as to why no monies have been paid to any copyright owners over the past five years notwithstanding that SAMPRA is rumoured to have collected some R500 million to date in total

¹⁵ Copyright Act 98 of 1978 – Ch 1 Sec 9 (3)

in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.”¹⁶

In other words with both of the above, the law provides for a creator (author or performer) to transfer their right to a royalty to another person.

Having addressed *inter alia* ownership and the nature of the various rights, the law stipulates that

“Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorize”¹⁷

The law thus confirms that if a license from the ***“the owner of the copyright”*** is not secured, (and this should be in writing) then the acts of communicating sound recordings to the public, broadcasting them and/or transmitting them through a diffusion service would be acts infringing copyright.

A sound recording typically is the outcome from the exercising of the reproduction right in a musical and literary work, to the extent that a sound recording embodies (and carries) and is a copy of a song. Whilst the law does not address directly the location or place of communication of a sound recording to the public as far as sound recordings are concerned, the law does so as far as songs are concerned

“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 so used was not aware and had no reasonable grounds for suspecting that the performance would be an infringement of the copyright”¹⁸

Here the ***“performance in public of the work”*** would not just be limited to live performance but also include the playing of sound recordings (by a DJ) as well as the use of radio and backtracks.

Apart from the above, nowhere in law is there any other reference to ***“place”*** or ***“place of public entertainment”*** as far as public performance or communication to the public.

The law goes on to address ***“Penalties and proceedings in respect of dealings which infringe copyright”***¹⁹ by confirming that

“Any person who at a time when copyright subsists in a work, without the authority of the owner of the copyright— sells or lets for hire or by way of trade offers or exposes for sale or hire” or ***“by***

¹⁶ Performers Protection Act 11 of 1967 – Sec 6

¹⁷ Copyright Act 98 of 1978 – Ch 2 Sec 23 (1)

¹⁸ Copyright Act 98 of 1978 – Ch 2 Sec 23 (3)

¹⁹ Copyright Act 98 of 1978 – Ch 2 Sec 27

way of trade exhibits in public” “articles which he knows to be infringing copies of the work, shall be guilty of an offence”²⁰

The law offers a number of exceptions, instances where the “*authority of the owner of the copyright*” is not required such as “*fair dealing*”, “*judicial review*”, “*quotations*”, “*teaching*” and certain other uses none of which have application in addressing the argument.

What actually is the Collecting Society’s argument?

In the public domain, the Collecting Society’s argument is that, based on the law’s position that “***The communicating of sound recordings to the public is a restricted act***”, that “***a licence from***” the Collecting Society “***for the use of sound recordings in its repertoire***”²¹ is required.

The Collection Societies argument is that in particular DJ’s “***REQUIRE THEIR OWN LICENCE TO COVER INDIVIDUAL, AND ONE OFF EVENTS***”²² as DJ’s are responsible “***for the communicating to the public of sound recordings as Featured Music***” i.e. spinning a set.

Accordingly the Collecting Society has issued a Tariff for what it refers to as a “***Mobile DJ***” for the “***for the communicating to the public of sound recordings***”

The Collecting Society provides examples of what in the Collecting Society’s point of view is “***INDIVIDUAL, AND ONE OFF EVENTS***” such as

“Fetes, Outdoor Shows, Sports Club Discos, Local Business’ Christmas parties, 21st Birthday Parties, Weddings etc”

The Collecting Society also makes clear what in The Collecting Society’s view a “***mobile DJ licence does not cover***”²³ which includes:

“Events held in discotheques, nightclubs or similar venues;

Permanent/regular engagements;

Consecutive events held in the same venue”

The Collecting Society acknowledges that if further information can be provided to the Collecting Society, the “***necessary licences can be arranged for the individual promoters or venues***”²⁴ who quite clearly in the Collecting Society’s view would be the responsible parties.

The Collecting Society points out that the Tariff is subject to the Collecting Society’s “***General Terms and Conditions for Communicating Sound Recordings to the Public Licences***” and also to “***Penalty***

²⁰ Copyright Act 98 of 1978 – Ch 2 Sec 27 (1) (b) and (c)

²¹ SAMPRA – Tariff 13

²² SAMPRA – Tariff 13

²³ SAMPRA - Tariff 13

²⁴ SAMPRA Tariff 13

Clause” with a “surcharge” if a DJ would “continue with the communicating to the public without first obtaining or renewing your licence”. The Collection Societies take here is that this “is designed to act as a deterrent to unlicensed communications to the public of sound recordings”²⁵

Two definitions are offered to the public by the Collecting Society as regards the Tariff:

“Repertoire” means the collection of copyright sound recordings owned or controlled by members of SAMPRA from time to time

And

“Featured Music”. The playing of sound recordings as a main or special attraction that is essential to the operation of the premises and/or the main event

In email communications the Collecting Society has gone on record (even though none of the information disclosed is available in public) to expand understanding as to its points of view and with the following comments has provided some insight into the Collecting Society’s thinking and argument that DJ requires, in most instances, a Mobile DJ License

“A Mobile DJ (as opposed to a DJ operating from a venue that has discos as a regular feature), does exactly that when he renders music acoustically audible when it would otherwise not be heard. The Mobile DJ receives payment and his services are linked to the use of sound recordings he/she is using. He/she is employing those recordings for his/her own benefit, namely payment. A royalty is payable to the copyright owner”²⁶

And

“It follows that those sound recordings that do not form part of SAMPRA’s repertoire do not require a licence from SAMPRA - but still remains a restricted act in terms of the Act and would require a licence from another party”²⁷

And

“There is no direct definition of “featured music” in the Copyright Act, but established practice draws a distinction between “featured music” and “background music”. Collecting societies have always drawn distinctions in the manner in which music is used and therefore assessed and licensed, with the value to the user of “featured music” being assessed to be higher than the value to the user of “background music”. These distinctions are drawn in order to distinguish one tariff sufficiently from another, and one manner of music usage from another. The alternative would be to have one tariff which is applicable to all music users irrespective of how they make use of music. It follows that hairdressers are not assessed on their turnover and broadcasters are not

²⁵ SAMPRA Tariff 13

²⁶ Email from SAMPRA - Mon 2014/08/18 11:46 AM

²⁷ Email from SAMPRA - Mon 2014/08/18 11:46 AM

assessed on the seating capacity of their reception areas. This distinction in the manner of assessment is also not provided for in any Copyright legislation.

*The distinction to be drawn between “featured” and “non-featured” music is a relatively simple one: if the music is intended as e.g. background music it is “non-featured” (e.g. in a hairdressing salon). If the music forms the focus of attention and is part of the offering for which the consumer either pays or is demonstrably drawn to the venue at which the music is “featured” or to the broadcast or distribution medium in question, (e.g. at a disco or “live” music concert (for purposes of the composition)), it is “featured”.*²⁸

And

*“Typically, a Mobile DJ who arrives to supply music at a special function, or once off event such as weddings, birthdays and annual parties, offers “featured” instead of background music. Employing a mobile DJ, who is not otherwise at your service, would necessarily mean that it is a feature suited to the occasion. The host of a party would not otherwise be under any obligation to procure a licence for their private use of music”*²⁹

The Collecting Society in question here is the South African Music Performance Rights Association or SAMPRA, an NPO.

