

NEEDLETIME: THE LONG AND WINDING ROAD¹

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SUMMARY

The article chronicles the long and winding road of the development of rights to royalties for performers from the recognition of a sort of potential right in the Berne Convention, through the different international instruments such as the Rome Convention, the TRIPs Agreement and eventually, for purposes of this article, the most important World Intellectual Property Organisation Performances and Phonograms Treaty (WPPT). It then proceeds to deal with the development of the law relating to performers' rights in South Africa. It shows that, despite vehement objections from the National Association of Broadcasters (NAB), the Performers' Protection Act and the Copyright Act were amended in 2002 and through these amendments a legislative framework for the protection of performers in South Africa was established. It concludes that, in spite of these legislative measures, the implementation of needletime has been controversial because of the vastly different interpretations of the empowering legislation. This has resulted in a delay in the payment of needletime rights which has led to several judicial challenges that once settled, should hopefully bring a measure of legal certainty to this area of law.

1 INTRODUCTION

When a piece of music is fixated or recorded, there are several rights that co-exist simultaneously. There are several different forms of copyright as well as the rights that are enjoyed by the performers of the musical work.

¹ This article is based on excerpts from the LLM dissertation entitled "A Comparative Analysis of the Development of Performers' Rights in the United Kingdom and South Africa" by Tanya Wagenaar. Title inspired by the song "The Long and Winding Road" written by John Lennon and Paul McCartney, performed by The Beatles.

These are distinct from one another and can be owned by different persons or the same person.²

The copyright in a composition is traditionally held by composers, while copyright in the sound recording is held by whomever is responsible for the fixation of the piece of music, usually the recording company.³ The sound recording of the work is normally contained in a phonogram which is defined to mean “any exclusively aural fixation of sounds of a performance or of other sounds”.⁴ Therefore, the copyright in a sound recording is the right that flows from the mechanical or digital fixation of a performance of a song.⁵ The artists, or performers who performed the song, are not accorded any form of copyright but are the beneficiaries of a system of rights known as performers’ rights.

“Performers’ rights”, which refer to the system of rights accorded performers, should not be confused with performing rights which refer to the right to perform a musical or dramatic work in public in exchange for a royalty. This ensures that the creator is remunerated for this public performance.⁶ Examples of public performance include the playing of sound recordings in shopping malls, bars, nightclubs, discotheques, hotels, airlines, skating rinks, restaurants, theme parks, circuses, bowling alleys, universities, colleges, television shows, radio broadcasts, and background-music services to name but a few.⁷ Simply put, whenever music is performed anywhere in public, a royalty has to be paid.⁸ As copyright owners, composers in South Africa have been the beneficiaries of this right (and the royalty) since colonial times. In contrast, recording companies (with the exception of a brief period between 1934 and 1965) and the performers who perform on sound recordings have historically been denied this right.

In 2002 this position changed when the Performers’ Protection Act⁹ and the Copyright Act¹⁰ were amended to include a performing right for the copyright owners of sound recordings as well as performers. More commonly known as “needletime”, it refers to the right of recording companies and performers to receive a royalty whenever a piece of recorded music is broadcast in public. Needletime owes its name to the gramophone needle which was used to play gramophone records on

² Matzukis “The Great South African Needletime Debate” 2010 *Music Industry Online* http://preditor.mio.co.za/assets/articles/attachments/00247_the_great_south_african_needletime_debacle.pdf (accessed 2011-02-20).

³ Also known as producers of phonograms.

⁴ Article 3(b) of the Rome Convention.

⁵ Matzukis 2010 *Music Industry Online* (see fn 2 above).

⁶ Anon “Needletime Rights” POSA www.samro.org.za/needletime/needletime_rights/ (accessed 2011-05-13).

⁷ Anon “Do we have Money for You?” *Musicians Neighbouring Rights Royalties* http://www.nhmusicians.com/members/mnrr_brochure.pdf (accessed 2011-05-12); Anon “Needletime Rights” POSA (see fn 6 above); and Anon “How Music Royalties Work” *University of Liverpool* <http://entertainment.howstuffworks.com/music-royalties7.htm> (accessed 2011-05-18).

⁸ Anon “How Music Royalties Work” *University of Liverpool* (see fn 7 above).

⁹ 11 of 1967.

¹⁰ 98 of 1978.

gramophone record players and was derived from the maximum allowance of time that a radio station could spend playing records of music.¹¹ It is an economically-natured right also sometimes referred to as “pay for play”.¹² Therefore, in terms of this right, entities that broadcast music are required to pay those responsible for a recorded work for the use of their product.¹³ For recording companies, this signifies a reintroduction of the right after an absence of nearly 40 years while performers have now been extended the benefit for the first time. Its reintroduction into our law has been controversial at best and has resulted in legal debates and judicial challenges that have delayed the implementation and distribution of royalties in terms of the provisions of relevant legislation.

When researching the issue of needletime rights in South Africa, it becomes clear that there is no concise narrative of the development of this right in South African law. The focus of this article will be to chronicle the historical development of needletime rights in South Africa from the adoption of various international treaties designed to protect the interests of related rights holders; through its origins in the performing rights accorded to copyright owners during colonial times; to the inevitable reintroduction of needletime rights into South African law. Ultimately, the purpose of this article is to create some certainty regarding the details of the development of this particular area of intellectual property law.

2 HISTORICAL BACKGROUND

2.1 International developments

2.1.1 General

Internationally, the development of rights for performers and recording companies is reflected through the various international instruments designed to protect the rights of these parties, known as neighbouring- or related-rights holders. The international conventions to be discussed are the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention); the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention); the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement); and the World Intellectual Property Organisation Performances and Phonograms Treaty (WPPT). Each of these will be looked at separately.

¹¹ Oxford Dictionaries “Definition of Needle Time” <http://oxforddictionaries.com/definition/needle+time> (accessed 2011-07-19).

¹² Hollis “To Play or Not to Play” 2009 *Bowman Gilfillan* <http://www.bowman.co.za/LawArticles/Law-Article-id-2132417409.asp> (accessed 2011-07-24).

¹³ Anon “Needletime Rights” POSA (see fn 6 above).

2 1 2 *The Berne Convention*

Historically, the development of the rights of related rights holders, particularly performers, has lagged behind that of authors' rights. When the need arose internationally for performer protection, protection of authors had already been established 75 years earlier through the Berne Convention of 1886. Although the Berne Convention only provides protection for authors of copyrighted works, it is important from a performer's point of view in that initially, performers sought protection under this Convention. The argument that performers should be regarded as authors and their performances as "works" drew sympathy¹⁴ when it became clear in the years leading up to World War II that unauthorized copying of musical works was endangering the recording industry.¹⁵ The view that performers should be regarded as authors was "challenged by an invocation of a romantic notion of authorship"¹⁶ and rejected internationally. According to the more popular arguments, authors can be only those who create original works. Since performers merely interpret an already existing work, they cannot, therefore, be regarded as authors.¹⁷

The call for international protection of the rights of performers did not go unheard, however, and *vœux*¹⁸ as resolutions were adopted at the Rome Revision Conference of 1928 and at the Brussels Revision Conference of 1948 that "expressed the wish that participating governments consider what measures could be taken to protect the rights of performers" and "the wish that studies be undertaken, particularly in respect of the protection of performers as a neighbouring right".¹⁹ The artistic quality of performances was emphasized and it was determined that the protection of performers would have to be achieved outside the ambit of the Berne Convention.²⁰ This conclusion paved the way for the drafting of the Rome Convention in 1961.

