

Clarifying the history, roles, responsibilities and regulatory environments concerning collection societies in South Africa

Commentary motivated by “Report of the Meeting of the Deputy Minister Tobias-Pokolo with the music sector stakeholders 2010” with specific reference to Collecting Societies and to the need for intervention”.

Authored by: Graeme Gilfillan
Date: 1st July, 2010.
At: Johannesburg, South Africa

Index

1. Summary	3
2. Collecting Societies and South African Law	5
3. Common Misconceptions about collecting societies and associations in South Africa.	7
4. Collecting societies and associations in South Africa in detail	10
5. Collecting Societies – Situation Analysis	15
6. Commentary	20
7. Role of the Registrar of Copyright	22
8. Conclusion – the urgent need for intervention: why and when?	23

1. Summary

Collecting Societies have been operating in South Africa for almost fifty years and have for the most part done so in a private, unregulated and secret environment outside of the scrutiny of government or any other form of national oversight, and have done so as *de facto* monopolies. It's thus long overdue that a proactive interventionist hands on approach to copyright ownership and administration in South Africa be driven at a ministerial level.

It would thus be quite correct for the Registrar of Copyright, for instance to urgently address some of the vexing issues that remain a plague from the past, issues that perpetuate grinding poverty in the music industry such as the loss of land and the income that would accrue from the ownership of such land. It would perhaps be a gross error to presume that the only land 'stolen' in South Africa in the past is physical land, and it might equally be a gross error to presume that there was no black intellectual land to be 'stolen', as in the form of copyrights, designs, trademarks and patents.

An authors right is a property right, no different in the main than a physical property right. Of particular import during the struggle to liberate South Africa, and especially since, is the issue of redistribution of physical property to its rightful ownership.

It is axiomatic, for instance, that the lyrics and music to Ipi Ntombi are land...land of the mind, intellectual land, intellectual property in the form of copyright, which to this day generate 'rental' income to its current owners every time such 'land' is performed or reproduced. One could imagine how family of the work's original authors feel, in extreme poverty (as one author...Ms Margaret Mcingana died in), when every time the land of "Ipi Ntombi" works are harvested the only ones to eat are the white heirs of Bertha Egnos, the white woman who claimed authorship (though spoke no word of Zulu) of Ipi Ntombi works, and for whom the **perpetuated unchanged copyright system of yesteryear in South Africa** continues to protect. The family of the original authors remain in poverty and tragedy continues to rule in 2010 in post apartheid South Africa copyright – this is the tragic truth.

The deepest tragic truth to the cultural community that lived through apartheid and still is alive today in South Africa is the one that sees those who stole and misappropriated their land during the past continue to benefit from the income generated by that theft. The tragedy cuts especially deep when the Registrar of Copyright fails to give the same treatment accorded to recovering physical land by the Government, the same shrift, to land of the mind. In law they are the same, so should be no different in politics.

There is thus no logic, in the context of re-distribution of land of the mind in South Africa, to the intended amendments as stated in the Intellectual Property Laws Amendment Bill in amendment of Section 3 (1A) (a) (i) of the Copyright Act 98 1978 as amended, the insertion of 11C (2) (a) and the amendment of Section 23 (5) (b) of the Copyright Act 98 1978.

The purpose of this paper (which is by no means exhaustive, and which hopefully will generate debate and discussion, and be the subject of correction and disagreement as the case may arise) is to conscientize a reader to the historical landscape and current context of collecting societies in South Africa, their respective roles and responsibilities, to clarify with a finer degree of focus the current situation concerning such collecting societies in South Africa and certainly as far as the government reader is concerned, to jolt into urgent action.

As South Africa currently considers significant amendment to its intellectual property legislation, it is critical that there is no confusion by government in distinguishing between existing applicable collecting society regulations¹ (and those to whom such applies) and those collecting societies where such regulation either does not apply or does not exist². It is to the latter that most focus should be given as amending the databases to reflect the true ownership of EXISTING copyrights will have a significant impact on the nation's foreign exchange and tax receipts, never mind the bank accounts of authors, publishers, estates and the like.

¹ Those dealing with Section 9 rights - Copyright Act 98 of 1978 as amended read with the Performers Protection Act 1967, as amended

² Those dealing with Section 6 and Section 8 rights - Copyright Act 98 of 1978 as amended

The collecting societies do not just deal with the present and the future, some hold most of the ‘title deed’ information of most all the musical and literary work copyrights created in South Africa’s recorded past.

