COPYRIGHT REVIEW COMMISSION REPORT (2011)

the dti
Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

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LIST OF ABBREVIATIONS

ABRAMUS	*Associacao Brasileira de Musica e Artes*
ADAMi	*Administration des droits des artistes et musiciens interpretes*
ARIPO	African Regional Intellectual Property Office
APRA	The Australasian Performing Right Association
ASAMI	Association of the South African Music Industry
BIEM	*Bureau International des Societies Gerant Les Droits D'enregistrement et De Reproduction Mecanique*
BSDA	Bureau Senegalaise Du Droit D'Auteur
CIGS	Cultural Industries Growth Strategy
CIPRO	Companies and Intellectual Property Registration Office
CIPC	Companies and Intellectual Property Commission
CISAC	International Confederation of Societies of Authors and Composers
CRC	Copyright Review Commission
CTS	The Centre for Technology and Society
DAC	Department of Arts and Culture
DACST	Department of Arts, Culture, Science and Technology
DALRO	Dramatic, Artistic and literary Rights Organisation (Pty) Ltd
DOC	Department of Communications
DRM	Digital Rights Management
ECAD	Escritorio Central de Arrecadacao e Distribuicao
EC Act	The Electronic Communication Act 36 of 2005
ECT Act	Electronic Communications and Transactions Act 25 of 2002
FIA Federation	Federations of International Actors
FTE	Full Time Equivalent
GRAMO	The Norwegian Joint Collecting Society For Performing Artists And Producers
IPRS	Indian Performance Right Society Limited
ICASA Authority	Independent Communications Authorities of South Africa
ICT	Information Communications Technology
IFPI	International Federation of Phonographic Industries
IFRRO	International Federation of Reproduction Organisation
ILO	International Labour Organisation
IPO	Independent Producers Association
ISO	International Standard Organisation
ISPA	Internet Service Providers Association
ISPs	Internet Service Providers
MCPS	Mechanical Copyright Protection Society
MITT	Music Industry Task Team
MNO	Mobile Network Operator
NAB	National Association of Broadcasters
NCB	Nordisk Copyright Bureau
NHC	National Heritage Council

NORM	National Organisation for Reproduction Rights in Music in Southern Africa
OSPs	Online Service Providers
POSA	Performers Organisation of South Africa
PPL	Phonographic Performance Ltd
PPL (India)	Phonographic Performance Limited
ProLitteris	*Gesellschaft fur die collective Verwertung der Rechte an Literatur, Fotografie und bildender Kunst*
PRS	Performing Rights Society Ltd
PwC	PriceWaterhouseCoopers
RBT	RingBackTone
RiSA	Record Industry of South Africa
RRO	Reprographic Reproduction Organisation
SABC	South African Broadcasting Corporation
SAMPRA	South African Music Performing Rights Association
SAMRO	Southern African Music Rights Organisation Limited
SANTACO	The South African Taxi Council
SARRAL	South African Recording Rights Association Limited
SACEM	Society of Authors Composers and Publishers of Music
SACVEN	*Sociedad de Autores y Compositores de Venzuela*
SCPP	*Societe civile des Producteurs de Phonographiques*
SOCAN	The Society of Composers, Authors and Music Publishers of Canada
SPPF	*Societe civile des Producteurs de Phonogrammes en France*
SPEDIDAM	*Societe de perception et de distribution des droits des artistes interpretes de la musique*
SPRE	*Société de Perception de la Rémunération Equitable*
SSA	*Société Suisse des Auteurs*
SUISA	Cooperative Society of Music Authors and Publishers in Switzerland
SUISSIMAGE	Swiss Authors' Rights Cooperative for Audiovisual Works
the dti	Department of Trade and Industry
TONO	The Collecting Society For Composers And Lyricists In Musical Works In Norway
TPMs	Technical Protection Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WASPA	Wireless Application Service Providers Association
WCT	WIPO Copyright Treaty
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation

EXECUTIVE SUMMARY

i. The Copyright Review Commission (CRC) conducted a detailed examination of the workings of collecting societies that were established in South Africa to license musical and literary works, sound recordings and published editions to prospective users, and to collect on behalf of the rights owners the royalties payable by the users. It analysed their functioning and the degree to which they complied with the accepted principles of corporate governance. Societies set up to collect royalties payable for the broadcasting, transmission in a diffusion service or communication to the public of sound recordings (so-called 'needletime' royalties) are regulated by statute and the Commission considered the extent to which they complied with the regulations promulgated under the Copyright Act, 1978.

ii. A major focus of the CRC's work was to ascertain how it came about that, nine years after the enactment of needletime legislation in 2002, not a cent had been paid in royalties to musicians and record companies. It concluded that the legislation, which provided for a statutory licence in respect of needletime, did not adequately protect the rights owners, whose rights were made subject to the licence. This made possible the delay of payment and led to the current situation where two cases before the Copyright Tribunal and another in the North Gauteng High Court have to be decided before the musicians and record companies involved are able to receive the money owing to them. The royalties in these cases amount to millions of rand. The CRC says it appears that those entitled to these royalties have not received payment because of what looks like a prolonged filibuster designed to postpone the day when broadcasters will have to pay needletime. If that is the case, then it is unfortunate that the main beneficiary of this alleged filibuster is the national broadcaster. The CRC makes detailed recommendations as to how the defects in the law that made this situation possible could be rectified. It also recommends that the Copyright Tribunal be drastically recast to enable it to function expeditiously and efficiently. See Chapter 3, paragraphs 3.3.11 to 3.3.13.