2 1 3 *The Rome Convention*

The Rome Convention is a multilateral agreement that protects the rights and interests of performers, producers of phonograms and broadcasting organizations by providing minimum standards which contracting states are required to incorporate into national law.²¹ Seen by Caviedes as being to

¹⁴ Morgan *International Protection* (2002) 119.

¹⁵ Gruenberger "A Duty to Protect the Rights of Performers? Constitutional Foundations of an Intellectual Property Right" 2006 *Cardoza Arts & Entertainment LJ* 617 624.

¹⁶ Gruenberger 2006 *Cardoza Arts & Entertainment LJ* 626.

¹⁷ *Ibid*; Labra "The Rome Convention: A Three-cornered Marriage (A Love Triangle?) 1991 *Copyright Bulletin* 18 <http://unesdoc.unesco.org/images/0009/000917/091744eo.pdf> (accessed 2011-07-24).

¹⁸ Wishes.

¹⁹ Morgan *International Protection* 119.

²⁰ Morgan *International Protection* 119–120.

²¹ Vanheusden "Performers' Rights in European Legislation: Situation and Elements for Improvement" 2007 *AEPO-ARTIS* http://www.aepo-artis.org/usr/AEPO-ARTIS%20Studies/Study%20Performers%20Rights%20in%20Acquis_AEPO-ARTIS.pdf 12 (accessed 2010-05-29).

related rights what the Berne Convention was to authors' rights,²² its main purpose:

“was not to harmonize pre-existing law, with respect to performers' rights (for, in many countries, no such rights existed); rather, the purpose of the Rome Convention was to create a new class of rights beneficiaries – i.e., performers, as distinct from authors or composers.”²³

The above-mentioned view is emphasized in Article 1, appropriately titled “Safeguard of Copyright Proper”, which states that the Rome Convention shall not affect the protection of copyright in literary and artistic works in any way and that no provision of the Convention shall be interpreted as prejudicing this protection. Gruenberger observes that the main reason for this attitude was authors' associations which feared negative legal and economic effects on their rights as authors if performers were accorded strong forms of protection. They argued that granting an exclusive right (in the nature of copyright) to performers would allow them to forbid the uses of their fixed performances. Furthermore, granting performers and recording companies a right to claim remuneration would effectively mean that “the same ‘cake’ could have to be divided among more claimants.”²⁴ A compromise was reached and the concept of “related rights” or “neighbouring rights” was born.²⁵

Although the Convention provides rights for performers, recording companies and broadcasters, upon comparison, the Convention prejudices the rights of performers in several ways. The following are important for the purposes of this article.

Firstly, according to Article 7(1), the protection given to performers takes the form of “possibility of preventing” which essentially means a performer has the possibility of preventing certain acts relating to his performances from being conducted.²⁶ In contrast, recording companies and broadcasters are given the right to authorize or prohibit reproduction of their product.²⁷ In essence, this amounts to a far stronger form of protection accorded to them than to performers. By providing only for the “possibility of preventing” certain acts and not providing a right to authorize and prohibit these acts “the

²² Caviedes “International Copyright Law: Should the European Union Dictate its Development?” 1998 *Boston University International LJ* 165 174.

²³ Cosgrove “Minstrels in the Public Domain? British Copyright Legislation and the Argument for an Extension of Performers' Rights Protection in the European Union” 2006/2007 *Loyola of Los Angeles Entertainment LR* 383 395.

²⁴ Gruenberger 2006 *Cardoza Arts & Entertainment LJ* 627.

²⁵ Anon “Introduction to the WIPO Performances and Phonograms Treaty (WPPT)” *UATM* <http://www.uatm.com.ua/laws/int/Introduction%20to%20the%20WIPO%20Performances%20and%20Phonograms%20Treaty%20WPPT.pdf> 1 (accessed 2010-08-02).

²⁶ The notion of “possibility of preventing” was apparently included at the request of the British government who did not want to create a right for the benefit of performers but whose legal system allowed for criminal sanctions to be imposed for certain actions that infringed the interests of performers. See Anon “The Rome Convention” *AEPO-ARTIS* www.aepo-artis.org/pages/137_1.html in this regard.

²⁷ Article 10 and 13 respectively.

protection granted to performers is relatively weak, limited to aural interpretations and recordings and widely open to exceptions".²⁸

Secondly, Article 12 provides that if a sound recording published for commercial purposes or a reproduction of the recording, is broadcast or communicated to the public, a single equitable remuneration must be paid by the user to the performer, or to the producer of the recording, or to both. Owing to the fact that only a single equitable remuneration is payable, it is therefore up to the contracting states to decide whether the beneficiary of this right is to be the performer or the phonogram producer, or both of these parties.

Thirdly, Article 16(1) contains Reservations which allow a contracting state to notify the Secretary-General of the United Nations that they will not be complying with the provisions of Article 12 at all. Simply put, contracting states can choose not to pay any remuneration whatsoever.²⁹ Although this is the first international attempt at providing a performing right for performers and producers of phonograms, the mechanisms put in place by the Convention are not very compelling and widely open to exceptions.³⁰ However, performing rights have been widely accepted by the states that have ratified the Convention and in the majority of cases, have been granted to both the performer(s) and the phonogram producer(s) involved in the recording of a piece of music.³¹

From the above it is clear that performers were granted a somewhat lower level of protection than broadcasters and recording companies.³² A possible reason for this is that drafters may have disadvantaged performers by placing them in the same group under the same convention as phonogram producers and broadcasting organizations.³³

"Grouping together such heterogeneous rights in one international convention under a single label has caused inequities in the protections granted to the disadvantage of the performing artists."³⁴

Although it is opined that the minimum standards provided by the Convention were designed to allow national laws of contracting states to go further in terms of the level of protection they provide to related rights holders,³⁵ the Convention has been severely criticized for the level of protection it does provide.³⁶ In summary, the rights granted by the

²⁸ Anon "The Rome Convention" *AEPO-ARTIS* (see fn 26 above).

²⁹ Vanheusden 2007 *AEPO-ARTIS* 12 (see fn 21 above).

³⁰ Anon "The Rome Convention" *AEPO-ARTIS* (see fn 26 above).

³¹ *Ibid.*

³² Cosgrove 2006/2007 *Loyola of Los Angeles Entertainment LR* 396.

³³ Caviedes 1998 *Boston University International LJ* 175.

³⁴ Gruenberger 2006 *Cardoza Arts & Entertainment LJ* 628.

³⁵ Barnard "Performers' Rights" 2005 *Music Law Updates* <http://www.musiclawupdates.com/articles/ARTICLE%2005PerformersRights.htm> (accessed 2010-06-30).