As there is a paucity of publicly available material addressing collecting societies in South Africa, this paper is meant to form part of the body of work that will evolve on the subject, and meant to give the reader a reasonable and accurate understanding of collecting societies in South Africa, within the current context of an IP environment that is both under scrutiny, as well as desperate for better contextual understanding, especially from the State.

2. Collection Societies and South African Law

In respect of any mention of any kind, or reference to the phrase ‘collecting societies’ in the Copyright Act 98 of 1978 as amended, the following are current

- Definitions “means a collecting society established under this Act; Definition of ‘collecting society’ inserted by s.1 (*h*) of Act no. 9 of 2002
- Chapter 1 Section 9A 1(a) and Chapter 1 Section 9A 1(b)
- Regulations Chapter 5 Section 39 (cA)

None of the above actually provides for a definition of the phrase “Collecting Society”, and nor does it appear that any collecting society was ever “established under this Act”.

Three collecting societies were formed in South Africa prior to the current copyright legislation:

- SAMRO³ 1961
- SARRAL⁴ 1966
- DALRO⁵ 1967

Two trade associations were also formed in South Africa prior to the current copyright legislation:

³ Southern African Music Rights Organization Limited

⁴ South African Recording Rights Association Limited

⁵ Dramatic Artistic and Literary Rights Organization (PTY) Ltd

- NORM⁶ 1970
- RISA⁷ formerly ASAMI⁸

In respect of the mention of ‘collecting societies’ in the Performers Protection Act 11 of 1967 as amended, the following are current:

- Definitions “means a collecting society established under this Act; Definition of ‘collecting society’ inserted by s.1 (a) of Act no. 8 of 2002
- Section 5 (3) (a) and Section 5 (4) (a)

The Collection Society Regulations as of 1 June 2006 “...set out the conditions under which a collecting society may be established and may operate under the Copyright Act 98 of 1978 as provided for in Section 39 (cA) read together with section 9A of the Copyright Act 98 of 1978 and with section 5(3) of the Performers Protection Act 1967 (Act 11 of 1967)”⁹.

Whilst these Collection Society Regulations detail *inter alia* the accreditation procedure and the powers and functions of the Registrar, the Regulations have neither impact nor authority on Section 6 and Section 8 rights collecting societies.

Three (3) societies have been accredited under these Regulations:

- RISA in respect of SAMPRA¹⁰
- SAMRO in respect of POSA¹¹
- SARRAL¹²

A review of the historical and current legislation concerning collection societies in South Africa confirms the following:-

- a. There is no past nor current legislation or regulation concerning ‘for profit’ collecting societies, those specifically concerned with Section 6 and Section 8 rights¹³;

⁶ National Organization of Reproductive Rights in Music in Southern Africa Ltd

⁷ Recording Industry of South Africa

⁸ Association of South African Music Industries

⁹ Collecting Society Regulations published under GN 517 in GG 28894 of 1 June 2006

¹⁰ South African Music Performance Rights Association

¹¹ Performers of South Africa

¹² South African Recording Rights Association Limited was the first society to be accredited, in 2007, when it was accredited for both sound recording owners and also performers – the only society to receive accreditation for both. Due to reasons beyond SARRAL’S control it has been unable to implement it’s plans.

¹³ Copyright Act 98 of 1978 as amended

- b. Current legislation concerns only non profit societies accredited under the Collecting Society Regulations 2006, those specifically concerned with Section 9 (9A) rights;
- c. In respect of those societies that current South African Copyright Law **does not regulate**, South Africa appears not to have heeded the globally recognized general legal position on collecting societies as follows:

“The exercise of rights by collecting societies has long been the subject of scrutiny by legislatures, and in a number of countries systems of court or tribunal determinations are established in order to protect applicants from abusive exercise of rights”¹⁴

- d. For profit societies in South Africa were not formed under any existing or previous Copyright regulation.
 - e. There are very few case histories, or local lines of authority or appropriate legal precedent in South African law concerning or involving collecting societies as either defendant or plaintiff.
 - f. There is no understanding of, or reflection in any legislation, that recognizes the *de facto* monopolies that for profit societies have always been, and provisions for any form of oversight or control of such monopolies.
3. **Common misconceptions about collecting societies and associations in South Africa** (*especially those dealing with Section 6 and Section 8¹⁵ rights, whose activities are not currently regulated*)

The following misconceptions should be considered in respect of **for profit societies**¹⁶, those dealing with Section 6 rights:

- That the new Collecting Society Regulations¹⁷ apply to such societies. The facts are that such do not;