iii. Based on international trends and the problems experienced as a result of multiple collecting societies operating within the same set of rights (e.g. the National Organisation for Reproduction Rights in Music (NORM) versus the Southern African Music Rights Organisation (SAMRO) with regard to mechanical rights) the CRC recommends that the legislation be amended to allow for only one collecting society per set of rights with regard to all music rights governed by the Copyright Act of 1978 (i.e. performance, needletime and mechanical rights). See Chapter 6, paragraph 6.3.4.

iv. Currently, only needletime collecting societies are supervised by the Registrar. Considering the recent collapse of the South African Recording Rights Association Ltd (SARRAL) and the inadequate protection of its members, the CRC believes it appropriate to regulate all relevant music rights collecting societies (SAMRO and NORM). See Chapter 7, paragraph 7.4.2.1.

v. The CRC believes that the provisions in the Collecting Society Regulations for payment into an ‘escrow’ account are unsatisfactory because:

- The money that users agree that they are liable to pay and subsequently deposit into such accounts, cannot be distributed until the dispute over the appropriate tariff is resolved; and
- If users have to pay the money demanded before being permitted to broadcast or otherwise communicate the recordings to the public (an issue which is sub-judice), they may be obliged to pay unreasonably large sums of money into the account.

These problems are addressed in the CRC's recommendations in Chapter 3, paragraph 3.3.5.

vi. In the report, the CRC analyses the problems that led to the dispute between the Registrar and the South African Music Performance Rights Association (SAMPRA), and recommends an amendment to the legislation to confirm a 50% split on needletime between performers and recording entities. The CRC did not receive copies of agreements between artists and recording entities that made provision for any other split. See Chapter 3, paragraph 3.3.8.

vii. The CRC investigated the failure of the national broadcaster to pay over an extended period for the use of mechanical rights (i.e. those falling under Section 9 of the Copyright Act) and music videos. See Chapter 3, paragraphs 3.2.13 to 3.2.23.

viii. The operations of mobile service providers were investigated and recommendations made to prevent mobile operators and wireless service providers from distributing music content unless licensed to do so by the relevant collecting societies. See Chapter 4, paragraph 4.8.1.

ix. It is of the utmost importance that the Copyright Act and the Performers' Protection Act be amended to govern effectively the digital exploitation of copyright works. The CRC believes that an overall impact study should be conducted and finalised to determine the appropriateness for the country to ratify and implement the World Intellectual Property Organisation (WIPO) Internet treaties. See Chapter 4, paragraph 4.3.20.

x. The United States of America (USA) is the largest market in the world for performance rights collections, but also has the largest omission, with analogue radio broadcasters able to play sound recordings without having to pay royalties. Taking this into consideration, the CRC recommends that no needletime royalty payments be made in respect of analogue radio broadcasts to the performers and record companies from countries such as the US, which do not provide for needletime royalties to be made in respect of such broadcasts. See Chapter 10, paragraph 10.12.9.

xi. Since 2000, mobile operators have been selling ringtones, but have made no payments for performance and needletime rights. South African copyright law lags behind in the digital era. The right 'to communicate a work to the public' at a time and place chosen by the user adequately addresses the transmission of works on networks as well as the streaming of content. This new right has been adopted in most other jurisdictions. The CRC recommends that the copyright law be amended to adopt the right 'to communicate work to the public' as one of the exclusive rights of copyright owners. See Chapter 4, paragraph 4.8.2.

xii. In 2010, the industry collected R357 million in royalties. This is extremely low in relation to the size of the industry and local economy. The CRC believes that in five years' time, if current leakages (non-payments by broadcasters, mobile entities, public transporters and others) are adequately addressed, the industry could potentially target collections worth R1 billion per annum. (This is subject, of course, to the approval of the relevant tariffs by the Tribunal in cases where the parties involved do not agree.) See Chapter 8, paragraph 8.1.8.1.

xiii. In Chapters 6 and 7, the CRC sets out the respects in which the collecting societies have failed to comply with the applicable principles of sound corporate governance and Collecting Society Regulations. The Commission recommends that adherence to the good principles of corporate governance (e.g. King III) be compulsory for collecting societies, and that the Registrar be empowered to take over the administration of any such society should he or she be satisfied that it is being run in a manner that is detrimental to the respective rights holders.

xiv. The CRC considered the circumstances surrounding the collapse and liquidation of one collecting society accredited under the regulations, and makes recommendations as to what action should be taken by liquidators and what should be done to avoid further collapses. See Chapter 7, paragraph 7.1 and paragraph 7.4.1.