*SAMPRA it is claimed “was accredited by the Department of Trade and Industry's Companies and Intellectual Property Registration Office (CIPRO) in June 2007. SAMPRA is a national, non-governmental, organization that licenses to third parties specific copyrights that vest in record companies that are members of the Recording Industry of South Africa (RiSA). The body of sound recordings licensed by SAMPRA is referred to as its repertoire”*³⁰

*One finds that SAMPRA “is a collective licensing society of copyright owners of music sound recordings. Its mandate is to collect and distribute royalties to the members of the Recording Industry of South Africa (RiSA) whenever their recordings are broadcast, diffused or communicated to the public”*³¹

According to SAMPRA “If the copyright owner is a member of RiSA it can be assumed that the recording forms part of the repertoire in which SAMPRA administers rights”

*SAMPRA confirms the “SAMPRA Distribution Rules and Policies”, which inter alia advises that the definition of SAMPRA Repertoire “means all sound recordings owned or controlled by the member of RiSA, from time to time and as may be extended by the Executive Committee of SAMPRA from time to time.”*³²

²⁸ Email from SAMPRA - Mon 2014/08/18 11:46 AM

²⁹ Email from SAMPRA - Mon 2014/08/18 11:46 AM

³⁰ <http://www.sampira.org.za/about>

³¹ <http://www.sampira.org.za/home>

³² <http://www.sampira.org.za/terms>

SAMPRA confirms that ***“The trading names of record companies and labels that are members of RiSA and the copyright owners of the sound recordings which may not be broadcast, diffused or communicated to the public without payment of a licence fee are listed below”***³³

On the very same page SAMPRA then advises ***“Select a letter from the alphabet to navigate through the listings of our registered members.”*** The reader is not sure as SAMPRA’s reference to ***“our registered members”*** here, when a few lines above SAMPRA refers quote clearly to ***“The trading names of record companies and labels that are members of RiSA”***³⁴

What is wrong with the Collecting Society’s argument?

There are five distinct reasons that speak to what is wrong with the Collecting Society’s argument, however prior to proceeding and for the avoidance of ambiguity and misunderstanding, it is noted that this opinion proceeds on the basis that permission is required by law to perform sound recordings in public, to broadcast and to communicate such to the public³⁵. Additionally this opinion intends to clarify the issues related to a DJ’s performance in public and to shed some light on the rights, rules, roles and responsibilities of the various parties presently. Noting that not everything is agreed, solved or properly understood by all in the trade, the objective of this opinion is to challenge the establishment and all the players to examine their rights, rules, roles and responsibilities variously and to up their respective professional game, to the extent that a far stronger productive, knowledgeable, responsible and profitable (for all) music industry comes into being.

So what’s wrong then with the Collecting Society’s argument.....and why the need for this opinion?

Well, when DJ’s (professional and amateur) in an industry find themselves open to prosecution and persecution (whether legal or an abuse of due process or power) simply for plying their trade, and they have no understanding or knowledge of this, then there is something terribly wrong.

To compound a bad situation to worse, finding correct and proper information is extremely difficult for anyone. The Collecting Society might well point to its website with a view that everything is there. This is not the case and when the industry association’s website is missing in action so to speak and important documentation cannot be accessed, things start take on a different look and there is no wonder that there is industry wide confusion.

The five reasons are as follows:-

1. **In holding a DJ responsible for a license the Collecting Society is targeting the wrong party.**

³³ <http://www.sampra.org.za/members>

³⁴ <http://www.sampra.org.za/members>

³⁵ Copyright Act 98 of 1978 - Ch 1 Sec 9 (c) (d) and (e)

There are several points that inform this view:

- DJ's work by contract of service. The vast majority are independent and not the employees of those who purchase their services. Whether the DJ plays music on radio, at a corporate event, a wedding, a nightclub or a festival the agreements are with the same 'independent contractor', the DJ for the provision of the service. In the same way that a radio DJ is not held accountable for a license when the DJ is playing music on radio, a DJ playing her or his set in any "*place of entertainment*" as a DJ is not liable for the license, the person purchasing his or her services is.
- The law makes no distinction as to whether on the one hand a "*venue*" or a "*promoter*" or a "*host of a party*" is responsible for securing a license. The idea that "*Events held in discotheques, nightclubs or similar venues, Permanent/regular engagements and Consecutive events held in the same venue*"³⁶ are the only ones where a DJ does not require a license from the Collecting Society cannot be found anywhere in law, nor can the distinction between "*Fetes, Outdoor Shows, Sports Club Discos, Local Business' Christmas parties, 21st Birthday Parties, Weddings etc*" being "*individual or one-off events*"³⁷ be found. In particular there is no basis in law for either the distinction as being either the responsibility of the DJ or not.
- The idea that a person who hosts an event, and who is responsible for ALL the licenses that should be in place for the event somehow escapes responsibility on one license for the event, the performance of the music, is incorrect in law. There is no definition of a "*party*" or "*private*" in the applicable laws. The distinctions made by the Collecting Society are subjective, arbitrary and inconsistent and vest in the minds of the few, outside of the public domain

2. **The Collecting Society does not own the rights to represent sound recording owners that the Collecting Society claims**

According to the Collecting Society "*If the copyright owner is a member of RiSA it can be assumed that the recording forms part of the repertoire in which SAMPRA administers rights*"³⁸

The Collecting Society has also said

*"It follows that those sound recordings that do not form part of SAMPRA's repertoire do not require a licence from SAMPRA - but still remains a restricted act in terms of the Act and would require a licence from another party"*³⁹

And that the Collecting Society

³⁶ SAMPRA – Tariff 13

³⁷ SAMPRA – Tariff 13

³⁸ Email from SAMPRA - Mon 2014/08/18 11:46 AM

³⁹ Email from SAMPRA - Mon 2014/08/18 11:46 AM

“is not able to license music sound recordings that are owned by non-members of RiSA”⁴⁰

These are extremely important admissions and never mind for the moment that there is only one Collecting Society accredited by the State in respect of sound recording owners. Legally there can't be another party, unless duly accredited. The importance of the admissions is manifest by the current reality in South Africa, being that the Collecting Society does not represent any of the rights or copyright owners it claims.

The presumption and assumption (by the Collecting Society and RiSA) that RiSA membership somehow grants rights to RiSA in the absence of any *plain language* affirming such a grant of rights from sound recording copyright owners (also referred herein as 'labels') to RiSA has no basis or grounds in law.

The law is quite clear about how a copyright owner transfers copyright⁴¹, and neither RiSA nor SAMPRO can provide any evidence of the grant of rights from labels

In short, it cannot be assumed (or presumed) that sound recordings owned by RiSA members make for the *“body of sound recordings licensed by SAMPRO”*.

As this opinion will show, this is a very serious industry challenge

A review of the RiSA membership Agreement advises no grant of rights of any kind in the two paragraphs at the end of the agreement other than to refer to RiSA Rules and Regulations and Code of Conduct, as follows:-

“THE APPLICANT ACKNOWLEDGES THAT HE IS AWARE THAT ALL RiSA MEMBERS ARE BOUND BY A COMPREHENSIVE SET OF RULES AND REGULATIONS AS WELL AS A CODE OF CONDUCT, COMPLIANCE WITH WHICH IS CLOSELY MONITORED BY THE RiSA SECRETARIAT

THE APPLICANT FURTHER ACKNOWLEDGES THAT SHOULD HE BECOME A MEMBER OF RiSA HE WILL BE OBLIGED TO BE BOUND BY THE AFOREMENTIONED CODE OF CONDUCT AND RULES AND REGULATIONS AS AMENDED FROM TIME TO TIME. THE APPLICANT ALSO UNDERTAKES TO ACQUAINT HIMSELF AND TO REMAIN ACQUAINTED WITH SAID RULES AND REGULATIONS AND CODE OF CONDUCT”⁴²

No rights of the copyright owner transferred here and there is no grant of rights (from the Copyright Owner) to RiSA of any kind that can be found

A search for the *“COMPREHENSIVE SET OF RULES AND REGULATIONS AS WELL AS A CODE OF CONDUCT, COMPLIANCE WITH WHICH IS CLOSELY MONITORED BY THE RiSA SECRETARIAT”* alleged by RiSA yields no documents of any kind entitled *“RULES AND REGULATIONS”* or

⁴⁰ <http://www.sampra.org.za/members>

⁴¹ Copyright Act 98 of 1978 - Ch 1 Sec 22 (1) and (3) (See Appendix 1)

⁴² From the RiSA membership agreement

"CODE OF CONDUCT". It is not possible to discern the contents what is referred to but not made available.