¹⁴ World Copyright Law”, J A Sterling 2003, pg 105

¹⁵ Copyright Act 98 of 1978 Ch 1 Sec 8 – Nature of Copyright in cinematographic films

¹⁶ SAMRO, DALRO and SARRAL, those Societies concerned with Copyright Act 98 of 1978 Ch 1 Sec 6 rights i.e. the nature of copyright in musical and literary works

¹⁷ Collection Society Regulations June 2006

- That such societies are non-profit organizations – in strictly legal terms they are not; in SAMRO’S case there is an attempt to obfuscate this “**for profit truth**” by advising on SAMRO letterhead “non-profit making”;
- That such societies are contemporary and up with the times – nothing could be further from the truth and inspections of the memoranda, articles and rules advise organizations steeped in rules made in the 1960’s;
- That the staff of such societies have appropriate qualifications, training, skills and knowledge development in respect of copyright, when such societies don’t as not a single society has qualified copyright expertise on staff;
- That all members are equal and/or treated equal – they are not;¹⁸
- That being a member of the international confederations CISAC and BIEM somehow implies that ‘high standards’ are deployed. A reading of the past three judgements by the European Court of Justice against not just CISAC and BIEM, but also most of the societies in the EU advises otherwise.¹⁹

The following misconceptions should be considered in respect of **associations**²⁰, those that are concerned with Section 6 and Section 8 rights:

- That such associations represent a trade’s interests – such associations don’t as they represent the interest of certain members and themselves typically;
- That such associations are licensed to collect and distribute monies and manage interest, like a bank – such associations are not licensed;

¹⁸ In SAMRO’S case, notwithstanding the three levels of membership (candidate, associate and full) which discriminate in respect of earnings and retirements annuity benefits, and have always been at the sole discretion of the Board; it is clear that the treatment afforded to a few publisher members is vastly different that that meted out to most members; Further only full members can be Board members and only full members can vote members on the Board; SAMRO refuses to disclose the racial composition of its membership, especially the number of full members who are black

¹⁹ http://ec.europa.eu/competition/antitrust/cases/index/by_nr_77.html

²⁰ RAV (formerly RISA) and NORM

- That such association's Boards are structured for the interest of the association's members when they are not;²¹ The Boards are structured on the basis that a bigger (estimated) market share allows for more seats on the Board (and more votes).

Common Misconceptions concerning **all collection societies** dealing with Section 6 and Section 8 rights (this **excludes** those established under the new Collecting Society Regulations 2006;

- Collecting societies will protect rights of all author and publisher members when such won't, only ever protecting the rights and interests of certain members;
- That income distribution is fair and equitable when it is decidedly not;²²
- That they support the Government initiatives to make the industry more transparent and efficient and accountable, and are aligned with the National Agenda – with the exception of SARRAL, this is not true and could not be further from the truth for any other society or association;
- That such are transformed – with the exception of SARRAL, they are not. Appearances are often deceptive until one looks at the Board composition of each society and their voting rights (it being accepted that executive directors have no voting right);

The most critical misconceptions that should be addressed:

- That a society that takes assignment (ownership) of an author's rights is acting in the author's interests. **AN ASSIGNMENT IS A LOSS OF OWNERSHIP** and there is nothing good about this, or helpful to the interests of authors or the country;
- That Societies have limitations as to how they spend members monies - such societies do not; the memoranda and articles of association are geared for profit, and allow for

²¹ Such associations are set up to manage the interest of the 4 or 5 biggest companies. Both NORM and RISA still practice a system where market share gets one more board seats, and this has ensured control by 4 companies since inception of both organizations regardless of the number of members.

²² 98.51% of SAMRO'S membership earned 22.4% of SAMRO'S distributable income, with the remaining 1.49% of members (90 members out of 6,000 +) receiving the balance 75% plus income (aprox R198 million)²². In the same 2009 year SAMRO'S Board and Management spent R90 million on operating costs, almost twice what was paid out to 98.51% of the membership

the widest possible Board discretion. The Boards of such Societies have the right to invest and spend members as they feel fit;

4. **Collecting societies and associations in South Africa in detail**

As far as type and structure, there are three forms of collecting society operating in South Africa, of which only one type, the “Non-profit Organization” type, is regulated by the current Collection Society Regulations 2006:

- For Profit
- Associations
- Non-profit

The for profit collecting societies are those concerned with Section 6 rights²³, and very specifically the public performance and mechanical rights and are old (having been formed in the 1960’s), having never been regulated by South Africa Copyright Law, and having being born literally at the dawn of the apartheid state. Such include:

SAMRO

Registration #:	1961/002506/09
Industry Code:	Code 9 – Community, social and personal services
Members:	authors, composers, arrangers and publishers of musical and literary works;
Rights:	Section 6. Performance and mechanical rights in musical and literary works;
Licensees:	users of public performance, broadcast, transmission through diffusion services rights (“collectively ‘public performance rights) and mechanical rights

²³ Copyright Act 98 of 1978 Ch 1 Sec 6 – Nature of Copyright in musical and literary works

Formed by: PRS²⁴ and Gideon Roos²⁵;
 Date formed: 1961 (as SAFCA²⁶) and as SAMRO (1966);
 Collects from users of its rights including broadcasters, facilities and other users;
 Rights relationship: takes assignment from members²⁷;
 # of members: 6,600 +/-
 Affiliations: CISAC and BIEM
 Annual Turnover: R350 million

DALRO²⁸

Registration #: 1967/005018/07
 Industry Code: Private Households, extritorial organizations, representatives of foreign governments and other activities not adequately defined
 Members authors and publishers
 Rights: Section 6. Reprographic reproduction rights (photocopying from published editions), public performance rights (including stage rights for book musicals and dramas) and reproduction rights (granted for both publishing and copying) in works of visual art²⁹
 Licensees: user of literary works (schools, universities, theatres etc)
 Formed by: SAMRO
 Date formed: 1967
 Collects from: users of its rights including universities, theatres etc
 Rights relationship: on the basis of assignment from members
 # of members: not disclosed
 Affiliations: IFRRO
 Annual turnover: R26 million

SARRAL

Registration #: 1963/001301/09
 Industry Code: Private Households, extritorial organizations, representatives of foreign governments and other activities not adequately defined

²⁴ Performing Rights Society (UK)

²⁵ SAMRO founder and Chairman from 1961 to 1998

²⁶ South African Federation of Composers and Authors

²⁷ SAMRO Memorandum of Association clause 2bis "Notwithstanding anything to the contrary herein contained, the Company shall be deemed to be acting on behalf of Members, and receiving income from the exercise and enforcement of various rights on behalf of and for the benefit of members"

²⁸ Dramatic Artistic Literary Rights Organization

²⁹ www.dalro.co.za

Members	authors and publishers
Members:	authors, composers, arrangers and publishers of musical and literary works, performers on sound recordings and owners of sound recordings;
Rights:	Section 6. Mechanical and performance rights in musical and literary works.
Licensees:	users of mechanical rights and public performance, broadcast, transmission through diffusion services rights (“collectively ‘public performance rights)”))
Formed by:	MCPS ³⁰ , SACEM ³¹ , GEMA ³² and George Hardy ³³ ;
Date formed:	1966;
Collects from	users of its rights including broadcasters, facilities and other users;
Rights relationship:	on the basis of license from members;
# of members:	4,500 +/-
Affiliations:	CISAC and BIEM
Annual Turnover:	R9 million

The associations are those concerned with Section 8 rights and Section 6 rights - they are relatively ‘old’. They include:

RISA (now RAV)

RISA Registration #:	1995/005158/08
RISA Industry Code:	Code 9 – Community, social and personal services
RAV Registration #:	2000/021434/08
RAV Industry Code:	Code 9 – Community, social and personal services
Members:	owners (licensors) and licensees of cinematographic films (in the form of video producer rights in music videos);
Rights:	Section 8. Until 2009, dealt with public performance rights in cinematographic films (music videos), and thereafter has reverted to its primary role as an association of sound recording owners and licensees, representing their members interests variously, running

³⁰ Mechanical Copyright Protection Society - UK

³¹ Société des auteurs, compositeurs et éditeurs de musique (French Society)

³² Gesellschaft für musikalische Aufführungs (German Society)

³³ Managing and Financial Director at SARRAL from 1970 to 2002

	the annual SAMA Awards, issuing ISRC Codes as well overseeing an Anti-Piracy Unit
Licensees:	users of music videos - primarily broadcasters, shebeens, bars and clubs
Formed by:	ASAMI;
Date formed:	RISA 1995, and RAV 2000;
Collects from	users of its rights including broadcasters, facilities and other users;
Rights relationship:	takes license from members;
# of members:	1300 +/-
Affiliations:	IFPI ³⁴
Annual Turnover:	unknown