xv. The costs-to-royalty income ratio (i.e. administration costs as a percentage of total collections) for collecting societies selected for international benchmarking purposes varies between 10% and 24%. (The maximum allowable ratio is 20% in terms of current local regulations, which the CRC regards as appropriate.) The CRC believes that SAMRO's current ratio of approximately 30% is excessive in relation to the international average. This is confirmed by the fact that when compared with other collecting societies, SAMRO has the lowest average ratio of revenue collected to labour costs. The CRC recommends that SAMRO be given three years to resolve this matter. See Chapter 10, paragraph 10.12.1.

xvi. The CRC analysed the amounts of money collected and thereafter distributed, as well as the efficacy of attempts to trace persons in cases where royalties could not be distributed because the persons entitled thereto could not be identified. Recommendations are made as to what should be done to identify and trace the persons concerned. See Chapter 10, paragraph 10.12.7.

xvii. The CRC ascertained that approximately 24% (as per Table 17 in Chapter 10) of royalties collected are paid to local authors and composers. This is due to the fact that local music content usage is significantly lower than that of non-local content. The CRC recommends that the local music content targets gazetted by the Independent Communications Authority of South Africa (ICASA) be raised significantly and that the monitoring process be strengthened. See Chapter 11, Table 26 (a), (b), (c), (d) and (f) and Chapter 10, Table 17 (j).

xviii. The CRC compared tariffs charged in South Africa with those in Brazil, France, India, Norway, Senegal, Switzerland and the United Kingdom (UK), and found that most of the tariffs applied in South Africa were significantly lower. See Chapter 8, paragraph 8.2.12.

xix. The CRC analysed examples of contracts between collecting societies and users and between performers and recording companies and made recommendations as to what improvements should be effected. **the dti** is urged to draw up standard contracts between performers and record companies that are fair to both sides and that parties to such agreements are encouraged to use. See Chapter 10, paragraph 10.12.5.

xx. The CRC believes that the Copyright Act must be amended to provide for the reversion of assigned rights to royalties 25 years after the assignment of such rights. Such an amendment will help relieve the plight of composers whose works still earn large sums of money, which are going to the assignees of the composers' rights long after the assignees (or their predecessors) have recouped their initial investment and made substantial profits, in excess of those anticipated when the original assignment was taken. See Chapter 10, paragraph 10.12.10.

xxi. The report considers developmental aspects relating to the local music industry and the need for education about copyright matters of both the public (which has to be persuaded as to the legitimacy and value of copyright and performers' rights) and musicians (so that they can avoid being exploited). See Chapter 12.

xxii. The CRC recommends the establishment of an interdepartmental steering committee, which should be led by **the dti** with representatives from the Department of Arts and Culture (DAC) and the Department of Communications (DOC) or ICASA, to drive the implementation of key aspects of this commission. This committee should include the Registrar and heads of all relevant collecting societies. See Chapter 13, paragraph 13.6.2.

xxiii. The question of introducing a blank tape levy, which was recommended by the Music Industry Task Team (MITT), is being considered by the Task Team appointed by the DAC and was not dealt with by the CRC in this report.

xxiv. A comparative study was conducted with Brazil, France, India, Norway, Senegal, Switzerland and the UK. Key findings include:

- With regard to the maturity of the industry, South Africa lags behind when compared with the developed countries;
- India and Brazil face similar challenges around the collection of royalties;
- South Africa is the highest importer of music despite the fact that it is the only country with a formal music quota system;
- With regard to the efficiencies around collections processes, significant improvements are required;
- Only Brazil and France have fair competition among the collecting societies with regard to membership; and
- No country has fair competition with regard to the music users' market. See Chapter 14.

xxv. The CRC recommends that ICASA include as a condition in broadcasters' licences that repeated failure by broadcasters to comply with needletime and copyright obligations will lead to the cancellation of such licences. See Chapter 11, Table 26 (e).

1 INTRODUCTION

1.1 ESTABLISHMENT OF THE COMMISSION

1.1.1. On 18 November 2010, the Minister of Trade and Industry, Dr Rob Davies, MP, established the Copyright Review Commission (CRC) to assess concerns and allegations about the collecting societies model that is in place for the distribution of royalties to musicians and composers of music. The CRC, which is accountable to the Minister of Trade and Industry, was instructed to advise and make recommendations for the Minister's consideration on 19 terms of reference, set out in 1.3 below.

1.2 MEMBERS OF THE COMMISSION

1.2.1. The following persons were appointed as members of the Commission: the Honourable Mr Justice IG Farlam (chairperson), Mr Oupa Lebogo, Mr Nala Mhlongo, Prof. Tana Pistorius, Dr Jean Swanson-Jacobs, and Prof. Musa Xulu.

1.3 THE COMMISSION'S TERMS OF REFERENCE

1.3.1. Assess the effectiveness of the structure of collecting societies in South Africa, including those that belong to authors, composers, recording companies, musicians/artists and others. The CRC should make recommendations to improve the collective management of copyright.