None at all

So the Collecting Society relies on its definition of *"SAMPRA Repertoire"* to make a claim on rights in respect of RISA members' sound recordings.

The Collecting Society goes further, it warrants this right to licensees

This is extremely risky for all

An investigation into the chain of copyright from the copyright owner to the Collecting Society licensee, in the event of their being any infringement claims, reveals that there are gaps, and for the sector of the so-called "Mobile DJ" the Collecting Society could not in law prove its rights, without additional documentation which presently is not in place

How RISA member owned and controlled sound recordings actually make it to become defined as *"SAMPRA Repertoire"* or than by 'assumption' or 'dictate' is unclear to the extent that from a point of law, one can only conclude that the Collecting Society has no rights presently to represent sound recording owners because RISA has no such rights from RISA members.

The fact that that, as the Collecting Society puts it a *"user can easily establish who the copyright owner is of any such recording – and should in fact do so at the time of acquiring the sound recording to ensure that the recording is a lawful recording"*⁴³ this has little to do with the legal requirement for the Collecting Society having in place the correct documentation in respect of the right to represent the *"copyright owner"*.

In addition the idea that is easy to *"establish who the copyright owner is of any such recording"* is especially untrue of the digital manner in which most of the works purchased and/or licensed by DJ's for use. Many sites on the internet that sell music via download to DJ's (local and international) do not offer the typical disclaimer that appears on a physical CD which advises that *"All rights of the producer and the owner of the work reproduced reserved. Unauthorized copying, public performance, broadcasting and hiring out or directly or indirectly of this recording is prohibited"*⁴⁴. The nature of a digital download and the information (metadata) that travels with the purchase of a download does not always carry any of the disclaimers one sees on physical product regarding the producer and owner's rights.

⁴³ Email from SAMPRA - Mon 2014/08/18 11:46 AM

⁴⁴ From HOM003 – Hugh Masekela "Playing at Work"

3. **The Collecting Society is not compliant with the laws that regulate the Collecting Society's behaviour**

As has been stated above the Collecting Society *“was accredited by the Department of Trade and Industry's Companies and Intellectual Property Registration Office (CIPRO) in June 2007.”*⁴⁵

According to the Collecting Society it *“is a national, non-governmental, organization that licenses to third parties specific copyrights that vest in record companies that are members of the Recording Industry of South Africa (RiSA). The body of sound recordings licensed by SAMPRA is referred to as its repertoire”*⁴⁶

The Collecting Society's accreditation by the State comes with a number of legal compliance requirements as follows:-

- The condition precedent that the Registrar be satisfied that the Collecting Society *“affords to copyright owners or their licensees and/or to performers, or to organisations representing copyright owners or licensees and/or performers 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 royalties to be received”*⁴⁷. None in the DJ sector in RiSA membership can attest to being given any *“right and opportunity to take part in decision making concerning the affairs of”* the Collecting Society;
- Whilst the law refers in respect of the Collecting Society that *“A representative collecting society shall be open to all persons either directly or through the membership of a collective organisation representing a particular group of rightholders having a similar interest”*⁴⁸, the Collecting Society has only one member, RiSA, and the Collecting Society offers no access to membership directly *“to all persons”* as envisaged by the law.
- The law is clear about voting stipulating that *“Each member of a collecting society must have at least one vote”*⁴⁹. The Collecting Society circumvents this requirement by *“administering..... on behalf of an organisation representing 50 or more copyright owners”* where the *“organisation representing 50 or more copyright owners”*⁵⁰ itself does not have one member one vote.

⁴⁵ <http://www.sampira.org.za/about>

⁴⁶ <http://www.sampira.org.za/about>

⁴⁷ Collection Society Regulations 2006 – Ch 1 Sec 3 (3) (c)

⁴⁸ Collection Society Regulations 2006 – Ch 2 Sec 5 (1)

⁴⁹ Collection Society Regulations – Ch 2 Sec 5 (3)

⁵⁰ Collection Society Regulations – Ch 1 Sec 3 (1) (a)

Were any party to enquire of the Collecting Society for its membership agreements⁵¹, as anticipated in the law so as to confirm this one member one vote requirement, the Collecting Society can produce only one, its agreement with RISA. This agreement is not disclosed to any members of RISA and not publicly accessible – its terms and conditions are unknown.

Further were any party to enquire as to where in the “*membership agreement*” that the “*organisation representing 50 or more copyright owners*” had with those copyright owners where such ‘one member one vote’ could be found, it would not be found.

It suits the Collecting Society’s purposes not to have to deal with one member one vote, and to rather circumvent the requirement by continuing the outdated undemocratic model of RISA’s past where the more market share one has the more Board votes one has. In the view of many this is one of unpalatable hangovers from the music industry’s past that has to date escaped changed.

- The law is clear about the information that the Collecting Society should provide on request as follows:

“Any member shall be entitled, to obtain:⁵²

- (a) annual statements of accounts and the of persons that constitute the highest executive organ and/or senior management of the collecting society;*
- (b) reports of the highest executive organ and of the auditors, the reports to be submitted to the general meeting;*
- (c) where appropriate, the text and motivation of resolutions submitted to the general meeting of members, and information concerning candidates for the highest executive organ and senior management; and*
- (d) the overall amount, certified by the auditors, of the remuneration paid to any director or other employee of the collecting society”*

The information has been requested, and it has not been forthcoming. Whilst the Collecting Society may have submitted

- The law stipulates that the Collecting Society

“..shall administer the rights of its members and the proceeds of the exercise of such rights in accordance with the Copyright Act, 1978, the Performers’ Protection Act, 1967, and these Regulations”⁵³

⁵¹ Collection Society Regulations – Ch 2 Sec 5 (5)

⁵² Collection Society Regulations – Ch 2 Sec 5 (4)

As is evidenced in this opinion, the Collecting Society does not do so

- As much as the recordings owned by foreign copyright owners have a right to earn a royalty when communicated to the public in South Africa, so do South African copyright owners have a right to receive royalties from the communication to the public of South African owned sound recordings in the more than 50 (fifty) countries that have acknowledged and acceded to the Rome Convention⁵⁴, whether via WIPO⁵⁵ or via the WTO⁵⁶ and TRIPS⁵⁷.

The law stipulates that

“Whenever desirable or expedient, a collecting society shall enter into reciprocal agreements with foreign collecting societies or rightholders, and shall administer the rights entrusted to it and shall distribute at least of the money collected to its members”⁵⁸

South Africa acceded to the WTO and TRIPS on 1st January 1995.