NORM³⁵

Registration #:	1971/000142/09
Industry Code:	Private Households, extritorial organizations, representatives of foreign governments and other activities not adequately defined
Members	authors and publishers
Members ³⁶ :	publishers of musical and literary works;
Rights:	Section 6. Mechanical rights in literary and musical works;
Licensees:	users of mechanical rights – primarily record companies and broadcasters;
Formed by:	5 multinational publishers including Warner (Gallo), EMI, Sony, Universal and BMG (names of today);
Date formed:	1971;
Collects from	users of its rights including record companies, broadcasters, advertising and film companies;
Rights relationship:	takes license from members
# of members:	120 +/-
Affiliations:	none
Annual Turnover:	R23 million (2009)

³⁴ International Federation of Phonographic Industries

³⁵ National Organization of Reproductive Rights in Music in Southern Africa Ltd - is an association of publishers which has operated as a collection society since the 1970's. Its Board Structure has been and still is dominated and controlled by 5 major multi-national publishers/affiliates in SA.

³⁶ Same board structure as RISA - all the major publishers are owned by the major record companies

The non-profit societies are the only ones who are concerned with the new regulatory environment³⁷ and are all formed since 2008, subsequent to their progenitors being accredited by the Registrar of Copyright. Such societies are centred on Section 9 rights³⁸ regulations only, and no other rights. Of the three, only one (SARRAL) was accredited for both sound recording owners and performers. Such include:

SAMPRA³⁹:

Members:	record Companies/Labels – owners of sound recordings
Rights:	public performance rights in sound recordings
Licensees:	Users of sound recordings – broadcasters & general
Formed by:	RISA
Date formed:	2008
# of members:	not disclosed by most likely most of the RISA membership of +/- 1,300 labels
Affiliations:	none
Annual Turnover:	unknown

POSA⁴⁰:

Members:	performers on sound recordings;
Rights:	rights of performers on sound recordings
Collects from:	SAMPRA and SARRAL ⁴¹
Formed by:	SAMRO
Date formed:	2009
# of members:	Not disclosed
Affiliations:	none
Annual Turnover:	Zero

** It should be noted that as of the date of this paper, there were no registration records of “POSA” at CIPRO – i.e. the organization is not yet formed, or it is in the process of being formed. POSA uses SAMRO’S website and there is indication that

³⁷ Collection Society Regulations as of 1 June 2006

³⁸ Copyright Act 98 of 1978 Ch 1 Sec 9 – Nature of Copyright in sound recordings

³⁹ South African Music Performance Rights Association

⁴⁰ Performers of South Africa

⁴¹ SARRAL has made an arrangement for SAMPRA to collect on SARRAL’S behalf for SARRAL’S sound recording owner members

SARRAL:

Members:	sound recording owners and performers on sound recordings;
Rights:	rights of performers on sound recordings and rights of owners of sound recordings
Collects from:	SAMPRA
Formed by:	SARRAL
Date formed:	2007
# of members:	4500 +/-
Affiliations:	none
Annual Turnover:	Zero

5. Collecting Societies – Situation Analysis

It is important to consider each society's and each association's current situation the way it is.

SAMRO

With some 180 employees, 6,600 members, 50 + affiliates and approximately R350 million in annual group income and 49 years in the business in South Africa, SAMRO is by far and above the largest collection society in Africa.

SAMRO is a *de facto* monopoly, whose Board is white controlled.

SAMRO acquires member's rights through assignment, licenses such rights to users in South and abroad and is a key African society member at CISAC.

SAMRO was founded by the PRS (UK) and a former leading employee of Verwoed's SABC.. Gideon Roos in 1961.

SAMRO started out as a public performance rights organization, though added mechanical and film synchronization rights in the 1960's. Whilst acquiring mechanical rights from members since the 1960's wherever possible, SAMRO never exercised these rights until 2006, when it became an associate member of BIEM.

In 2009 SAMRO was accredited for performer's rights in sound recordings (one half of the so-called 'needle time' coin)

SAMRO has been a monopoly in respect of performance rights since inception, and since 2006 has made a concerted attempt to extend this monopoly to mechanical rights and performers rights in sound recordings over the past 4 years.

In 1967 SAMRO entered into a contract with SARRAL, wherein SAMRO agreed not enter into mechanical rights and SARRAL agreed not to enter into performance rights. Such agreement held until SARRAL'S copy of the agreement disappeared in 2002.

For the past 8 years SAMRO has been in conflict with SARRAL, which has included failed mediation attempts by CISAC and BIEM, complaints at the Auditor General and the Competition Commission and court conflict through proxies, and since 2006 effectively competes with SARRAL.

The absurd circumstance is that whilst SAMRO collects R350 million per annum and fiercely protects its monopoly right to do so, studies have shown that public performance licensing penetration and compliance in South Africa is less than 10%, and that the real market size is in excess of R3 billion per annum.