1.3.2. Assess the relationship of collecting societies in South Africa to determine the extent of and access to royalties from public and private broadcasters and how these royalties are distributed to artists.

1.3.3. Assess the nature of private and public agreements that radio and TV stations have with local and international collecting societies, and determine how royalties are distributed and the pattern of receiving for local vis-à-vis international rights owners.

1.3.4. Assess the nature and extent of the use of music by mobile telephony companies and whether these companies are paying copyright royalties to the rightful owners.

1.3.5. Assess the distribution of royalties and determine the percentages distributed nationally vis-à-vis outside South Africa.

1.3.6. Assess tariffs associated with these licensing agreements.

1.3.7. Assess licensing agreements that universities, other institutions of higher learning and training institutions have with collecting societies regarding royalties for copyright or literary work; and how these royalties are distributed to collecting societies and from there on to artists, composers, authors and/or publishers.

1.3.8. Determine whether all money collected is distributed and for what purposes any remaining money is being used, e.g. for administration or social pension purposes.

1.3.9. Assess a sample of contractual relationships between collecting societies in the music industry and other users such as hoteliers and places of employment. Determine how these contracts are structured and how royalties are fixed.

1.3.10. Determine whether collecting societies, both nationally and internationally, collect for members only and/or for non-members. Assess how the royalties of non-members are treated and distributed, including the effort taken by collecting societies to trace non-members whose royalties are in their custody.

1.3.11. Assess reciprocal agreements between collecting societies and their counterparts, and determine who owns the rights in such a relationship. Are rights assigned to third parties without the consent of the owner of those rights?

1.3.12. Assess how reciprocal agreements operate among states. Can South Africa, for example, direct how reciprocal agreements should be structured in terms of Section 4 of the Performers' Protection Act, 1967?

1.3.13. Assess contractual relationships among artists and big recording companies, such as Sony, EMI, Gallo and Universal, and publishing houses pre- and post-Copyright Amendment Act, 2002 and the Performers' Protection Amendment Act, 2002.

1.3.14. Determine whether accredited collecting societies are complying with the Copyright Regulations regarding the administration and distribution of needletime royalties. Recommend a compliance model for good corporate governance.

1.3.15. Assess contractual relationships among artists and independent labels pre- and post-Copyright Amendment Act, 2002 and the Performers' Protection Amendment Act, 2002. How are royalties distributed, flowing from these contractual relationships?

1.3.16. Assess how foreign broadcasters treat the playing of music of South African artists and composers who do not belong to collecting societies and where no reciprocal agreements exist. Determine if any royalty is payable, to whom it is payable and how such royalty is treated by the laws of various countries where it is collected.

1.3.17. Assess all licences issued by ICASA to public and private radio and TV stations in relation to music genres. Is there compliance with the terms of the licence? How can enforcement be improved?

1.3.18. Determine whether collecting societies are complying with the general rules of corporate governance in terms of relevant legislation and the Copyright Regulations, 2006, which regulate the administration of the needletime royalty.

1.3.19. Assess the efficiency of legislation in South Africa to deal with the concerns raised above.

1.4 PROCESS FOLLOWED BY THE COMMISSION

1.4.1. Advertisements in the print and electronic media invited interested parties to submit written representations on the matters covered by the terms of reference. Twenty-eight written responses were received from the individuals, companies and organisations listed in Appendix 1 (a).

1.4.2. Members of the CRC attended public hearings, where interested parties were able to make oral submissions. These took place on 10 May 2011 in Cape Town, 11 May 2011 in Port Elizabeth and Bloemfontein, 12 May 2011 in Kimberley, 13 May 2011 Potchefstroom, 16 and 17 May 2011 in Johannesburg, and 19 May 2011 in Durban.

1.4.3. A summary of the oral representations at these hearings was compiled by the CRC secretariat and is set out in Appendix 1 (b).

1.4.4. The CRC investigated the majority of items reported to it. There were, however, some important items that the Committee could not investigate as they fell outside the scope of its terms of reference. The CRC will refer these items to the Standing Advisory Committee on Intellectual Property for the Minister of Trade and Industry.

1.4.5. The CRC wishes to express its gratitude to those who submitted written and made oral representations.

1.4.6. Following these submissions, members of the CRC undertook an international benchmarking exercise and visited seven foreign countries to obtain comparative material to assist it to make recommendations based on international best practice.

1.4.7. The international benchmarking reports prepared after these visits are set out in Appendix 2 and the key findings summarised in Chapter 14.

1.4.8. Meetings were held with representatives from the collecting organisations active in South Africa: the Southern African Music Rights Organisation Ltd (SAMRO); the Performers Organisation of South Africa (POSA), a trust set up to administer needletime rights for SAMRO's performer members; the South African Music Performers Rights Association (SAMPRA); the National Organisation for Reproduction Rights in Music in Southern Africa Ltd (NORM); the Recording Industry of South Africa (RiSA); the Dramatic, Artistic and Literary Rights Organisation (DALRO); and two former directors of the South African Recording Rights Association Ltd (SARRAL), a collecting organisation now in liquidation.