The law further confirms that

“The protection granted to performers by this Act shall be extended automatically in respect of performances-

- (a) taking place;*
- (b) broadcast without a fixation; or*
- (c) first fixed,*

in a country which is a member of the World Trade Organisation: Provided that the right conferred on performers in section 5(1)(b) shall, in the case of performances in the Republic, but emanating from a country which is a member of the World Trade Organisation, only be granted to them to the extent that performances emanating from the Republic enjoy corresponding protection in that country, and such

⁵³ Collecting Society Regulations 2006 – Ch 2 Sec 6 (1)

⁵⁴ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961

⁵⁵ World Intellectual Property Organization

⁵⁶ World Trade Organization

⁵⁷ Agreement on Trade-Related aspects of Intellectual Property Rights

⁵⁸ Collecting Society Regulations 2006 – Ch 2 Sec 6 (3)

*performances of foreign origin shall not enjoy any wider protection in the Republic than is enjoyed in that country by performances emanating from the Republic*⁵⁹

It has been without question “*desirable and expedient*” for the Collecting Society, over the past 7 (seven) years to put in place “*reciprocal agreements with foreign collecting societies or rightholders*” so that South African copyright owner royalties would flow back to the country.

The Collecting Society has failed to implement a single “*reciprocal agreements with foreign collecting societies or rightholders*” since its inception.

No royalties have ever returned to South Africa or any South African copyright owners in South Africa

4. **There has been no proper consultation with the DJ sector, of any kind to the extent that understanding and agreement can be said to be reached, especially when it comes to the jargon (definitions of) used, transparency of the rules and the money.**

Is this critically important?

Absolutely

The DJ community, a large portion who are RISA members and the owners of the copyright in sound recordings they respectively produce and record of original dance music, are not opposed to the enforcement and compliance of license regulations at venues and promoters for whom the DJ’s supply services. Notwithstanding the DJ copyright owners have something to gain (which is not quite clear) no DJ wishes to knowingly perform at an event that is not compliant with all of the licenses needed, in respect of safety, health, liquor, security, public liability insurance and other considerations. There can be and have been terrible outcomes when requisite licenses are ignored.

So the importance of the buy-in of the DJ community, especially the large number of those who form RISA membership cannot be understated and this is gained through proper consultation.

When the Mobile DJ – Tariff 13 was conceived, such was done without consultation and buy-in to the extent that the communities assistance in ensuring the correct parties apply for the correct licenses would be garnered, a gain for entire music industry.

When it comes to the definitions used variously by the Collecting Society, the following prevails

⁵⁹ Performers Protection Act 11 of 1967 – Sec 4

- There are no formal definitions agreed with the DJ Sector or within the DJ community or with the RISA membership who are DJ's
- There has been no consultation with the DJ Sector or within the DJ community or with the RISA membership who are DJ's
- The definitions used by the Collecting Society are the view (whether personal or gleaned from others) of a few individuals and not of an organization, and not of any South African statute or the DJ community
- There is no evidence of any DJ sector buy-in or support, professional or amateur
- The definitions are contentious and if subjected to due debate and diligence would not be defined in the same manner held by some presently
- With no proper consultation, the definitions do not speak to other music industry realities, such as a DJ performing with a vocalist (or a group), who has booked the DJ to perform the back tracks for his or her performance, which performance includes the public performance and communication to the public of sound recordings

In short, there is no buy-in from the DJ community; there are no champions of the message being put out by SAMPRA and no formal support.

It is fair to say that the majority of DJ's who might have signed up for a Mobile DJ License have done so through fear, a sense of intimidation and ignorance and not one on the basis of understanding.

5. **Without the rights in sound recordings and without compliance with the laws that regulate the Collecting Society, the Collecting Society's claims (against a DJ) are presently unenforceable in law.**

Given the public position taken by the Collecting Society at its website regarding the Mobile DJ License and the need for such, this point is arguably the most uncomfortable truth that arises in this opinion.

Uncomfortable because the Collecting Society has gone after the wrong party, the DJ

Uncomfortable because the Collecting Society has erred in not consulting

Uncomfortable because in the long challenge to see the rights enforced, monies collected and fairly distributed, the type of arising posed by actuality has serious implications for the Collecting Society

Uncomfortable because it exposes holes and inconsistencies that might easily have been avoided

Uncomfortable because it exposes the extent to which the music industry is fragmented and how little real communication on important issues actually transpires

Uncomfortable because all parties in the equation are made to look bad.

Simply put the Collecting Society cannot prove its rights and this is not something to argue about but rather to engage and remedy.

It would not do, for instance, for the Collecting Society, if challenged by any third party, to consider as sufficient the issuing of an affidavit attesting to *“evidence to prove - the subsistence of the copyright in that work; or the title of any person in respect of such copyright, whether by way of ownership or licence”*⁶⁰ on the basis that *“the mere production of such affidavit in such proceedings shall be prima facie proof of the relevant facts”*.

This approach would be extremely risky however as such affidavit would fail scrutiny and muster in the event that a court called for *“oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to such person for reply, and any reply purporting to be a reply from such person, shall likewise be admissible in evidence in such proceedings.”*⁶¹

There are immediate remedies the Collecting Society on the one hand and copyright owners on the other hand might engage in to rectify the situation, the most important being a proper Collecting Society membership agreement directly between the Collecting Society and each copyright owner, and not via RISA. This would be as envisaged in the law and such would go a long way to clarifying the extensive and industry-wide misunderstanding at present.

Until there is resolution, what does this argument mean to the DJ?

The DJ requires reviewing his or her game so to speak, and if necessary upping their professional conduct standard.

This does not by any stretch of the imagination mean that the DJ rushes off and purchases a Mobile DJ license from the Collecting Society as a perceived ‘cheap’ means of allegedly being safe.

No – that would be incorrect. It is not the DJ’s responsibility.

Even though presently, as this opinion advises, there is no need for Mobile DJ (featured music) license, this does not mean that the DJ and the AGENT booking the DJ take lightly the idea that

⁶⁰ Copyright Act 98 of 1978 - Ch 2 Sec 26 (12) (a)

⁶¹ Copyright Act 98 of 1978 - Ch 2 Sec 26 (12) (b)

regardless of this reality, that some zealous law enforcement personnel with bad to no knowledge of the actual laws (not a criticism but a fact – most attorneys don't know the laws in this sector) may try and arrest them, instead of the organizer, club owner, event manager and the like who are the responsible .

Forewarned is forearmed so to speak and prevention is always better than cure

So confronted, the DJ produces his or her (signed) booking agreement for the booking that he or she is performing, and takes the 'unknown person' to a particular clause that should be in every DJ booking contract which reads as follows:

“Both parties accept that the public performance and communication to public of music at a place of public entertainment requires a license from the copyright owners or their respective collecting societies, both in respect of the sound recordings played by the DJ and in respect of the songs on those sound recordings. In respect of the event that the DJ is booked to perform the PURCHASER warrants and represents that it has secured all necessary public performance and communication to public rights from the copyright owners or their representative societies to enable the DJ to legally perform in public. The PURCHASER accepts that the aforementioned license compliance requirement is obligatory and indemnifies the DJ and the AGENT in the event that the PURCHASER fails to secure the requisite licenses, from any claims of any kind. Further neither the DJ nor the AGENT will have any liability or loss of fee in the event that the DJ's performance is disrupted or stopped due to the reason of the PURCHASERS failure to secure the requisite and necessary public performance and communication to public licenses for the event”

Professional conduct of a 2014 DJ advises the following:-

- The booking for any event where the DJ is to perform is made by written contract, regardless as to whether the DJ's set is for free or paid for
- The booking contract used is proper in law
- The DJ travels with a digital (or printed) copy of the booking agreement for each performance
- The AGENT makes sure prior as to PURCHASER'S commitment (as in the signed agreement) that the licenses are in place
- Bookings are not taken from 'clevers' who want not to pay licenses...in the same way that some PURCHASERS try to avoid VAT as if it is ok, which it is absolutely not
- As the DJ is, in economic theory classed as a 'public good' extra care should be taken as to being organized and well prepared, so as not to undermine and/or destroy the value one has as a public good.
- The type of event the DJ is booked for does not mean that the same rules that apply every time do not apply. It does not matter where a lot of people gather, for once gathered they are 'public'.
- Avoid so-called 'private' bookings that do not wish to do things in a legal manner
- Pay a heavy price for acting unprofessionally

If the DJ is ill-prepared he or she may well be arrested or at the very least harassed and prevented from leaving, at a time when anyone who could assist is likely fast asleep.