SAMRO currently collects 100% of the performance rights income in South Africa, and at least 30% of the mechanical rights income.

SAMRO turnover is over approximately at least 35 times that of SARRAL and at least 18 times that of NORM, and SAMRO currently uses approximately R91 million per annum of members money to operate.

DALRO

DALRO represents the reprographic rights of members (authors and publishers). It has separate CISAC membership, though operates inside SAMRO as a 'division' using SAMRO'S infrastructure since DALRO'S inception. It is relatively small with less than 15 employees and its turnover is less than 10% of SAMRO'S income.

Similar to the market for public performance rights, studies have shown that the reprographic rights licensing penetration and compliance in South Africa is less than 10%, and that the real market size is in excess of R1 billion per annum.

DALRO collects 100% of the income paid by users in South Africa and is a *de facto* monopoly.

SARRAL

SARRAL is a small mechanical rights organization, which after a long history with mechanical rights, decided to branch into public performance rights in 2009. In 2007 SARRAL was also accredited to represent the interests of performers (like SAMRO) and sound recording owners (like SAMPRA).

SARRAL has 12 employees and has an annual turnover of R8 million.

Since 2003, SARRAL'S Board and management has been black controlled, and today SARRAL remains the only collecting society that can in truth make this claim.

Starting 2003, experienced one legal attack after another, including an attempt to liquidate it on "just and equitable grounds". The attempt to liquidate came from a former Board member and Audit Committee Chair who had received R10.3 million from SARRAL in 6 years, an unfathomable amount of income for mechanicals. The individual had been asked to repay R4.7 million back to SARRAL, and after demands instead for more monies, the individual embarked on litigation to SARRAL. So began conflict which remains to this day.

Starting late 2005, two new SARRAL Board members and the new General Manager instituted a forensic investigation by KPMG Forensics, and stopped a number of past practices, including point discrimination in favour of "commercial music" as well the holding of reserves, and set the organization on a pure non-profit basis.

Despite its struggles and difficulties SARRAL membership include the bulk of the largest selling SA composers, publishers, performers and labels today.

In November 2009, an order to liquidate SARRAL was granted in the South Gauteng High Court, and in February 2010 SARRAL was granted leave to appeal at the Supreme Court. The winding up order was also inexplicably not stayed, and the Liquidators has the contradictory task of trying to wind up an organization that has been granted leave to Appeal in the Supreme Court of Appeal.

SARRAL currently collects 30% of the mechanical rights income in South Africa, and contrary to some opinion, continues to operate.

Since being accredited by the Registrar of Copyright for both performers and sound recording owners, SARRAL has signed up 120+ sound recording owner members, and in excess of 800 performer members. SARRAL had in anticipation of the legislation, started signing members in 2002.

SARRAL has not collected any income in respect of its sound recording owner members, as such income is tied up in the dispute between SAMPRA and the Registrar of Copyright.

In 1967 SARRAL entered into a contract with SAMRO, wherein SAMRO agreed not enter into mechanical rights and SARRAL agreed not to enter into performance rights. Such agreement held until SARRAL'S copy of the agreement disappeared in 2002.

SARRALS current turnover is 30% of what it was in 2003.

SARRAL is currently under the management of Reuben Miller Group and Westrust, pending leave to appeal.

RISA

Formerly ASAMI, RISA represents some 1300 record labels, and was until 2009, the de facto collection society for VPL (video producer licenses) – rights in cinematographic films which are applicable to music videos broadcast by broadcasters. RISA licensed the broadcasters and collected and distributed the income. Since 2009 RAV has taken over this function.

RISA currently:

- is responsible for issuing the ISRC for each recording released in SA
- collects RISA levies to fund and run an Anti-piracy unit
- runs the SAMA'S each year
- lobbies on regulatory issues and represents members in court actions
- represents IFPI in South Africa

RISA'S Board is a controlled Board, where members with the biggest market share have more votes and exercise perpetual control.

RISA (historically) and RAV presently are effective monopolies in South Africa.

It should be noted that RAV's formation is in 2000, a clear indication that the industry of sound recording owners has long awaited regulation, licensing and distribution of incomes from the public performance of sound recordings. South Africa became the the 52nd country to implement the public performance of sound recordings in its legislation.