Meetings were held with representatives of the main role players in the music industry in South Africa: the SABC; Primedia Broadcasting; the SABIDO Group, which owns e.tv and the ESAT news channel; the National Association of Broadcasters (NAB); MultiChoice; M-Net; TELKOM, Vodacom; the Internet Service Providers Association (ISPA); the Wireless Application Service Providers Association (WASPA); Sony Music Entertainment (Pty) Ltd; EMI Music South Africa; Universal Music (Pty) Ltd; and the Gallo Record Company Ltd.

In addition, several government departments and bodies sent representatives who gave evidence before the CRC and provided information, viz. ICASA, the Department of Arts and Culture (DAC), and the office of the National Director of Public Prosecutions (NDPP).

1.4.9. The CRC derived considerable benefit from the reports of three foreign commissions that dealt in recent years with copyright issues, namely:

1.4.9.1. The *Review of Australian Copyright Collecting Societies*, a report made in 1995 to the Australian Ministers for Communications and Arts and Justice by Mr Shane Simpson (the Simpson Report);

1.4.9.2. The *Gowers Review of Intellectual Property*, a review commissioned by the British Chancellor of the Exchequer and the Secretaries of State for Trade and Industry and Culture, Media and Sport, written by Mr Andrew Gowers and published in December 2006 (the Gowers Review); and

1.4.9.3. *Digital Opportunity, a Review of Intellectual Property and Growth, an Independent Report* by Professor Ian Hargreaves, commissioned by the British Prime Minister and published in May 2011 (the Hargreaves Report).

2 THE FACTUAL BACKGROUND

2.1 PRE-1994 NEEDLETIME ASSESSMENT

2.1.1. In September 1992, the then Deputy Minister of Trade and Industry, Mr D Graaff, MP, referred the questions of needletime and a blank tape levy to the Standing Advisory Committee, appointed in terms of Section 40 of the Copyright Act of 1978, of which the chairperson was the Honourable Mr Justice LTC Harms. The relevant proposals were made by the Association of the South African Music Industry (ASAMI). According to the Committee's report, it disagreed with ASAMI that the right to needletime was taken away in 1965 because Parliament succumbed to pressures from the SABC. They attributed the removal of needletime to "the alleged existing abuse of rights and an intractable attitude of the record industry to agree to a reasonable royalty rate" (the Standing Advisory Committee on the Copyright Act, *Report on 'Needle Time' and 'Blank Tape Levy*', 1993). According to the report, the broadcasters had presented the argument against needletime that the promotional value of broadcasting was sufficient compensation in lieu of a royalty. ASAMI, on the other hand, argued that the promotional value could be taken into account when a licence was negotiated. The Statutory Advisory Committee concluded that although much was to be said for needletime, a recommendation could not be made unless a number of matters were cleared up, including:

- whether performers should share in the income;
- what the financial implications would be for smaller broadcasters;
- whether it would hamper the freeing of the airwaves;
- what the financial implications would be for the country;
- how performers would gain and how much; and
- whether the introduction of needletime should not await developments in the US and at WIPO, an agency of the United Nations (UN), which negotiates and manages the various intellectual property (IP) treaties.

2.2 THE ESTABLISHMENT OF THE MUSIC INDUSTRY TASK TEAM (MITT)

2.2.1. In 1995, the Standing Advisory Committee acted as a commission of enquiry in terms of the Copyright Act, solicited public opinion on the reintroduction of needletime and recommended accordingly. This process culminated in legislative amendments to the Copyright Act and the Performers' Protection Act, introduced in Parliament in 2002 (report from **the dti** to the CRC on *Government Involvement in the Music Industry*, *2011*).

2.2.2. The renewed attempt to provide for needletime royalties took place in the context of the newly elected government, supported by the poor majority, and consensus among all stakeholders on the need to improve the standard of living of performers who were entitled to a share (normally 50%) of needletime royalties. The poverty of musicians was evidenced by the recurring phenomenon of seemingly successful musicians dying poor (e.g. Simon 'Mahlatini' Nkabine). In 1998, this prompted the then Minister of Arts and Culture, Science and Technology to establish the Music Industry Task Team (MITT) to investigate the problems of the industry.

2.2.3. The MITT met during February and March 2000 and held five regional hearings, from May to June 2000, in Pietersburg, Bloemfontein, Durban, Cape Town and Port Elizabeth, deliberating with and consulting a wide spectrum of South Africans.

2.2.4. The MITT was part of a wider initiative of the Cultural Industries Growth Strategy (CIGS), which recognised the global movement towards an information or knowledge economy, a decline in the job-creation potential of the traditional sectors of the economy, and the potential of South Africa's culture sector to contribute to growth (*Music Industry Task Team Report*). The CIGS and MITT policy documents were developed as part of the mandate of the Department of Arts and Culture, Science and Technology to develop the music sector as a cultural industry. CIGS advocated the development and promotion of the music sector as a tool for job- and wealth-creation. The MITT recommendations were aimed at the development of an effective and enabling legislative framework, human resources, economic growth, and the development and promotion of the music industry.