If the AGENT and/or the DJ wish to cut corners, take chances, steal from the State by doing underground cash deals not on the books and generally behave badly, then both should expect, at some point or another, the full might of the law to fall upon them.

This is the nature of the South African DJ's day presently. All parties would agree that the situation is fluid and changing.

Does a DJ presently need a Mobile DJ (featured music) license from SAMPRA?

The short answer is 'NO'

When, if ever, does a DJ need a Mobile DJ (featured music) license?

Never

When, if ever, does a DJ need a license to communicate to the public?

If the issue raised above are remedied, if and when ever the DJ puts on an event (of any kind) (the DJ should not think that 'private' has any real meaning and/or application), and recorded music will be used in any way at that event, then the DJ is no longer acting as a DJ, but as one who is knowingly arranging for music to communicated to the public (by any DJ or by any artist performing to a backtrack for that matter) and therefore as the arranger and/or organizer, knowing the purpose of booking the DJ (herself or himself as the case may be) in the first place should seek a license from the copyright owners (labels) of the tracks the Organizer (also a DJ) intends to play or their respective Collecting Society.

If the DJ performs at any venue and knows prior to the performance that the organizer or venue, in fact whoever is booking the DJ, does not have a license from the copyright owners (labels) of the tracks the DJ intends to play, then currently the DJ exposes himself to the risk of the ill-informed

trying to enforce a license requirement on the DJ that the organizer of the event should have had in the first place. Smart play is for the DJ to decline to perform such an event.

Other issues of compliance DJ's need to be aware of

Arguably the most important consideration in the professional DJ's toolkit is the understanding of the turf they operate in.

There are rules

It is not a free for alldo as you like...business.

Specifically there one issue the DJ needs to be aware, that being where and how he or she sourced the music that he or she is going to play in his or her set, at any event as well as, believe it or not, crossing an international border.

This is the issues of the legality of the copies of the tracks the DJ will play during his or her set. If such were acquired illegally or without consent or are in any way infringing copies themselves, there can be big trouble.

A lot of DJ's don't take heed of this issue, and ill-prepared the DJ can find themselves being detained and their travel plans disrupted.

If purchases are made on the internet, the DJ keeps track of that, and notes what disclaimers are present, if any.

If local record labels and majors have sent out "promo" copies in digital format for performance by DJ's, then the DJs keep the digital record of such communications

If a DJ walks in to perform with a CD case full of CDR's with large amounts music recorded (with no lists of the works necessary) and can't prove the source it is highly likely that the DJ exposes them self for prosecution

There is another license required which is addressed in the clause above that DJ's should add to their booking contracts, but which should be highlighted again, that being the license required by the place of public entertainment or the promoter in respect if the musical and literary works (songs) to be performed. In South Africa the Collecting Society with the rights in respect of public performance, broadcast, transmission through a diffusion service and communication to the public of musical and literary works is SAMRO⁶² – a monopoly.

⁶² Southern African Music Rights Organization

The laws addressing musical and literary works⁶³ in South Africa are different than those for sound recordings⁶⁴ and from the DJ's perspective are addressed in a separate opinion.

Does a DJ need a Mobile license from SAMRO?

No

Conclusion

Most professional DJ's in South Africa today have a relationship of one kind or another with RISA (Recording Industry of South Africa, a Johannesburg based NPO that primarily serves as an association for record labels in South Africa) and a very large number of RISA members create, license and release music locally (and a good few internationally), yet ask any one of them if they have been consulted with, debated on, met about, read about or in any other way were informed as to what, as far as their professional association was concerned, constituted professional best practice, one would find blank looks.

The surprise and anger of the DJ community expressed and ventilated across the industry in various media over the past two weeks attests the lack of consultation that has transpired

Without an operating web-site it is impossible to verify the Rules and Regulations and Code of Conduct referred in the RISA Code of Conduct that RISA members must abide by

If one were to enquire at RISA as to the extent (as on record evidence might indicate) that RISA had endeavoured to have discussion, interchange or any communication with its members regarding the Mobile DJ license – RISA has nothing to show.

In short, RISA it appears seeks to implement rulings (that directly affect a swathe of its membership) the outcome of which has its member's availed to (false) arrest and/or attempted prosecution, all without any consultation with those members.

The record indicates that RISA has not consulted with the bulk of its membership as regards a Mobile DJ License.

This is unfortunate

The cynical might call the recent moves by the Collecting Society to hold DJ's (many of whom are RISA members) accountable when their DJ service to communicate sound recordings to the public has been ordered and booked, an ill-advised money grab.

The Collecting Society comply with its obligations in law that

⁶³ Copyright Act 98 of 1978 – Ch 1 Sec 6

⁶⁴ Copyright Act 98 of 1978 – Ch 1 Sec 9 and 9A

“The aim of a collecting society shall be to administer public playing rights effectively and efficiently, to maximise the economic exploitation of the rights entrusted by the rightholders for their direct benefit and not to generate or accumulate unneeded profits in the hands of the collecting society itself, and to distribute the proceeds of such exploitation equitably amongst its members”⁶⁵

Prior to closing, it is necessary to address and clarify the context of the unfortunate recent occurrence which saw a DJ allegedly being arrested, and finding himself obliged to sign a “Civil Settlement Agreement” (wherein he agreed to pay R11,050 for having 170 (one hundred and seventy) “..infringing copies of sound recordings and/or cinematographic films, the copyright in which is owned by the parties represented directly or indirectly by RISA, and have been found in possession of the infringer....”⁶⁶) as a way of illuminating a landscape that presently is shrouded in mystery for most DJs (professional and amateur).....that being what constitutes professional conduct of a DJ and what are the rules?

At first, word out was that the aforementioned DJ was arrested for not having a Mobile DJ License from SAMPRA. The discussion was ventilated on social media, making its way to Y FM and then the Sunday Sun. No one it seemed had the correct information regarding the DJ and the exact circumstances from a legal point of view.

The Civil Settlement Agreement signed by the DJ is with RISA, not the Collecting Society and bears no relation to the prior claims ref the DJ not having a Mobile License. The Civil Settlement Agreement was in relation to the DJ’s admitted possession of 170 (one hundred and seventy) copies of CD’s the DJ had on his person, regarded as ‘infringing copies’ and that he “.....without appropriate authorization traded with, or otherwise dealt in, such infringing copies”. According to RISA the actual act of DJ’ing constituted “traded with or otherwise dealt with” and such claim was claim was made under the Counterfeit Goods Act 1997 and/or the Copyright Act 1978. (This is another story altogether and will be addressed in a separate opinion that addresses what constitutes an infringing copy). No specific statute was referred to.