NORM

NORM is a for profit association of publishers structured as company limited by guarantee, and has some 100 members. Until 2001 it was represented by SARRAL before taking on licensing, collection and distribution of its member's mechanical rights income directly. From 1971 to 1992, NORM and SARRAL shared the same Chairman, George Hardy

NORM has been the principal representative of the interests of the multi-national publishers and their local affiliates and subsidiaries. Most of its members, with few notable exceptions, are owned by their respective record companies. The net result of this is that unlike other countries, the mechanical license rate paid by record companies has not changed in over 30 years in South Africa. This is a classical circumstance that occurs when the licensee owns and/or controls the licensor.

Like RISA, the Board is structured so that those with larger market share have more members on the Board (and more votes). This structure has endured perpetual control in the hands of a few (its founders).

NORM'S Board is overwhelmingly white and represents the bulk of multi-national publishers and their catalogues in South Africa.

SAMPRA

SAMPRA is the main accredited non-profit society for sound recording owners and has absorbed RISA'S membership in this regard. SAMPRA also acts for SARRAL sound recording owners. SAMPRA thus represents the bulk of sound recordings being publicly performed on

SAMPRA employed the previous Financial Manager of SAMRO, Alan Johnson, in 2008 to lead their licensing and collection efforts. SAMPRA also hired a good portion of SAMRO'S sales team.

SAMPRA has been vigorously collecting for the since 2008, and as September 2010 is believed to have collected in excess of R50 million.

SAMPRA has been unable to reach agreement with the NAB, and its members led chiefly by the SABC. A large portion of public performance of sound recording income due to SAMPRA members and affiliates is collectable from radio broadcasters, and to date few if any have paid, costing SAMPRA members and performers millions of rands.

SAMPRA has not been able to distribute to date due to a dispute with the Registrar of Copyright.

POSA

Since being formed in early 2009, POSA has been actively signing up performer members on the basis of assignment of the performer's right.

POSA operates out of SAMRO, and its expenses are being paid by SAMRO, using performance rights in musical works income, due to authors and publishers, to subsidize the costs.

POSA's capacity to collect income is dependent on the outcome of the dispute between SAMPRA and the Registrar of Copyright, as POSA does not represent sound recording owners. The bulk of POSA'S members are those on new sound recordings, as opposed to performers on recordings done in the past, when such were done under record contracts with labels.

6. Commentary

- there is currently a vicious 'play for keeps' copyright industry war concerning the ownership and control of various kinds of copyrights in South Africa;
- The protagonists are allegedly SAMRO on one hand and allegedly SAMPRA (RISA) on the other hand, both for outright and dominant control of their respective sectors

- The lone defendant...the nuisance.....and much maligned..... is black owned and run SARRAL, for both;
- At stake for SAMRO is allegedly the monopolistic private unregulated control of public performance and mechanical rights in musical and literary work income in South Africa (and further afield in Africa) on the one hand;
- At stake for SAMPRO is allegedly the monopolistic private regulated control of sound recording ownership rights in South Africa on the one the other hand;
- Government has to date been an intentional bystander, inexplicably refusing to implement the national agenda in the sector in respect of equities, refusing to intervene and despite organizational conflict and carnage before it's eyes has adopted a 'neutral' wait and see; What interventions that have occurred to date cannot be said to be anything of assistance to the industry.
- The 'playing field' is far from level in any terms in what may be termed a classic 'comrade v capital' fight;
- To a large extent the Registrar of Copyright's limited sector experience, as well as the inexperience of its dedicated staff has been ruthlessly exploited by industry vested interests, to obfuscate the important issues of national and critical importance, and to play down the 'war' to the extent that such does not exist.
- There is substantial need for education and awareness, and the root of the need for such can be found in:
 - The abject refusal of government and the industry to move or motivate music industry contract into the vernacular, and the utter and clear disinterest in the need to move away from an 'English' only approach. As copyright agreements in English in the sector are almost incomprehensible to English speakers, it is evident that the challenge is far greater for those for whom English is a second language;
 - The exceptionally incorrect view that the music industry is in Johannesburg only, and is an English only industry;

- The myopic and narrow view that the industry is made up of musicians only, and that only musicians can talk for, and/or are affected by, and/or representative of, the music industry;
 - The refusal of government to address the past, and redress circumstances wherein not speaking English was an ok reason to lose one's heritage and legacy; No charter.
 - The refusal of government to recognize the land plunder of the past concerned not only black physical property, but also black intellectual property and the utter lack of programs, interest or attention in respect of redistributing historical black land of the mind.
- Governments efforts to date to regulate have been intentionally thwarted - simply Government is persuaded to focus, and give great import and time, on rights not yet in place or distributed as in needletime rights (Section 9), and utterly dissuaded from focusing or giving any attention to dealing with the 40 years of rights history, which today is an existing R500 million per annum unregulated sector concerning Section 6 rights;
 - The in your face paucity of foreign income (from SA copyrights) trickling and dripping slowly back to South Africa – (less than 2% of Gross Revenue at SAMRO) – clearly indicative that the world wide ownership of South African copyright assets is neither held in South Africa⁴², nor disclosed to the Government.
 - A key issue of a collecting society's value is its database and files. More than members these represent the archival actual record of the past, and of ownership in the past and most importantly accountability.