2.2.5. Based on submissions, the MITT identified the following problems in the industry:

- Inadequate and outdated copyright legislation, particularly with regard to needletime;
- Piracy and copyright infringement;
- Low levels of local content and lack of monitoring;
- Unfair contracts;
- Lack of access to education, training and information about the economics of the industry, and lack of transparency and accountability of key players;
- Inadequate definition of musicians' status as workers in labour legislation, undermining their access to legal protection and benefits;
- Racism and sexism in the industry;
- Isolation of musicians living outside Gauteng; and
- Inadequate funding for music development.

2.2.6. The MITT report made many valuable recommendations (see Appendix 3). Many of the problems mentioned in that enquiry and addressed in the MITT recommendations are still prevalent in the music industry today and were raised repeatedly by stakeholders during the public hearings held by the CRC.

2.3 SUBMISSION BY THE DEPARTMENT OF ARTS AND CULTURE

2.3.1. In its submission to the CRC, the DAC indicated that it was co-operating with relevant departments, the private sector, trade unions and civil society to implement the MITT recommendations. Further, the DAC indicated that it had been working with **the dti** and the Companies and Intellectual Property Registration Office (CIPRO) and that the relationship had led to the amendment of the copyright legislation in 2002 as well as the creation of new collecting societies for needletime (submission to the CRC by the DAC, August 2011). This indicates that either little has happened in terms of the implementation of the CIGS and MITT since 2002, or the relevant departments have not co-operated to assess the work that has been done. It would, however, have assisted the CRC a great deal if the DAC had provided a full progress report on the implementation of the recommendations, or lack thereof, to avoid a situation, real or perceived, where commissions of enquiry lead to further commissions of enquiry and a lack of action.

2.3.2. It can be assumed that the appointment of the CRC was the implementation of one of the MITT recommendations. A number of MITT recommendations overlap with the terms of reference of the CRC and these recommendations need to be effected to enhance the effectiveness of collective management of copyright and related rights. Collective copyright management in itself cannot enhance sustainable livelihoods of copyright owners without the broader economic and developmental context of the music industry being addressed. In this regard, Brazil stands out as a prime example of an emerging market with a successful music industry, both in terms of global and domestic impact (see benchmarking report on Brazil in Appendix 2).

3 HISTORY OF COPYRIGHT AND NEEDLETIME LEGISLATION

3.1 HISTORY OF COPYRIGHT LEGISLATION

3.1.1. The law of copyright grants the creators of original works (such as literary, musical and artistic works, cinematograph films, sound recordings and published editions) exclusive rights to control and exploit these works commercially. When a work is protected by copyright, such acts as the reproduction, distribution or communication of the work to the public may not take place without the consent of the creator of the work or the person to whom the creator's rights have been assigned. In some cases, however, the acts concerned may be performed without the consent of the owner of the copyright, but subject to certain conditions, including the payment of royalties, the amount of which has been agreed to by the owner or his representative or determined in terms of a statute or by a court. In such a case, one speaks of a statutory or compulsory licence.

3.1.2. The primary purpose of copyright law was stated by the Franki Committee (the Copyright Law Committee appointed in Australia in 1974) to be:

> To give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand ... as copyright is in the nature of a monopoly the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered. (para. 1.05.9, Davidson, Menotti and Wiseman Australian Intellectual Property Law (2008) p183.)

This essentially repeats what Lord Macaulay, then TB Macaulay, MP, said in his famous speech in the House of Commons in 1842 in the debate on what became Talfourd's Act, viz.:

> It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil: but the evil ought not to last a day longer than is necessary for the purpose of securing the good.

After quoting that passage, Mr Gowers said:

> If the exclusive right granted by copyright ... lasts longer than it needs to, unnecessary costs will be imposed on consumers. (Gowers Report, p.50, para. 4.26.)

3.1.3. Copyright law in South Africa is a creation of statute, and the earlier statutes (Act 9 of 1916 and Act 63 of 1965) closely followed the British legislation on the topic (the third schedule to Act 9 of 1916 was a reprint of the 1911 British Copyright Act (1 & 2 Geo. 5, c. 46)), and even the present Act, the Copyright Act 98 of 1978 (the material provisions of which are set out in Appendix 4A), contains many provisions based on the British legislation and has much in common with it. It is, therefore, appropriate to begin with a consideration of the British Copyright Act passed in 1710 in the reign of Queen Anne and known as the Statute of Anne (8 Ann., c. 21). It conferred rights on authors (and through them their assigns) who had the sole right of printing books for a term of 14 years from the date of publication, and for a further term of 14 years if the author was still alive at the expiry of the first 14-year term. The question as to whether there was a common law right of copyright on the expiry of the statutory period was decided by the House of Lords in *Donaldson v Becket* (1774) 2 Bro PC 129, in which it was held that there was no such common law right either because no such right had ever existed or, if it had, it had been abolished by the Statute of Anne.