³⁶ See International Labour Organisation *Report on the problems arising with regard to the Rome Convention through developments in law and practice concerning transmission by cable and satellite* Geneva (1989) http://www.ilo.org/public/libdoc/ilo/1989/89B09_580_engl.pdf (accessed 2011-07-24); and Francon "Should the Rome Convention on Neighbouring

Convention are not regarded to be adequate or substantial enough to change the realities of the professional lives of related rights holders, particularly performers.³⁷ However, in spite of the criticisms, it is still considered to be a major benchmark in the development of performers' rights. The interests of performers "took a significant step forwards"³⁸ and as a result is considered to be where "[t]he story of performers' rights essentially begins".³⁹

Although South Africa has not yet ratified the Rome Convention, the Performers' Protection Act embodies the sections of the Rome Convention that deals with performers' protection and grants protection to performers of literary, musical, dramatic, dramatico-musical and artistic works. In addition, much of the Act's terminology and phraseology relating to the protection of performers has been borrowed from the Convention.⁴⁰ Performers are granted the right to prevent anyone from broadcasting or communicating a performance to the public; the right to prevent a fixation from being made of a performance; and the right to prevent a reproduction of a fixation of a performance.⁴¹ These rights are stronger in nature than those provided for under the Rome Convention which only gave performers the "possibility of preventing" these acts.

Despite these developments, performers and recording companies in South Africa were still not accorded performing rights for the public broadcasting of sound recordings.

The fact that the Rome Convention does not provide adequate measures for ensuring that members give effect to it at domestic level⁴² was the main motivation behind the adoption of the TRIPs Agreement which does make provision for its enforcement by adherents.⁴³

2 1 4 *The TRIPs agreement*

The main purpose of the TRIPs Agreement is to provide for minimum standards with which countries must comply in relation to their intellectual-property laws, and to provide for adequate means to enforce these laws.⁴⁴ Protection of performers and producers of phonograms is contained in Part II: Article 14. Although the Agreement repeats most of the provisions of the

Rights be Revised?" 1991 *Copyright Bulletin* <http://unesdoc.unesco.org/images/0009/000917/091744eo.pdf> (accessed 2011-07-24) in this regard.

³⁷ Rembe "Time for a Performers' Convention" 1991 *Copyright Bulletin* <http://unesdoc.unesco.org/images/0009/000917/091744eo.pdf> 25 (accessed 2011-07-24).

³⁸ Barnard 2005 *Music Law Updates* (see fn 35 above).

³⁹ Towse "The Singer or the Song? Developments in Performers' Rights from the Perspective of a Cultural Economist" 2007 *Review of Law & Economics* 749.

⁴⁰ Dean "Performers' Protection" 2003 *Handbook of South African Copyright Law* 1–111.

⁴¹ S 5.

⁴² Dean "International Copyright" 2004 *Handbook of South African Copyright Law* 1–92.

⁴³ Dean 2004 *Handbook of South African Copyright Law* 1–92 to 1–93.

⁴⁴ Dean 2004 *Handbook of South African Copyright Law* 1–93.

Berne Convention and to a lesser extent those of the Rome Convention,⁴⁵ the advancement of related rights is still significant owing to the fact that since it has a high level of international acceptance, related rights has progressed from being a mainly European concern to one affecting nearly all developed states.⁴⁶

South Africa assented to the World Trade Organisation (WTO) Agreement, and therefore to the TRIPs Agreement, in April 1994. Although South African law relating to copyright and performers' rights already complied, for the most part, with the provisions of the TRIPs Agreement, amendments were nevertheless required in order to comply fully with the Agreement.⁴⁷ For this reason the Intellectual Property Laws Amendment Act⁴⁸ was enacted.

Despite ratification of the TRIPs Agreement, South African performers and recording companies were still not accorded performing rights. This situation is owing to the fact that firstly, the TRIPs Agreement does not expressly provide for performing rights; and secondly, Article 2 of the TRIPs Agreement provides that nothing in Part I to IV of the TRIPs Agreement shall detract from existing obligations that contracting states may have in terms of, *inter alia*, the Rome Convention. Since South Africa has not yet ratified the Rome Convention, it was able to ratify the TRIPs Agreement without implementing a performing right for performers or recording companies.

The inadequacies of the Rome Convention and the TRIPs Agreement were suffered by most of the rights holders they purported to protect, especially performers and recording companies.⁴⁹ In 1992, a Committee of Experts was established by the Assembly of the Berne Union to prepare a Possible Instrument on the Protection of Rights of Performers and Producers of Phonograms⁵⁰ which was the precursor to the WPPT. Its mandate extended to almost all areas of the protection of performers and producers of phonograms where the clarification of existing international norms and the establishment of new norms were needed.⁵¹ The progress of their work accelerated with the adoption of the TRIPs Agreement⁵² and on 20 December 1996 two agreements were signed at the Geneva Diplomatic Conference, namely the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).⁵³ For the purposes of this article, only the WPPT will be concentrated on.

⁴⁵ Anon "The TRIPs Agreement of the GATT which became the WTO (World Trade Organisation) since (1994)" *AEPO-ARTIS* www.aepo-artis.org/pages/139_1.html (accessed 2010-07-21).

⁴⁶ Morgan *International Protection* 121.

⁴⁷ Dean 2004 *Handbook of South African Copyright Law* 1–93.

⁴⁸ 38 of 1997.

⁴⁹ Anon "The WIPO Performances and Phonograms Treaty of 20 December 1996" *AEPO-ARTIS* http://www.aepo-artis.org/pages/138_1.html (accessed 2-08-2010).

⁵⁰ As reflected in Documents AB/XXIV/2 and AB/XXIV/18 as adopted by the Assembly and Conference of Representatives of the Berne Union.

⁵¹ Anon "Introduction to the WIPO Performances and Phonograms Treaty (WPPT)" *UATM* 1 (see fn 25 above).

⁵² *Ibid.*

⁵³ Morgan *International Protection* 122.

2 1 5 *The WPPT*

The most important and urgent task of the Geneva Conference was to offer clarity on the existing norms and, where possible, to create new norms in response to issues that arose as a result of new developments in digital technology, especially the Internet.⁵⁴ These issues were referred to as the “digital agenda” and covered aspects such as definitions; rights applicable to storage and transmission of performances and phonograms in digital networks; limitations on and exceptions to rights in the digital arena; technological measures of protection; and rights-management information.⁵⁵

With regard to performing rights, article 15 provides the same kind of rights to remuneration that the Rome Convention provides with one notable exception. Whereas the Rome Convention provides that contracting states are to decide whether the beneficiary of the right should be performers, or producers of phonograms, or both, the WPPT provides that this right must be granted to both parties. This provision is a significant improvement in the level of protection granted to performers and recording companies.⁵⁶ However, article 15(3) provides that contracting states are still entitled to exercise possible reservations regarding the granting of this right in much the same way as under article 16 of the Rome Convention. Essentially this means that contracting states can still choose not to grant the right at all.

As chair for technical matters relating to the African group of states and vice-chair of the Drafting Committee,⁵⁷ South Africa played an active role in the conclusion of the WPPT.⁵⁸ Although South Africa signed the WPPT on 12 December 1997⁵⁹ it has not yet ratified it.

2 2 **The development of a performing right in South Africa**

2 2 1 *The early years*

While under British rule, South Africa was subject to various British statutes dealing with copyright. The first piece of legislation to have a direct bearing on copyright law in South Africa was the British Literary Copyright Act, 1842. The Act protected all works first published in the United Kingdom, regardless of the nationality of the author. It was applicable in the British dominions and

⁵⁴ Anon “Introduction to the WIPO Performances and Phonograms Treaty (WPPT)” *UATM* 2 (see fn 25 above).