7. **Role of the Registrar of Copyright**

The Registrar has *inter alia* the following roles to carry out:

⁴² See www.ascap.org and search the ownership of “ntjilo ntjilo” for just one example

- Serious and Critical responsibility. As the guardian and arbiter in respect of copyright regulation and practice in South Africa, the Registrar of Copyright carries a critical and poignant burden.
- To grasp and embrace the idea that a country that does not own its knowledge will lose its culture, and that the representative at the IP 'table' of culture...is copyright.
- To seek, obtain and maintain the best knowledge and superior sector intelligence (information) systems concerning copyright.
- To call copyright indaba's and forums.
- To act on a national basis in the national interest.
- To recognize the ownership and control of copyrights is really about the ownership and control of the cultural facet of a nation's knowledge (the others being its patents, designs and trademarks).
- To intervene and regulate copyright matters.
- To call for, and see to the implementation of, a charter concerning copyright.
- To enforce and regulate best practice in the sector.
- To act and intervene and never see itself as a 'neutral' force, but as the ardent proponent of the Government's policy of the day.
- To see to it that national legislation is up to date and integrated with the WTO, WIPO etc, and to see to it that existing commitments are not breached;
- To see to it that South African copyright owners comply with (and the law enforced) Section 5 of the Imperial Copyright Act 1916, in force verbatim until 1965 in South Africa, which Act provides for the reversionary interest in works authored before 1965 twenty five years after the death of any author, and that the databases of collecting societies are amended;

- Recognize the imperative that the bulk of vested copyright claims by publishers (and some authors) that occurred during the apartheid state occurred in exactly the same manner that physically land was disposed from indigenous peoples in South Africa, in a bloody and tragic manner, and do something about it; The collecting society database and file records contain an accurate history of the dispossession of copyright in South Africa.
- Ensure that author's rights are dealt with as property rights, and that all members of the state machinery operate in accordance with the law concerning such.
- Facilitate and implement national membership of organizations such as ARIPO, as well as ever important of issue of being current and compliant with international treaties such as TRIPS, the Berne Convention, the Rome Convention, WCT etc

8. **Conclusion – the urgent need for intervention: why and when?**

There is an exceptionally urgent need for appropriate intervention of the right kind.

Disagreement between stakeholders and government is costing the industry of copyrights tens of millions of rands, and is blocking the creation of a large number of jobs. A real shortage of knowledge, experience and applicable qualifications concerning copyright at the DTI coupled with the approach of the Registrar of Copyright, it is opined in some quarters, has resulted in the net effect of focusing stakeholders to dwell on differences and to thus lose sight of their respective commonalities, resulting in fragmentation in the sector.

There is an urgent need to amend the mindset of the past ten years concerning copyright at Government, as inaction and procrastination, coupled with weak motivation is causing severe damage to export earnings, job creation, tax contribution and well being of the rights sector, in a manner that is still set to have drastic consequences.

Why? South Africa has one of the oldest most out of date copyright acts in Africa

South Africa has delayed in accessing to numerous international IP treaties and currently has not followed Berne Convention procedures to ratify some 40 new member countries.

Copyright is one way in which a nation's knowledge is owned

Copyright is the 'guardian' of culture

Urgent need to redress the past and to convene a charter

Urgent need to force disclosure of, and repatriation of global domicilia of South African copyrights back to South Africa

Urgent need for a commission of enquiry into all for profit, non-profit and association collecting societies;

The urgent and critical need to stop the 'assignment' of rights by SA creators, in English, at societies – for to do so is lose ownership – there is no 'control of ownership' – it is a contradiction in terms;

There is turmoil in collecting societies and their administration, and a very urgent need for external intervention

Section 6 and Section 9 rights are without sufficient regulation and oversight

Urgent need to inform, educate and integrate certain efforts, with other departments of Government (e.g. SARS, DAC and others)

Efficient copyright legislation and oversight is critical to

- trade development in the SADC region
- Job creation
- Export earnings
- Tax receipts
- IP asset growth and value.

When? As soon as possible