3.1.4. Works other than books subsequently also received copyright protection, viz, engravings (in 1734), sculptures (in 1798), and drawings, paintings and photographs (in 1862). Performing rights were also subsequently covered by copyright (in 1833), as were musical rights by the Copyright Act of 1842 (5 & 6 Vict. c.45), known as Talfourd's Act.

3.1.5. The term of copyright, which had been extended in 1802 and 1814, was further extended by Talfourd's Act, which repealed the Statute of Anne and provided that copyright in published works was to last for the life of the author plus seven years after his or her death, or for 42 years, whichever was the greater.

3.1.6. Originally, by the Statute of Anne, only books by British authors enjoyed copyright protection. In 1838, the law was amended by the International Copyright Act (1 & 2 Vict. c. 59), which provided for copyright protection to be granted to foreign authors by Order in Council. After further legislation on the topic, Britain entered into a series of bilateral copyright conventions. In 1886, a multilateral convention was agreed at Berne, which was given statutory effect by the International Copyright Act of 1886 (49 & 50 Vict. c. 33). The Berne Convention, as revised in Berlin in 1908, provides in Article 5 (2) that copyright arises automatically on the making of the work (i.e. no registration is required) and in Article 7 (1) that the minimum term must be the author's life plus 50 years. It also lays down (in Articles 3 to 5) that member states must follow the principle of national treatment, in terms of which each member state must accord works originating from other member states the same protection it offers its own nationals. South Africa is a member of the Berne Convention, which is now administered by WIPO, which has its headquarters in Geneva. South Africa is a party to the Agreement on Trade-Related

Aspects of Intellectual Property Rights (the TRIPS Agreement), which is also based on the principle of national treatment. Nationals of other parties enjoy copyright protection no less favourable than that given by a World Trade Organisation (WTO) member to its own nationals.

3.1.7. The British Copyright Act of 1911 (which had statutory force in South Africa as it was printed in the third schedule of our Act 9 of 1916) brought all the different copyrights under one statutory roof. Section 5 provided for a statutory term of the author's life plus 50 years (the minimum prescribed in the Berne Convention). It also invalidated *inter vivos* assignments by authors of their works as well as licences to publish such works in so far as concerned the second half of the 50-year period after the author's death. This provision was enacted out of a concern for the dependants of deceased authors. It was not re-enacted in the 1965 Act (following in this regard the 1956 British Copyright Act (4 & 5 Eliz. 2, c.74), which repealed the 1911 Act as it applied in Great Britain, with the result that the protection granted thereby only applies in the case of works made before 11 September 1965 (when the 1965 Act came into operation) by authors and composers who died less than 50 and more than 25 years ago. (This provision was invoked by Prof. Owen Dean to obtain royalties for the heirs of the late Solomon Linda, who composed the *Imbube* song in 1939.) The CRC was informed that currently no attempt is being made to collect royalties on behalf of heirs of other South African composers to whom Section 5 of the 1911 Act applies. The Commission recommends that this omission be rectified.

3.1.8. The 1911 Act (Section 19) also gave what it described as a 'copyright' right to the producers of sound recordings to prevent reproductions of their recordings. This right was later held to include the right to prevent public performances of recordings: see *Gramophone Co v Cawardine* [1934] Ch. 450. This right was not strictly a 'copyright' right because it was not, as Prof. WR Cornish put it (*Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights,* [7th ed., para. [9-08]):

> ... conferred upon the 'executant' artist whose performance was recorded, but upon the business which organised the recording. It was not thus an author's right at all, but something which continental theory would scrupulously distinguish as a 'neighbouring right'. An important precedent was thus set for an age that was to see a great increase in the technical possibilities for artistic expression.

The 1965 Act followed the 1956 British Act in adding three new forms of entrepreneurial copyright to that of sound recordings recognised in the 1911 Act. These included copyrights in cinematograph films (Section 14(1)), broadcasts (Section 15(1)) and published editions, i.e. the typographical arrangement thereof (Section 16(1)).

3.1.9. Unlike the entrepreneurs, performers had to wait much longer to receive protection. As Owen Morgan (*International Protection of Performers' Rights*, 2002, p1) points out:

> ... in the absence of technology: (i) a performance exists past the time of its presentation only in the memory of a spectator physically present when the performance was given; and (ii) the communication of a performance is limited to the spectators physically present in the immediate vicinity of the performance at the time it is presented.

Performances in consequence were transitory. Mr Justice Arnold (*Performers' Rights*, 4 ed, p17, para. 1.42) says:

> Performers did not need protection, for the only way in which their performance could be exploited was by the public paying admission to a concert or play. Performers might be unfairly exploited by impresarios, but that was simply a matter of contract between the performer and the impresario.

What altered the situation was technology, in particular the invention of the phonograph by Thomas Edison in 1877, the pianola by Edwin S Votey in 1897, and the cinematograph by the Lumiere brothers in 1895. These inventions meant performances could now be 'fixed', i.e. embodied in a stable and permanent form, enabling the sound and images of the performance to be perceived after the actual performance was over. These fixations were artefacts that could be reproduced and sold, allowing the performances to be exploited in ways other than by charging admission to the actual event. With the invention of broadcasting (first by radio and thereafter by television), performances, whether fixed beforehand or transmitted live, were disseminated to large numbers of people over vast areas.