⁵⁵ Anon “Introduction to the WIPO Performances and Phonograms Treaty (WPPT)” *UATM* 2-3 (see fn 25 above).

⁵⁶ Anon “Introduction to the WIPO Performances and Phonograms Treaty (WPPT)” *UATM* 7 (see fn 25 above).

⁵⁷ Wendland “The Digital Agenda” 1997 *Juta’s Business Law* 143.

⁵⁸ Dean 2004 *Handbook of South African Copyright Law* 1–93.

⁵⁹ The WPPT was signed by Trevor Manuel.

included “all the colonies, settlements and possessions of the Crown which now are or hereafter may be acquired.”⁶⁰

The Act was the first to introduce performing rights to copyright law in South Africa and applied to dramatic and musical works.⁶¹ However, this protection was limited to authors of musical and dramatic works only.⁶² The rationale for this was obvious enough in that performers’ protection was not needed. The phonogram had not yet been invented,⁶³ so the only way in which a performance could be exploited was by the public paying for admission for entry to a performance.⁶⁴ If a performer appeared before an audience of people and performed, there was a performance; if the performer chose not to perform, there was no performance. The limits to the rights that the performer had in that performance were thus clear and obvious.⁶⁵

On 31 May 1910, the Union of South Africa was established through which South Africa was given the status of a self-governing territory. The unification of the provinces brought with it a call for consolidation of the many differing laws that applied in the different provinces. Codification of copyright law materialized in the form of the United Kingdom’s Copyright Act, 1911 which, as an imperial measure, formed the basis of copyright law in most of what were then English colonies and dominions.⁶⁶ Adoption of the 1911 Act was not compulsory, and dominions were free to adopt or reject it.⁶⁷ Following the model of the 1911 Act, the Union enacted The Patents, Designs, Trade Marks and Copyright Act, 1916.⁶⁸ As the name indicates, it was a composite act regulating the laws of patents, designs, trademarks and copyright. The law relating to copyright was to be found in Chapter 4 as well as Schedule 3, which contained the entire text of the United Kingdom’s Copyright Act, 1911. The 1916 Act, therefore, effectively adopted the 1911 Act as imperial law in the Union⁶⁹ and perpetuated the protection that had previously been accorded to works under British rule. This included works protected by the so-called Provincial Copyright Acts;⁷⁰ works protected by the common law; as well as musical, dramatic or artistic works which had

⁶⁰ Dean *The Application of the Copyright Act, 1978, to Works Made Prior to 1979* (LLD Thesis Stellenbosch 1988) 346.

⁶¹ *Ibid.*

⁶² The author of a musical work was a composer and the author of a dramatic work was a playwright.

⁶³ The phonogram was the first ever recording device and was invented by Thomas Edison in 1877.

⁶⁴ Arnold *Performers’ Rights* (2008) 16.

⁶⁵ Morgan *International Protection* 4.

⁶⁶ S1(1) of the British Copyright Act, 1911 as contained in Schedule 3 of the Patents, Designs, Trade Marks and Copyright Act, 1916.

⁶⁷ Macgillivray “The Copyright Act, 1911, Annotated” 1912 <http://www.archive.org/download/copyrightact191100gearich/copyrightact191100gearich.pdf> (accessed 2010-08-15).

⁶⁸ Originally known as The Union of South Africa Act (of Copyright) 1916.

⁶⁹ Kahn “South African Copyright – A Brief History” *iCommons* <http://archive.icommons.org/articles/south-african-copyright-a-brief-history> (accessed 2010-07-01).

⁷⁰ Acts regulating copyright that were passed in the Cape, Transvaal and Natal. The OFS neglected to pass any acts regulating copyright in its territory with the result that the common law applied there.

previously only enjoyed copyright protection in the United Kingdom.⁷¹ The 1916 Act declared that the 1911 Act, subject to certain variation, regulated the law relating to copyright in South Africa.⁷²

Where previously “copyright” and “performing right” were defined separately, the 1911 Act (as contained in the 1916 Act) defined “copyright” to include the traditional rights accorded authors as well as a performing right in the case of musical and dramatic works.⁷³ This meant that a performing right was automatically included as part of the rights an author had as copyright owner of musical and dramatic works. In addition, the 1916 Act provided that if any person was, before the commencement of the Act, entitled to copyright and a performing right in a work, he was entitled at his option to assign the right or to continue to reproduce or perform the work subject to the payment of a royalty.⁷⁴ This provision seems to be the first South African legislative reference to royalties, the backbone of the performing right, and denotes the right of authors to receive a royalty whenever their works are performed in public. The position has prevailed and today, authors have an unfettered right to receive remuneration whenever their works are performed in public.

From the above it is clear that performing rights were, by definition, originally only accorded to authors of musical and dramatic works. With the advent of the phonogram, and subsequently films and wireless radio, came a widening of the performers’ audience in both space and time as well as a new enterprise in the form of the recording industry.⁷⁵ Despite these advances, owners of the copyright in sound recordings and performers were generally denied a performing right.

2 2 2 *Extension of the performing right to recording companies*

In 1932, the British organized recording industry expressed the view that the Act of 1911 implied a performing right in a sound recording⁷⁶ by providing that:

“Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works ...”⁷⁷

⁷¹ Dean “Background to Law of Copyright” 2006 *Handbook of South African Copyright Law* 9.

⁷² Dean 2006 *Handbook of South African Copyright Law* 1–3.

⁷³ S1(2) of the British Copyright Act, 1911 as contained in Schedule 3 of the Patents, Designs, Trade Marks and Copyright Act, 1916.

⁷⁴ S151(1)(a)(i)–(ii).

⁷⁵ Kerever “Should the Rome Convention be revised and, if so, is this the right moment?” 1991 *Copyright Bulletin* 5 <http://unesdoc.unesco.org/images/0009/000917/091744eo.pdf> (accessed 2011-07-24).

⁷⁶ Du Plessis “Performing rights: Part 2” *Accountancy SA* www.accountancysa.org.za/resources/ShowItemArticle.asp?ArticleId=1559&Issue=1068 (accessed 2010-11-04).

⁷⁷ S19(1) of the British Copyright Act, 1911 as contained in Schedule 3 of the Patents, Designs, Trade Marks and Copyright Act, 1916.

According to this interpretation, the use of the words “in like manner as if such contrivances were musical works” implied that since a performing right existed in a musical work, logic dictated that there should also be a performing right in a sound recording.⁷⁸ If performing rights were to be granted to copyright owners of sound recordings, then recording companies would be entitled to benefit from the application of this right. In 1934 a British court upheld this view in *Gramophone Co Ltd. v Stephen Cawardine & Co*⁷⁹ by deciding that proprietors of tea and coffee rooms had infringed the copyright of the plaintiffs by playing a record manufactured by the plaintiffs as background music to entertain their patrons.⁸⁰ Maugham J stated:

“I will observe in the first place that the company is given a copyright in the record ‘in like manner as if the record was a musical work.’ It is also to be noted that it has a term of copyright of fifty years from the making of the original plate.”⁸¹

The significance of this decision is that for the first time, copyright owners of sound recordings, namely recording companies, were accorded a performing right for the public performance or broadcast of their sound recordings. Since the 1911 Act was included in the Union Act of 1916, this decision applied *mutatis mutandis* in South Africa.