What is clear is that this had nothing to do with a so-called “Mobile DJ License”.....or the alleged need for one - there is no mention of such in the Civil Settlement Agreement signed by the DJ, nor is there any mention of the Collecting Society - SAMPRA.

The Collecting Society has been requested to remove the Tariff 13 from its website pending resolution of the issues raised and clarity as to who is responsible.

There is no need for a DJ to seek a Mobile DJ license and the demand for such should be removed.

⁶⁵ Collection Society Regulations – Sec 6 (2)

⁶⁶ Civil Settlement Agreement

Appendix 1: Relevant Sections/excerpts of the Copyright Act 98 of 1978 (Courtesy of the Copyright Act 98 of 1978 as amended)

Definitions

Ch 1 - 1 (1) (iv) (c) **“author”, in relation to— (c) a sound recording, means the person by whom the arrangements for the making of the sound recording were made.**

Ch 1 - 1 (1) (xlix) **“sound recording” means 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;**

Ch 1 - 1 (1) (li) **“work” a work contemplated in section 2**

Works eligible for copyright

Ch 1 - 2 (1) (e) **Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright—(e) sound recordings;**

Copyright by virtue of nationality, domicile or residence, and duration of copyright;

Ch 1 - 3 (1) Copyright shall be conferred by this section on every work, eligible for copyright, of which the author or, in the case of a work of joint authorship, any one of the authors is at the time the work or a substantial part thereof is made, a qualified person, that is— (a) in the case of an individual, a person who is a South African citizen or is domiciled or resident in the Republic; or (b) in the case of a juristic person, a body incorporated under the laws of the Republic;

Ch 1 - 3 (2) (c) The term of copyright conferred by this section shall be, in the case of— (c) sound recordings, fifty years from the end of the year in which the recording is first published;

Copyright by reference to country of origin

Ch 1 - 4 (1) (a) **Copyright shall be conferred by this section on every work which is eligible for copyright and which— (a) being a literary, musical or artistic work or a sound recording, is first published in the Republic.... and in respect of which copyright is not conferred by section 3.**

Copyright in relation to the state and certain international organizations

Ch 1 - 5 (4) Copyright conferred by this section on a cinematograph film, photograph, sound recording, broadcast, programme-carrying signal, published edition or

a computer program shall be subject to the same term of copyright provided for in section 3 for a similar work

Nature of copyright in sound recordings

Ch 1 - 9 (c) (d) (e) **Copyright in a sound recording vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic - (c) broadcasting the sound recording; (d) causing the sound recording to be transmitted in a diffusion service, unless that service transmits a lawful broadcast, including the sound recording, and is operated by the original broadcaster; (e) communicating the sound recording to the public**

Royalties

Ch 1 - 9A. (1) (a) **In the absence of an agreement to the contrary, no person may broadcast, cause the transmission of or play a sound recording as contemplated in section 9(c), (d) or (e) without payment of a royalty to the owner of the relevant copyright.**

(b) **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.**

(c) In the absence of an agreement contemplated in paragraph (b), the user, performer or owner may refer the matter to the Copyright Tribunal referred to in section 29(1) or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

(2) (a) **The owner of the copyright who receives payment of a royalty in terms of this section shall share such royalty with any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act No. 11 of 1967).**

(b) **The performer's share of the royalty shall be determined by an agreement between the performer and the owner of copyright, or between their representative collecting societies.**

(c) In the absence of an agreement contemplated in paragraph (b), the performer or owner may refer the matter to the Copyright Tribunal referred to in section 29(1), or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

(d) Any payment made by the user of the sound recording in terms of this subsection shall be deemed to have discharged any obligation which that user might have to make any payment in respect of his or her use of a corresponding fixation in terms of section 5 of the Performers' Protection Act, 1967 (Act No. 11 of 1967).

(3) In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.

General exceptions in respect of reproduction of works

Ch 17 The provisions of section 12 (1) (b) and (c), (2), (3), (4), (5), (12) and (13) shall *mutatis mutandis* apply with reference to sound recordings

Ch 12. (1) Copyright shall not be infringed by any fair dealing with a literary or musical work— (b) for the purposes of criticism or review of that work or of another work; or (c) for the purpose of reporting current events— (i) in a newspaper, magazine or similar periodical; or(ii) by means of broadcasting or in a cinematograph film:

Ch 12 (2) The copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings

Ch 12 (3) The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work

Ch 12 (4) The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work

Ch 12 (5) (a) The copyright in a literary or musical work shall not be infringed by the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy thereof is intended exclusively

for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work. (b) Any reproduction of a work made under paragraph (a) may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work

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

Ch 12 (13) An authorization to use a literary work as a basis for the making of a cinematograph film or as a contribution of a literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such film

Ownership of copyright

Ch 21 - (1) (a) **Subject to the provisions of this section, 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.**

Ch 21 - (1) (c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4

Assignment and licences in respect of copyright

Ch 22 - (1) **Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law**

Ch 22 - (2) An 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, or to a part only of the term of the copyright, or to a specified country or other geographical area

- Ch 22 - (3) **No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicense, the exclusive sublicenser, as the case may be**
- Ch 22 - (5) An assignment, licence or testamentary disposition may be granted or made in respect of the copyright in a future work, or the copyright in an existing work in which copyright does not subsist but will come into being in the future, and the future copyright in any such work shall be transmissible as movable property
- Ch 22 - (7) **A licence granted in respect of any copyright by the person who, in relation to the matters to which the licence relates, is the owner of the copyright, shall be binding upon every successor in title to his interest in the copyright, except a purchaser in good faith and without notice, actual or constructive, of the licence or a person deriving title from such a purchaser, and any reference in this Act to the doing in relation to any copyright of anything with or without the licence of the owner of the copyright shall be construed accordingly**
- Ch 22 - (8) (8) Where the doing of anything is authorized by the grantee of a licence or a person deriving title from the grantee, and it is within the terms, including any implied terms, of the licence for him to authorize it, it shall for the purpose of this Act be deemed to be done with the licence of the grantor and of every person, if any, upon whom the licence is binding
- Infringement
- Ch 23 – (1) **Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorize.**
- Ch 23 – (3) **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 so used was not aware and had no reasonable grounds for suspecting that the performance would be an infringement of the copyright.**
- Action by owner of copyright for infringement

Ch 24 - (1) **Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright, and in any action for such an infringement all such relief by way of damages, interdict, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringements of other proprietary rights**

Ch 24 - (1C) (1C) Before the owner of copyright institutes proceedings under this section, he or she shall give notice in writing to the exclusive licensee or sub-licensee of the copyright concerned of the intention to do so, and the exclusive licensee or sub-licensee 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

Ch 24 - (2) **Where in an action for infringement of copyright it is proved or admitted that an infringement was committed but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement**

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

Ch 25 - (1) **An exclusive licensee and an exclusive sub-licensee shall have the same rights of action and be entitled to the same remedies as if the licence were an assignment, and those rights and remedies shall be concurrent with the rights and remedies of the owner of the copyright under which the licence and sub-licence were granted.**

Ch 25 - (2) **Before an exclusive licensee or sub-licensee institutes proceedings under subsection (1), he or she shall give notice in writing to the owner of the copyright concerned of the intention to do so, and the owner 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**

Onus of proof in proceedings

Ch 26 - (7) Where in any proceedings brought by virtue of this Chapter with respect to the alleged infringement of copyright in a sound recording it is proved that records embodying that recording or part thereof have been issued to the public and that at the time when those records were so issued the following claims appeared on a label or any other printed matter affixed to such

records or in or on anything in which they were contained, that is to say— (a) that a person named on the label or printed matter is the author of the sound recording; or (b) that the recording was first published in a year and at a place specified on the label or printed matter, that label or printed matter shall be sufficient evidence of the facts so stated, except in so far as the contrary is proved

Ch 26 - (7A) A claim contemplated in paragraph (a) of subsection (7) may be made by means of the symbol “C” in conjunction with the name of the person concerned, and a claim contemplated in paragraph (b) of that subsection may be made by means of the symbol “P” in conjunction with the year and place in question.

