

The Issue of Copyright

Last year, Nokia launched its Nokia Music Store making it possible for South Africans to buy music using their hand-held devices or personal computers. Before this, there had been no large-scale digital music download operation in South Africa. No, Apple iTunes is not available in South Africa, “technically”.

Why are large companies not eager to tap into the South African market? It seems that, apart from broadband only really taking off now in South Africa, there is the issue of copyright. One of the hurdles a company would have to overcome in order to provide this service to its customers is the copyright hurdle, more particularly, the copyright laws surrounding needle time rights, the various collecting societies in the industry and the unregulated payment of royalties.

In terms of the Copyright Act (98 of 1978), sound recordings are considered works eligible for copyright protection and this copyright is usually owned by the recording company. Sound recordings are defined as *any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but not including a sound-track associated with a cinematograph film*. Copyright in a sound recording grants the copyright owner the exclusive right to, inter alia, make reproductions of the sound recording or communicate the sound recording to the public.

In terms of the Performer's Protection Act (11 of 1967), a performer is defined as *an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise performs literary or artistic works*. Performer's performances are protected in terms of the Performer's Protection Act through what is commonly known as needle time rights.

A needle time right (or performer's right in a performance) is owned by the performer and grants the performer the exclusive right to, inter alia, demand payment of a royalty for the reproduction or communication of his/her recorded performance to the public.

In terms of the Performer's Protection Act, reproduction is defined as *a copy made of a fixation of a performance*. A similar definition can be attributed to reproductions in relation to sound recordings.

In the music industry, most producers receive a royalty for the reproduction of their sound recordings and a portion of this is then paid to the performers whose performance is embodied on the sound recording in relation to their performer's right. Therefore, when a company copies

a song onto its website with the intention of making the song available to the public for further copying, a royalty should be paid to the producer of the song. Furthermore, it follows that each time a customer accesses the company's website and copies this song onto his personal hand-held device this, in turn, amounts to copying the song and the producer should receive a royalty for such copying.

Now consider the following scenario: *A customer is considering purchasing a song from the website. However, before purchasing the song, the customer wants to listen to the song to determine whether it is, in fact, the song he wants to purchase. The website provides a service to its customers (which is included in the subscription fee) allowing customers to listen to songs for a pre-determined period of time, for example, 30 seconds. The customer may listen to as many songs as he chooses without the song ever actually being copied to the customer's hand-held device.*

The question that arises is whether the company, as the website owner, is required to pay a royalty to provide this service. In other words, does this constitute communication of a sound recording to the public thereby entitling the producer (and performers) entitlement to a royalty?

In considering the answer to this question, it is interesting to note that neither the Copyright Act nor the Performer's Protection Act define the term "communication to the public". However, the definition of "communication to the public" can be found in the WIPO Performances and Phonograms Treaty of 1996 (WPPT), to which South Africa is a signatory.

In terms of the WPPT, communication to the public of a performance means "*the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. Furthermore, for purposes of Article 15 [of the Treaty], communication to the public includes making the sounds or representation of sounds fixed in a phonogram audible to the public*".

In terms of Article 15 of the WPPT, producers and performers enjoy the right to remuneration for the direct or indirect use of sound recordings published for commercial purposes which are broadcasted or communicated to the public.

Sound recordings are considered to have been published for commercial purposes when copies have been offered to the public in reasonable quantity. In terms of Articles 10 and 14 of the WPPT, producers and performers enjoy the right to make sound recordings and performances available to the public in such a way that members of the public may access them from a place

and at a time individually chosen by them. Once this has been done, a sound recording is considered to have been published for commercial purposes.

Therefore, in instances where a sound recording has been published for commercial purposes, and is communicated to the public or the sounds of which are made audible to the public, the producer and performer are entitled to remuneration for their respective copyright.

It seems, therefore, that the answer to the question posed above is in the affirmative. Unfortunately though, there is no South African copyright case law to refer to in this regard.

Let us consider a further scenario. You as a reputable company agree with the conclusion above and decide that royalties should be paid to the various producers and performers. However, you soon realise that in order to provide the full scale music service you intend providing to your customers, you now face the mammoth task of approaching each and every producer for each and every song you intend placing on your website.

Enter the collecting societies, stage right. Most South African producers and performers are represented by collecting societies who collect royalties in relation to various copyrights on behalf of their members and distribute the monies accordingly.

The difficulty that one faces is determining which collecting society to approach for which member (producer) in relation to which copyright. For instance SAMRO (Southern African Music Rights Organisation) collects royalties on behalf of its members in relation to, inter alia, mechanical rights¹ and copyright in musical works. RISA (Recording Industry of South Africa) collects royalties in relation to mechanical rights. SAMPRA (South African Music Performance Rights Association) collects royalties in relation to, inter alia, sound recordings and NORM (National Organisation for Reproduction Rights in Music in Southern Africa Limited) collects royalties in relation to mechanical rights.

Furthermore, collection and distribution of royalties is not regulated and collecting societies are tasked with negotiating the best royalty they can on behalf of their members. Therefore, the more members a collecting society has to whose music you require access, the more it can demand by way of royalties, notwithstanding the fact that you may be in a position to pay more as a result of your own status in society.

Even if a company is successful and negotiations result in it being permitted to make music available to the public, such permission will not be without restrictions. Let the negotiations

begin. These restrictions are collectively known as digital rights management (DRM) and include limiting the number of times a sound recording can be copied between devices once downloaded. Although available in other countries, DRM-free music is not available in South Africa (without a credit card issued by a U.S. bank).

One cannot argue with the music industry for wanting to get paid for their work. Furthermore, digital piracy is on the increase worldwide and it is debatable whether South Africa is even ready for DRM-free music. But in this fast changing (and shrinking) world, are the current laws sustainable?

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ⁱ Mechanical rights are the rights in connection with the recording, manufacture and distribution of copyright music.