The *Gramophone* decision created controversy in that broadcasters were opposed to recording companies having the right to prevent the use of their sound recordings.⁸² In the United Kingdom, the issue was settled with the adoption of the Copyright Act of 1956 which incorporated the right.⁸³

In South Africa, the licence fee for the broadcasting of sound recordings was initially no more than a few pence for each licenced listener.⁸⁴ In 1949, the International Federation of Phonographic Industry (IFPI)⁸⁵ entered into an agreement with the South African Broadcasting Corporation (SABC) whereby the SABC would pay a fee per side of a vinyl record to the IFPI every time it was used in a programme.⁸⁶ This arrangement continued until 1964 when a Select Committee of Parliament considered a draft Bill on copyright which had been prepared along the lines of the United Kingdom’s Copyright Act of 1956.⁸⁷ The Bill provided that a performing right should be accorded to copyright owners of sound recordings but this provision was not included in the final enactment. As a result, in 1965 the right of recording

⁷⁸ Du Plessis (see fn 76 above).

⁷⁹ (1934) Ch 450.

⁸⁰ 452.

⁸¹ 456.

⁸² The Australian Government *Discussion Paper: Review of One Per Cent Cap on Licence Fees Paid to Copyright Owners for Playing Sound Recordings on the Radio* (2005) [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)-1+FEB+LATEST+DiscussionPaper+CAP.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)-1+FEB+LATEST+DiscussionPaper+CAP.pdf/$file/1+FEB+LATEST+DiscussionPaper+CAP.pdf) (accessed 2011-07-17) 6.

⁸³ *Ibid.*

⁸⁴ Du Plessis (see fn 76 above).

⁸⁵ The representative association of the recording industry.

⁸⁶ Du Plessis (see fn 76 above).

⁸⁷ *Ibid.*

companies to be paid for the uses of their sound recordings fell away with the promulgation of the Copyright Act.⁸⁸ There are several theories as to why this happened. One camp claims that “the apartheid government did not want money to go to The Beatles in the UK.”⁸⁹ It is submitted that this theory is incorrect as The Beatles were already recipients of performance royalties whenever their works were broadcast in South Africa as the composers of their music; and the owners of the copyright in their sound recordings were, no doubt, the recording company they were signed to,⁹⁰ not The Beatles themselves. The second theory (and the most likely) provides that although this development came about at the insistence of the government of the time, users of recorded music in the commercial sector, such as broadcasters, were the main campaigners for the removal of this performing right in sound recordings.⁹¹ This development showed the governmental bias in favour of the SABC at the time and it has taken the South African recording industry “about 40 years to restore a right that should never have been taken away.”⁹²

Although performers have historically not been the beneficiaries of this right, it is submitted that had the performing right for recording companies prevailed, a performing right for performers would have followed soon thereafter.

2 2 3 The effect of the WPPT

As mentioned above, the right of recording companies and performers to receive remuneration in South Africa for the public performance of their works was largely overlooked through the enactment of international instruments designed to protect these rights holders. It was not until the enactment of the WPPT that this right received any real consideration from a South African perspective. Article 15(1) provides that performers and recording companies are entitled to receive remuneration if a fixation of the musical work is broadcast or communicated to the public. Although authors in South Africa have enjoyed the right to a royalty for the use of their musical and dramatic works since colonial times, needletime refers to the right of both recording companies and performers to receive royalties for the public broadcast of sound recordings.

2 2 4 The Music Industry Task Team

Following the deaths of several high-profile black performers who died in abject poverty in the late 1990s, there was a widespread call for the reform

⁸⁸ 63 of 1965.

⁸⁹ Lishivha as quoted in Anon “Battle Lines Drawn Over Needletime” 10 February 2011 *Media Magazine* <http://themediainline.co.za/2011/02/battle-lines-drawn-over-needletime/> (accessed 20-02-2011).

⁹⁰ After several rejections, The Beatles were eventually signed to Parlophone, a small label of EMI that specialized in novelty acts.

⁹¹ Matzukis 2010 *Music Industry Online* (see fn 2 above).

⁹² Du Plessis (see fn 76 above).

of South Africa's music industry. As a result, the former Minister for Arts, Culture, Science and Technology,⁹³ began directing changes to existing legislation aimed at protecting performers' rights.⁹⁴ This process began with the appointment of the Music Industry Task Team (MITT), consisting of several influential artists and industry representatives who met from 28 February to 3 March 2000 in Johannesburg. The MITT aimed to provide the Minister with strategies designed to address the problems facing the South African music industry through oral and written submissions on both the national and provincial level, and to indicate priorities regarding these recommendations.⁹⁵

Based on the MITT's submissions as well as the outcomes of five regional public hearings held in Pietersburg, Bloemfontein, Durban, Cape Town and Port Elizabeth from 8 May to 2 June 2000, a final Report consisting of 37 recommendations was drawn up. Of these, "Recommendation 1: Needletime" is the most important for the purposes of this article.

The Report recommended that South Africa should ratify the WPPT⁹⁶ and amendments regarding needletime in South Africa should be drafted and implemented immediately. They argued that no further public consultation on the matter was needed. It suggested that time frames be incorporated as to the amendment of the relevant Acts and that negotiations should commence between the broadcasters on the one hand, and producers and performers on the other hand, regarding the appropriate rate to be paid.⁹⁷ The Report further provided that the Minister should establish a joint performers and producers collecting-society to administer the collection of royalties which would make the Performers' Protection Act and the Copyright Act functional and in line with international standards.⁹⁸

Following the publication of the Report on 30 August 2001, the National Association of Broadcasters (NAB)⁹⁹ voiced strong opposition to some of the recommendations put forward by the MITT on the grounds that the position of broadcasters was not given adequate consideration.¹⁰⁰ The NAB noted that the MITT's statement that there was no need for any further public consultation on the issue of needletime was misguided and stated further that a detailed cost-benefit study was required to determine the effect of needletime; particularly the negative impact needletime was likely to have on South African broadcasters. Since needletime entails that a payment be made by users to recording companies and performers every time their

⁹³ Dr Ben Ngubane.

⁹⁴ Barrow 9 June 2000 *BBC News*.

⁹⁵ Department of Arts, Culture, Science and Technology *MITT Final Draft Report* (2001) http://www.saccd.org.za/objects/mitt_report.doc Preamble 1 (accessed 4-11-2010).

⁹⁶ Recommendation 3: Implementation and accession to the World Intellectual Property Organisation (WIPO) *Treaties* 6.

⁹⁷ Recommendation 1: *Needletime* 5.

⁹⁸ *Ibid.*

⁹⁹ The NAB represents the majority of public broadcasters, including the SABC.