Ch 26 - (10) **In any proceedings by virtue of this Chapter with regard to the alleged infringement of the copyright in a cinematograph film, a sound recording or a computer program, it shall be presumed, until the contrary is proved, that any person trading in the selling, letting or distribution of copies of any of the said works, and who was found in possession of a copy of any of such works, sold or let for hire or by way of trade offered or exposed for sale or hire such copy.**

Ch 26 - (11) Where in any proceedings by virtue of this Chapter with regard to the alleged infringement of the copyright in a work it is proved that the person alleged to have done an act which allegedly infringes the relevant copyright did such act without the authority of the exclusive licensee, it shall be presumed, unless the contrary is proved, that the relevant act was done also without the authority of the owner of the copyright concerned

Ch 26 - (12) (a) **In any proceedings by virtue of this Chapter relating to the alleged infringement of the copyright in a work, evidence to prove— (i) the subsistence of the copyright in that work; or (ii) the title of any person in respect of such copyright, whether by way of ownership or licence, may be adduced by way of affidavit, and the mere production of such affidavit in such proceedings shall be prima facie proof of the relevant facts.**

Penalties and proceedings in respect of dealings which infringe copyright

Ch 27 (1) **Any person who at a time when copyright subsists in a work, without the authority of the owner of the copyright—**

(a) makes for sale or hire;

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

(c) by way of trade exhibits in public;

(d) imports into the Republic otherwise than for his private or domestic use;

(e) distributes for purposes of trade; or

(f) distributes for any other purposes to such an extent that the owner of the copyright is prejudicially affected,

articles which he knows to be infringing copies of the work, shall be guilty of an offence

Ch 27 – (3) (3) Any person who causes a literary or musical work to be performed in public knowing that copyright subsists in the work and that performance constitutes an infringement of the copyright, shall be guilty of an offence.

Ch 27 - (6) A person convicted of an offence under this section shall be liable— (a) in the case of a first conviction, to a fine not exceeding five thousand rand or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, for each article to which the offence relates;

(b) in any other case, to a fine not exceeding ten thousand rand or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, for each article to which the offence relates

Provision for restricting importation of copies

Ch 28 - (1) The owner of the copyright in any published work may give notice in writing to the Commissioner for Customs and Excise (in this section referred to as “the Commissioner”)— (a) that he is the owner of the copyright in the work; and (b) that he requests the Commissioner to treat as prohibited goods, during a period specified in the notice, copies of the work to which this section applies: Provided that the period specified in a notice under this subsection shall not extend beyond the end of the period for which the copyright is to subsist: Provided further that the Commissioner shall not be bound to act in terms of any such notice unless the owner of the copyright furnishes him with security in such form and for such amount as he may require to secure the fulfilment of any liability and the payment of any expense which he may incur by reason of the detention by him of any copy of the work to which the notice relates or as a result of anything done by him in relation to a copy so detained

- Ch 28 – (2) **This section shall apply to any copy of the work in question made outside the Republic which if it had been made in the Republic would be an infringing copy of the work**
- Ch 28 – (4) Notwithstanding anything contained in the Customs and Excise Act, 1964 (Act No. 91 of 1964), a person shall not be liable to any penalty under that Act (other than forfeiture of the goods) by reason of the fact that any goods are treated as prohibited goods by virtue of this section.
- Ch 28 – (5) **This section shall mutatis mutandis apply with reference to an exclusive licensee who has the right to import into the Republic any work published elsewhere,**

**Appendix 2: Relevant Sections/excerpts of the Performers Protection Act 11 of 1967
(Courtesy of the Performers Protection Act 11 of 1967 as amended)**

Interpretation of terms

- Sec 1 (1) (b) 'collecting society' means a collecting society established under the Copyright Act, 1978 (Act no. 98 of 1978)
- 'fixation' includes storage of- (a) sounds or images or both sounds and images; or (b) data or signals representing sounds or images or both sounds and images;
- 'performer' means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise performs, literary or artistic works
- 'phonogram' means any exclusively aural fixation of sounds of a performance or of other sounds;
- 'reproduction' means a copy made of a fixation of a performance.

Protection of performers' rights in respect of performances in the Republic

- Sec 3. Performers shall be granted the protection provided for in section 5 of this Act in respect of their performances-
- (a) taking place,
 - (b) broadcast without a fixation, or
 - (c) first fixed,
- in the Republic.
- Sec 4 The protection granted to performers by this Act shall be extended automatically in respect of performances-
- (a) taking place;
 - (b) broadcast without a fixation; or
 - (c) first fixed,
- in a country which is a member of the World Trade Organisation: Provided that the right conferred on performers in section 5(1)(b) shall, in the case of performances in the Republic, but emanating from a country which is a

member of the World Trade Organisation, only be granted to them to the extent that performances emanating from the Republic enjoy corresponding protection in that country, and such performances of foreign origin shall not enjoy any wider protection in the Republic than is enjoyed in that country by performances emanating from the Republic

Restrictions on use of performances

5.(1) Subject to the provisions of this Act, no person shall-

(a) without the consent of the performer-

(i) broadcast or communicate to the public an unfixed performance of such performer, unless the performance used in the broadcast or the public communication is itself already a broadcast performance; or

(ii) make a fixation of the unfixed performance of such performer; or

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

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

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

(cc) if the original fixation was made in accordance with the provisions of section 8, and the reproduction is made for purposes not covered by those provisions; or

(b) by means of a fixation of a performance published for commercial purposes, without payment of a royalty to the performer concerned-

(i) broadcast the performance;

(ii) cause the performance to be transmitted in a diffusion service defined in section 1 of the Copyright Act, 1978 (Act no. 98 of 1978), unless such service transmits a lawful broadcast, including the performance, and is operated by the original broadcaster; or

(iii) cause any communication of the performance to the public.

Sec 5 (2)

In the absence of an agreement to the contrary, a performer's consent to the broadcasting of his or her performance shall be deemed to include his or her consent to the rebroadcasting of his or her performance, the fixation of his or

her performance for broadcasting purposes, and the reproduction for broadcasting purposes of such fixation.