¹⁰⁰ Abrahams (NAB) *Letter to Dr Adam (DACST)* (10-09-2001) http://webcache.googleusercontent.com/search?q=cache:KijVtyg4s9UJ:www.nab.org.za/contentfiles/NAB_submission_on_needletime_Oct_2001.doc+abrahams+nab+dacst&cd=3&hl=en&ct=clnk&gl=za (accessed 10-10-2010).

works are performed anywhere in public (from restaurants to workplaces to radio stations), the NAB submitted that a cost-benefit study was essential.¹⁰¹

Despite these objections, the legislature drafted amendments to the Performers' Protection Act and the Copyright Act, specifically regarding the implementation of needletime. The Performers Protection Amendment Bill¹⁰² and the Copyright Amendment Bill¹⁰³ were sent for approval on 18 September 2001. The NAB then published detailed submissions on 5 October 2001 outlining their objections to the proposed amendments.

In terms of their submissions, the NAB contended that the members that the NAB represents¹⁰⁴ would be detrimentally affected by the implementation of needletime. Their view was that needletime would be damaging to the local broadcasting industry, resulting in social, economic and cultural implications which would not be in the public interest.¹⁰⁵

The NAB argued that the need to comply with international treaties must be weighed up against public interests¹⁰⁶ and that even though the WPPT provides for needletime,¹⁰⁷ it also provides that contracting parties are given the discretion of whether or not to adopt the provision relating to needletime.¹⁰⁸ Therefore, according to the NAB, South Africa could accede to and implement the Treaty without incorporating needletime provisions.¹⁰⁹

The effect of the implementation of the amendments would be that broadcasters would have to pay an additional royalty for playing music which would add to the substantial costs they already incur for music use.¹¹⁰ The implementation of needletime would drive the majority of radio stations further into debt and could even necessitate the closure of some broadcasters.¹¹¹

The NAB contended further that, owing to the contract-based relationship that exists between artists and recording companies, needletime is likely to advantage these companies directly, not performers.¹¹² In addition, since more international music is aired on South African radio stations than South

¹⁰¹ *Ibid.*

¹⁰² B74D-2001.

¹⁰³ B73-2001.

¹⁰⁴ All television broadcasters, all SABC radio stations, the commercial-radio industry, and 40 community-radio broadcasters.

¹⁰⁵ NAB *Submission on the Copyright Amendment Bill and the Performers Protection Amendment Bill* (2001) http://www.nab.org.za/contentfiles/NAB_submission_on_needletime_Oct_2001.doc 4 (accessed 10-10-2010).

¹⁰⁶ *Ibid.*

¹⁰⁷ Article 15.

¹⁰⁸ Article 15(3).

¹⁰⁹ NAB *Submission on the Copyright Amendment Bill and the Performers Protection Amendment Bill* 31.

¹¹⁰ It was estimated by the NAB that the amount paid by broadcasters was as much as R90 million.

¹¹¹ NAB *Submission on the Copyright Amendment Bill and the Performers Protection Amendment Bill* 16.

¹¹² NAB *Submission on the Copyright Amendment Bill and the Performers Protection Amendment Bill* 19.

African music,¹¹³ the majority of the benefits derived from needletime would flow to international recipients.¹¹⁴

The NAB recommended more sustainable alternative strategies for developing the local music industry such as a South African Development Fund.¹¹⁵ This body would be a non-profit organization funded mainly by: broadcasters and other stakeholders, revenue generated from projects initiated by the fund, as well as through endorsements and sponsorships from the private sector.¹¹⁶ According to the NAB, their strategy of a development fund would be more suitable than the implementation of needletime as it would nurture the inter-dependent relationship between all relevant stakeholders, would encourage the development of the South African music industry, and would promote reinvestment of revenues into the industry.¹¹⁷

Despite South Africa's non-ascension to the WPPT and the vehement objections of the NAB, several amendments to the relevant legislation were enacted in line with provisions of the WPPT as a direct result of the MITT's recommendations.¹¹⁸ These amendments included the provision of needletime rights for both performers and recording companies with the former Minister of Trade and Industry,¹¹⁹ stating that the amendments would go a long way towards "liberating the talent of performers" and ensuring that the amount of local content of music programmes would be increased.¹²⁰

2 2 5 *The Amendment Acts of 2002*

The Performers' Protection Amendment Act¹²¹ and the Copyright Amendment Act¹²² came into force on 25 June 2002¹²³ and amended certain sections of the Performers' Protection Act and the Copyright Act¹²⁴ respectively. The amendments relating to needletime will be concentrated on.

¹¹³ This is in terms of the existing quota system that provides that only 25% of music that is played on South African radio stations need be South African.

¹¹⁴ NAB *Submission on the Copyright Amendment Bill and the Performers Protection Amendment Bill* 21.

¹¹⁵ NAB *Submission on the Copyright Amendment Bill and the Performers Protection Amendment Bill* 36.

¹¹⁶ NAB *Submission on the Copyright Amendment Bill and the Performers Protection Amendment Bill* 40.

¹¹⁷ NAB *Submission on the Copyright Amendment Bill and the Performers Protection Amendment Bill* 41.

¹¹⁸ Anon 10 February 2011 *Media Magazine* (see fn 89 above).

¹¹⁹ Alec Erwin.

¹²⁰ Loxton "New bills Make Sure Musicians Get Their Money" 21 February 2002 *IOL News* <http://www.iol.co.za/news/politics/new-bills-make-sure-musicians-get-their-money-1.82182> (accessed 18-07-2011).

¹²¹ 8 of 2002.

¹²² 9 of 2002.

¹²³ GG 23555 and GG 23556 of 2001-06-25 respectively.

¹²⁴ 98 of 1978.

The first amendment relates to the insertion of a definition for “collecting society” to mean a collecting society as established in terms of the Copyright Act.¹²⁵ The Copyright Act only refers to collecting societies in terms of their role as representatives of performers and copyright owners¹²⁶ and the provision that regulations may be promulgated to regulate the establishment, composition, funding and functions of collecting societies¹²⁷ in order to meet the collection and distribution demands that the implementation of needletime would create.

The second (and the most controversial) amendment made to the Copyright Act and the Performers’ Protection Act is the provision of needletime rights. The Copyright Act provides that no person shall broadcast, transmit or play a sound recording without payment of a royalty to the copyright owner of the sound recording.¹²⁸ The amount to be paid is to be determined by agreement between the user, the performer and the copyright owner of the sound recording, or their representative collecting societies.¹²⁹ Should the parties not be able to reach agreement on the amount to be paid, the matter can be referred to the Copyright Tribunal.¹³⁰ In addition, the copyright owners of sound recordings are entitled to receive royalties for a period of 50 years calculated from the end of the year in which the sound recording was first published.¹³¹

Similarly, the Performers’ Protection Act provides that no person shall broadcast, transmit or communicate to the public a fixation of a performance published for commercial purposes without payment of a royalty to the performer concerned.¹³² The amount to be paid shall be determined by agreement between the user and the performer, or their representative collecting societies¹³³ and in the absence of an agreement the matter can be referred to the Copyright Tribunal.¹³⁴ With regard to duration, performers are entitled to receive royalties from when the performance was first fixed in a phonogram and shall continue for a period of 50 years calculated from the end of the calendar year in which the performance was first so fixed.¹³⁵

Despite the demands of equity, the right conferred on copyright owners of sound recordings and performers are not equal. The Copyright Act provides that the owner of the copyright in the sound recording receives payment of the royalty from users and must then share such royalty with the performers who feature on the sound recording.¹³⁶ In contrast, the Performers’

¹²⁵ S 1(a) of both the Performers’ Protection Amendment Act and the Copyright Amendment Act.

¹²⁶ S 9A(1)(b).

¹²⁷ S 39(cA).

¹²⁸ S 9A(1)(a).

¹²⁹ S 9A(1)(b).

¹³⁰ S 9A(1)(c).

¹³¹ S 3(2)(c) of the Copyright Act.

¹³² S 5(1)(b).

¹³³ S 5(3)(a).

¹³⁴ S 5(3)(b).

¹³⁵ S 7 of the Performers’ Protection Act.

¹³⁶ S 9A(2)(a).

Protection Act provides that if a performer has authorized the fixation of his performance, he shall be deemed to have given the person responsible for this fixation the exclusive right to receive the royalty payable by users.¹³⁷ Therefore, if a performers' performance is recorded by a recording company, the recording company has the exclusive right to receive the royalty whenever a recording of that performance, which is published for commercial purposes, is broadcast to the public, transmitted in a diffusion service, or communicated to the public. Performers are only given the right to receive a share of the royalty payable whenever a recording of their performance is used in any of these ways and as such they have no exclusive rights.¹³⁸ Since the amount to be paid is to be determined by agreement between the performer and the recording company, or their representative collecting societies,¹³⁹ the extent to which the recording company is obliged to share the royalty with the performer depends on the terms of the contract between these parties. This provision further places the performer at a disadvantage as the performer might have to take legal action against the copyright owner to enforce his right to a share of the royalty to which he is entitled to legislatively.

The last amendment of importance to needletime is the provision in the Copyright Act that regulations may be promulgated to regulate the establishment of collecting societies in order to meet the collection and distribution demands that the implementation of needletime would create.

2 2 6 *Regulations on the establishment of collecting societies in the music industry*

A system whereby collecting societies are established to collect royalties on behalf of its members is better known as "collective rights management".¹⁴⁰

The ideal situation is that collecting societies be accountable to their members while being regulated by the state.¹⁴¹ Collective rights management, therefore, is a mechanism by which collecting societies can be accredited and given an enforceable mandate by which to administer these royalties.¹⁴² "The proper regulation and administration of these ideals pose the true challenge to the guardians of royalties in the music industry."¹⁴³

¹³⁷ S 5(4)(a).

¹³⁸ Dean "Nature and Scope of Copyright" 2003 *Handbook of South African Copyright Law* 1–36 to 1–36A.

¹³⁹ S 9A(2)(b) of the Copyright Act and s5(4)(a) of the Performers' Protection Act.

¹⁴⁰ French playwright, Beaumarchais, is widely recognised as being the first person to give expression to this idea and his efforts resulted in the establishment of the first collective rights management body. See Du Plessis "Compliance, Copyright Act and Performers' Protection Act: Part I" *Accountancy SA* http://www.sampra.org.za/downloads/asa_sep_08.pdf 2 (accessed 17-10-2010) in this regard.

¹⁴¹ Address by President Jacob Zuma to the Report Back Meeting with Performing Artists/Cultural Industry Sector (17-11-2009) <http://allafrica.com/stories/200911180835.html> (accessed 02-11-2010).

¹⁴² Hollis "To Play or Not to Play" *Bowman Gilfillan* (see fn 12 above).

¹⁴³ *Ibid.*

On 1 June 2006 the Minister of Trade and Industry published Regulations on the Establishment of Collecting Societies in the Music Industry¹⁴⁴ in terms of section 39(cA) of the Copyright Act. The purpose of the Regulations is to regulate the establishment, composition, funding and functions of collecting societies.

The relevance of these Regulations in so far as they apply to the collection of needletime royalties will primarily be concentrated on.

The Regulations set out the conditions under which collecting societies can be established and can operate in terms of relevant legislation.¹⁴⁵ Furthermore, the Regulations provide that the aim of a collecting society should be, *inter alia*, to administer performing rights effectively and efficiently.¹⁴⁶

In terms of the Regulations, the relevant definitions relating to rights management apply as they appear in the Performers' Protection Act and the Copyright Act but further provides for the introduction of new terms, namely the "public playing right", which refers to the right of a performers and recording companies to receive a royalty in terms of the Act,¹⁴⁷ "members' rights", which refers to the public playing rights of rights holders who are members of the collecting society that is granted accreditation¹⁴⁸ and "framework agreements" which describes licensing agreements that can be entered into by collecting societies and users of works.¹⁴⁹

The Regulations provide that any person or body representing more than 50 rights holders that intends to act as a collecting society must acquire accreditation, upon written application, from the Registrar.¹⁵⁰ Accreditation will be granted, if certain requirements are met,¹⁵¹ for a period of five years and shall be renewable, upon application, for a further five years.¹⁵²

In terms of the Regulations, the Registrar shall act as supervisor of accredited collecting societies and requires that a register of all accredited collecting societies be kept; that the collecting societies submit an annual report to the Registrar; and that the Registrar be kept informed at all times regarding the collecting society's organizational structure and operational features.¹⁵³ In June 2006, the Companies and Intellectual Property Registration Office (CIPRO) were appointed as accrediting authority. However, with the joining of CIPRO and the Office of Companies and Intellectual Property Enforcement (OCIPE) in May 2011, the resulting body, the Companies and Intellectual Property Commission (CIPC), became the current accrediting authority. Therefore, CIPC is the supervising body of

¹⁴⁴ GG 28894 of 2006-06-01.

¹⁴⁵ Regulation 2.

¹⁴⁶ Regulation 6(2).

¹⁴⁷ Regulation 1(iii).

¹⁴⁸ Regulation 1(v).

¹⁴⁹ Regulation 1(ii)(a) and (b).

¹⁵⁰ Regulation 3(1) and (2).

¹⁵¹ Regulation 3.

¹⁵² Regulation 5.

¹⁵³ Regulation 4(1)–(3).

accredited collecting societies for all intents and purposes and the decisions of the accrediting authority can only be contested in a court of law.¹⁵⁴

A royalty rate or tariff accepted by the collecting society and users must be submitted to the Registrar for approval.¹⁵⁵ Should a proposed tariff not be acceptable, the Regulations provide that the amount demanded by the collecting society may then be paid into an escrow account pending the outcome of a referral to the Copyright Tribunal or arbitration.¹⁵⁶

Collecting societies are required to draw up a distribution plan which sets out how payments are to be distributed. Such a plan must be approved by the Registrar.¹⁵⁷ Distributions are to occur at least once a year and a minimum of 80% of all royalties collected during this period must be distributed to members with no more than 20% being retained by the collecting society to defray costs.¹⁵⁸

The passing of these Regulations signifies the last legislative step that has been taken in the development of the needletime right in South Africa to date.