- Sec 5 (3) (a) **The amount of any royalty contemplated in subsection 1(b) shall be determined by an agreement between the performer and the person who broadcasts or transmits, or causes communication of, the performance, as the case may be, or between their representative collecting societies.**
- (b) In the absence of an agreement contemplated in paragraph (a), any party may refer the matter to the Copyright Tribunal established in terms of section 29(1) of the Copyright Act, 1978 (Act no. 98 of 1978), or the parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act no. 42 of 1965).
- Sec (4) (a) A performer who has authorised the fixation of his or her performance shall, in the absence of any agreement to the contrary, be deemed to have granted to the person who arranges for such fixation to be made the exclusive right to receive the royalties contemplated in subsection (1)(b) in respect of any broadcast, transmission or communication of such fixed performance: Provided that the performer is entitled to share in any payment received by the person who arranges for the fixation, in the manner agreed upon between the performer and the person who arranges for such fixation, or between their representative collecting societies.
- (b) In the absence of an agreement contemplated in the proviso to paragraph (a), any party contemplated in that proviso may refer the matter to the Copyright Tribunal established in terms of section 29(1) of the Copyright Act, 1978 (Act no. 98 of 1978), or the parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act no. 42 of 1965)
- Sec (5) Any payment made in terms of subsection (4) shall be deemed to have discharged any obligation by the person who broadcasts or transmits or causes communication of the performance to pay a royalty to the owner of any copyright subsisting in that fixation in terms of section 9A of the Copyright Act, 1978 (Act no. 98 of 1978).
- Sec (6) **In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.**

Term of protection

Sec (7) The prohibition against the use of a performance as provided for in section 5, shall commence upon the day when the performance first took place or, if incorporated in a phonogram, when it was first fixed on such phonogram, and shall continue for a period of 50 years calculated from the end of the calendar year in which the performance took place or was incorporated in a phonogram, as the case may be

Offences and penalties

Sec 9 (1) Any person-

- (a) who knowingly contravenes any of the provisions of section 5 (1); or
- (b) who knowingly sells or lets for hire or distributes for the purposes of trade, or by way of trade exposes or offers for sale or hire, any fixation of a performance or a reproduction of such a fixation made in contravention of section 5; or
- (c) who makes, or has in his possession, a plate or similar contrivance for the purpose of making fixations of a performance or reproductions of such fixations in contravention of section 5, shall be guilty of an offence and liable on conviction-
 - (i) in the case of a contravention referred to in paragraph (a), to a fine or to imprisonment for a period not exceeding three months, and the court convicting him or her may in addition, on the application of the performer whose rights have been infringed, and without proof of any damages, order him or her to pay to the performer as damages such amount, not exceeding the amount determined by the Minister from time to time by notice in the Gazette, as may in the circumstances of the case appear to it to be reasonable
 - (ii) in the case of a contravention of paragraph (b), to a fine not exceeding the amount determined by the Minister, in consultation with the Minister of Justice, from time to time by notice in the Gazette in respect of each fixation or reproduction; and
 - (iii) in the case of a contravention of paragraph (c), to a fine or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment

Damages or interdict for infringement of performers' rights

Sec 10

Any person who infringes the rights of any performer may be sued in any court of law by such performer for-

(a) an amount not exceeding the amount determined by the Minister from time to time by notice in the Gazette, and such court may, without proof of any damages and in addition to the costs of the action, award as damages such amount, not exceeding the said amount, as may in the circumstances of the case appear to it to be reasonable; or

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

Power of the court in respect of fixations, reproductions and plates made in contravention of this Act

Sec 11

The court before which any legal proceedings are taken under this Act may order that all fixations, reproductions of fixations or plates (including contrivances similar to plates) in the possession of the accused or the defendant, which appear to the court to have been made in contravention of this Act, be destroyed or otherwise dealt with as the court may in its discretion determine

Consent on behalf of performers and criminal liability of unauthorised agent

Sec 12.(1)

Where in any legal proceedings under this Act it is proved-

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

(b) that the person who made the fixation, the reproduction of a fixation, the broadcast or the public communication had no reasonable grounds for believing that the person giving the consent was not so authorised, the provisions of this Act shall apply as if it had been proved that the performers had themselves consented to the making of the fixation, the reproduction of the fixation or the broadcast or the public communication, as the case may be.

Sec 12.(2)

Where-

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

(b) if legal proceedings were brought against the person to whom the consent was given, the consent would by virtue of subsection (1) afford a defence to those legal proceedings, the person who gave the consent shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand, or to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment

Contracts in respect of use of performances

Sec 13

Notwithstanding the provisions of this Act any performer may enter into any contract with any user or prospective user of his performance in respect of the use of his performance, but such contract shall be enforceable only in the Republic

Appendix 3: Relevant Sections/excerpts of the Collecting Society Regulations 2006 (Courtesy of the Collecting Society Regulations 2006 as amended)

Scope

Sec 2. The Collecting Society Regulations set out the conditions under which a collecting society may be established and may operate under the Copyright Act, 1978 (Act 98 of as provided for in section 39 (cA) read together with section 9A of the Copyright Act, 1978, and with section 5 (3) of the Performers' Protection Act, 1967 (Act of 1967).

CHAPTER 1

Supervision

Accreditation

- Sec 3.(1) Any person or licensing body intending to act as a representative collecting society and
- (a) administering on behalf of 50 or more copyright owners, or on behalf of an organisation representing 50 or more copyright owners, the right to receive payment of a royalty in terms of section 9A of the Copyright Act, 1978 requires an accreditation from the Registrar in order to be authorised to function as a collecting society established under the Copyright Act, 1978
- Sec 3. (3) The Registrar shall not grant accreditation to an applicant unless he or she is satisfied that
- (c) the applicant affords to copyright owners or their licensees and/or to performers, or to organisations representing copyright owners or licensees and/or performers 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 royalties to be received.**
- Sec 3. (5) An accreditation shall be granted for a term of five years and shall subsequently be renewable for further periods of five years. Six months prior to the expiry of a five-year term, a collecting society established under the Copyright Act, 1978, may apply for a renewal. The provisions of subregulations (3) and (4) shall apply mutatis mutandis to such a renewal application.

CHAPTER 2

Obligations of societies

Membership structure

- Sec 5(1) A representative collecting society shall be open to all persons either directly or through the membership of a collective organisation representing a particular group of rightholders having a similar interest;
- Sec 5 (3) Each member of a collecting society must have at least one vote
- Sec 5 (4) Any member shall be entitled, to obtain:
- (a) annual statements of accounts and the of persons that constitute the highest executive organ and/or senior management of the collecting society;
 - (b) reports of the highest executive organ and of the auditors, the reports to be submitted to the general meeting;
 - (c) where appropriate, the text and motivation of resolutions submitted to the general meeting of members, and information concerning candidates for the highest executive organ and senior management; and
 - (d) the overall amount, certified by the auditors, of the remuneration paid to any director or other employee of the collecting society.
- Sec 5 (5) Nothing in these Regulations shall reduce, detract or affect in any way the rights or remedies that members of the collecting society are entitled to, or any relief available to them, under their membership agreement, the common law or any applicable legislation governing the legal entity accredited as a collecting society

Administration of rights

- Sec 6(1) A collecting society shall administer the rights of its members and the proceeds of the exercise of such rights in accordance with the Copyright Act, 1978, the Performers' Protection Act, 1967, and these Regulations.
- Sec 6 (2) The aim of a collecting society shall be to administer public playing rights effectively and efficiently, to maximise the economic exploitation of the rights entrusted by the rightholders for their direct benefit and not to generate or accumulate unneeded profits in the hands of the collecting society itself, and to distribute the proceeds of such exploitation equitably amongst its members. A collecting society shall distribute at least 80% amongst its members, and not more than 20% shall be retained by the collecting society after distribution to defray its costs or apply otherwise.
- Sec 6 (3) Whenever desirable or expedient, a collecting society shall enter into reciprocal agreements with foreign collecting societies or rightholders, and shall administer the rights entrusted to it and shall distribute at least of the money collected to its members.

Distribution

Sec 8.(1) Subject to subregulation 6 (2) a collecting society shall distribute at least once every year amounts collected by it according to a distribution plan and after deducting such amounts as are necessary to cover the costs incurred in the administration of the collecting society. The first such distribution shall be made not later than 18 months after the initial accreditation of the collecting society and subsequently not later than any anniversary of the initial accreditation and any renewal thereof;