To date, three South African collecting societies have received accreditation. These are the South African Music Rights Organisation (SAMRO),¹⁵⁹ the South African Performing Rights Association (SAMPRA)¹⁶⁰ and the South African Recording Rights Association Limited (SARRAL).¹⁶¹ SAMRO has been responsible for the collection of royalties on behalf of composers for the use of their musical works since 1961, but has established a subsidiary organization to collect needletime royalties on behalf of performers known as the Performers' Organisation of South Africa (POSA). SAMPRA collects royalties on behalf of recording companies,¹⁶² while SARRAL was accredited to collect on behalf of composers of musical works used in sound recordings, as well as performers. SARRAL has, however, since been liquidated.¹⁶³

3 THE CURRENT SITUATION

Despite the measures discussed above, the implementation of needletime has been fraught with controversy and rights holders have not yet received

¹⁵⁴ Moshito Music Conference & Exhibition "Session Transcripts" 2009 *Moshito Music Conference* http://www.moshito.co.za/page.php?p_id=185 (accessed 27-10-2010).

¹⁵⁵ Regulation 7(4).

¹⁵⁶ Regulation 7(5).

¹⁵⁷ Regulation 8(4).

¹⁵⁸ Regulation 6(2).

¹⁵⁹ Received accreditation on 1 April 2008.

¹⁶⁰ Received accreditation on 20 July 2007.

¹⁶¹ Received accreditation on 5 March 2007.

¹⁶² Recording companies belonging to the Recording Industry of South Africa (RISA).

¹⁶³ Hatitye "SARRAL Found Guilty of Misusing Musicians' Royalties" 9 November 2009 *Music Industry Online* <http://www.mio.co.za/article/sarral-guilty-of-misusing-musicians-royalties-2009-11-09> (accessed 02-11-2010).

any royalties.¹⁶⁴ This dispute is largely owing to vastly different interpretations of the empowering legislation by the various interested parties relating to how much the royalty tariff is to be and from when payment became due.

Rights-holders allege that broadcasters, such as radio stations, are breaking the law by withholding payment while broadcasters maintain that the royalty tariffs prescribed by SAMPRO are too high.¹⁶⁵ SAMPRO maintains that, if a person chooses to act as a broadcaster and subsequently elects to allocate 100% of its editorial broadcast time to airing sound recordings, then that broadcaster must pay the owner of the sound recording a royalty equal to 10% of its own annual net income derived from the sale of advertising and other sources of revenue. Members of the collecting societies will then be entitled to receive such payment as reflects the extent to which the broadcaster has used the sound recording(s) of their members.¹⁶⁶ The NAB has countered this proposed tariff by suggesting that the negotiation of the royalty should begin at 0.8%, rising to a maximum of 2% of net advertising revenue.¹⁶⁷

Broadcasters further maintain that they should be liable to pay only from the date that the royalty tariff has been definitively determined. In terms of their view, payment of the royalty is not retrospective and the relevant provisions of the Copyright Act and the Performers' Protection Act are interpreted to mean that the royalty only becomes payable once the rate has been agreed to by all interested parties or determined by the Copyright Tribunal.¹⁶⁸ Therefore, members of the NAB are not liable to pay the royalty until such time as the rate has been determined. According to this interpretation, broadcasters will, therefore, not be required to pay royalties back-dated as from 2002 when the Performers' Protection and the Copyright Acts were amended to provide for needletime.

SAMPRO, however, is of the view that both Acts are clear that the royalty becomes due as soon as the broadcaster elects to broadcast a sound recording.¹⁶⁹ Therefore, the royalty became applicable from when the amendments were made to the Performers' Protection Act and the Copyright Act regarding needletime, namely 25 June 2002.¹⁷⁰ If this interpretation is to

¹⁶⁴ Coetzer "South African Radio 'Needles' Labels" 30 August 2008 *Billboard* <http://www.lexisnexis.com/hottopics/lnacademic/> (accessed 04-11-2010).

¹⁶⁵ Coetzer 30 August 2008 *Billboard* (see fn 164 above).

¹⁶⁶ Du Plessis (SAMPRO) *Letter to Johann Koster (NAB)* (17-03-2008) http://www.nab.org.za/contentfiles/49_Part%203%20-%20Annexure%20JK7%20-%20JK9.pdf 4 (accessed 04-11-2010).

¹⁶⁷ Du Plessis (SAMPRO) *Letter to Peter Grealy (Webber Wentzel)* (03-09-2008) http://www.nab.org.za/contentfiles/49_Part%203%20-%20Annexure%20JK7%20-%20JK9.pdf 8 (accessed 04-11-2010).

¹⁶⁸ Founding Affidavit http://www.nab.org.za/contentfiles/47_Part%201%20-%20Index%20Notice%20of%20Motion%20Affidavit.pdf 15 (accessed 04-11-2010); Koster (NAB) *Letter to David du Plessis (SAMPRO)* (19-07-2007) http://www.nab.org.za/contentfiles/50_Part%204%20-%20Annexure%20JK%2010.pdf 4 (accessed 04-11-2010).

¹⁶⁹ Du Plessis (SAMPRO) *Letter to Peter Grealy (Webber Wentzel)* (03-09-2008) 4 (see fn 167 above).

¹⁷⁰ Founding Affidavit 15 (see fn 168 above).

be followed, once the tariff is determined, broadcasters will be liable to pay royalties back-dated as from 2002.

The results of these differing interpretations are several ongoing judicial challenges which have delayed the collection and distribution of needletime royalties. In total, it is estimated that up to R1 billion rand is owed to performers and recording companies by South Africa's commercial broadcasters, calculated since the implementation of needletime in 2002.¹⁷¹ This claim has erupted into a "raging battle that could make a violent punk mosh-pit look like the original peaceful Woodstock hippie farm."¹⁷²

The outcome of these cases still remains to be seen and only time will tell how the legislative measures are to be interpreted and how effectively these measures are to be implemented.¹⁷³

4 CONCLUSION

When a piece of music is recorded there are several co-existing rights. In this article it has been shown that, while copyright in music was recognized and normally held by authors and composers of music, performers of the musical works were until recently not entitled to any rights for public performance of their works.

The long and winding road of the development of rights to royalties for performers from the recognition of a sort of potential right in the Bern Convention, through the different international instruments such as the Rome Convention, the TRIPs Agreement and the WPPT has been chronicled.

It was further shown that, despite vehement objections from the NAB, the Performers' Protection Act and the Copyright Act were amended in 2002 in accordance with the provisions of the WPPT and a legislative framework for the protection of performers in South Africa was established.

Although performers have also been granted needletime rights, the level of protection accorded to them is somewhat weaker than that granted to recording companies. Recording companies have been granted the exclusive right to receive payment of royalties due, while performers are only entitled to claim a share of the collected royalty.

In order to meet the collection and distribution demands that the implementation of needletime would create, it was necessary to promulgate regulations. The Regulations on the Establishment of Collecting Societies in the Music Industry Act was passed in 2006. These Regulations set out the conditions under which collecting societies can be established and operate in terms of relevant legislation.

¹⁷¹ Mawson "Local Musicians Needled by Broadcasters" 12 February 2009 *Business Day* <http://www.lexisnexis.com/hottopics/lnacademic/> (accessed 04-11-2010).

¹⁷² *Ibid.*

¹⁷³ The various judicial challenges surrounding the implementation of the needletime right is the subject of further research to be submitted in a subsequent article.

In spite of the detailed legislative measures discussed above, the implementation of needletime has been controversial at best. Owing to vastly different interpretations of the empowering legislation by the various interested parties, the collection of needletime royalties has been delayed, which has led to several judicial challenges that, once settled, should hopefully bring a measure of legal certainty to this area of law.