Despite these developments, for many years performers were not entitled to a share of the income derived from the dissemination of their performances (unlike the entrepreneurs who organised the performances). In one respect, the 1965 Act weakened the position of the record producers. Under the 1916 Act, broadcasts of sound recordings were covered as 'performances', but Section 1 (6) of the 1965 Act (the effect of which is retained in the proviso to the definition of 'performance' in the 1978 Act) stated that the broadcasting or the causing of a work to be transmitted to subscribers to a diffusion service was not to be deemed to constitute a performance. The performance was to "be deemed to be effected by the operation of the receiving apparatus". The result was that broadcasters no longer had to pay royalties to the holders of copyright in respect of sound recordings that were broadcast.

3.1.10. The 1965 Act, following the British Act of 1956, provided copyright protection for cinematograph films, broadcasts and published editions, but made no provision in respect of performers. The 1978 Act also provided protection for programme-carrying signals. Although it initially did not repeat the protection given in 1965 to published editions, this was rectified in 1984 when Section 11A was inserted in the Act by Section 8 of Act 52 of 1984. In 1992, copyright protection was given to computer programs when Section 11B was inserted in the Act by Section 10 of Act 125 of 1992.

3.1.11. For many years, performers whose performances were recorded only received royalties on the sale of the recordings, often with an advance payment recouped from royalties as and when they became payable. This was the case not only in South Africa, but also elsewhere in the world. The record companies who owned the copyrights to recordings were exclusively entitled to the income from public performances and broadcasting of those recordings. Originally, performers sought to bring their claims for a share in the revenues generated from the playing of their recordings in public or over the air under the Berne Convention, contending that they should be regarded as authors and their performances as works. These arguments, however, were rejected at the Revision Conferences of the Berne Convention held in Rome in 1928 and in Brussels in 1948 (see Morgan, op. cit., p119). Thereafter, attempts to seek protection for performers were directed at obtaining a separate convention, which was achieved when the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations was concluded in 1961. South Africa has not acceded to this convention, but in 1967 Parliament passed the Performers' Protection Act 11 of 1967, which gives partial effect to the convention in that sections of the Act cover the same ground as certain articles of the Convention.

3.1.12. Section 5 (1) of the Act, as originally enacted, contained the following:

> (1) Subject to the provisions of this Act, no person shall without the consent of the performer (a) broadcast or communicate to the public a performance of such performer, unless the performance used in the broadcast or the public communication is itself already a broadcast performance or is made from a fixation of the performance or from a reproduction of such a fixation.

3.1.13. This Section was modelled on Article 7 of the Rome Convention. It allows for the broadcasting or communicating to the public of a recording without the consent of the performer, if the performance has previously been fixed. As Owen said (op. cit., p156), "[t]his is a serious restriction, given that the majority of performances that are broadcast and communicated to the public are embodied in a fixation." In such a case, however, the performer was entitled to equitable remuneration under Article 12 of the Convention, which reads as follows:

> If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers or to the producers of the phonogram or both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of the remuneration.

3.1.14. Despite the fact that Article 12 has been described as "the most important provision in the Convention" (Owen, op. cit., p172), the Act did not contain a section modelled on Article 12 and broadcasters continued to play commercial recordings without the consent of the performers or paying them any remuneration.

3.1.15. After playing sound recordings, South African broadcasters paid royalties in terms of tariffs that had been agreed with the collecting society representing the composers and the publishers who held the copyrights to the works played under Section 6 (d) of the Copyright Act, viz. SAMRO. They also paid royalties to one of the collecting organisations representing the record producers who held the copyrights to the recordings played in terms of Section 9 (a) of the Act (the so-called 'mechanical rights'), viz. NORM or SARRAL.

3.1.16. The tariffs, in terms of which royalties were paid in respect of the Section 6 (d) rights, were agreed with SAMRO. If SAMRO and the broadcasters were unable to agree on what tariff should apply or SAMRO had refused to grant a licence, the broadcasters could apply for relief to the Copyright Tribunal. The Tribunal was originally established under the 1965 Act, following the approach adopted in the British Act of 1956. The British Parliament had set up a tribunal, originally known as the Performing Right Tribunal, to provide a remedy for major copyright users who had complained about the terms on which the performing rights societies were doing business. The Tribunal was established after the Gregory Committee (whose report on copyright reform was accepted on this and other points by the British Parliament) found that certain societies were abusing the monopoly rights conferred on them.

3.1.17. The present Act re-enacted the provisions in the 1965 Act dealing with the Copyright Tribunal. Section 29 (1) provides that the judge or acting judge, designated from time to time as the Commissioner of Patents in terms of Section 8 of the Patents Act 57 of 1978, shall also be the Tribunal. The function of the Tribunal, in terms of Section 30, is to determine disputes between licensing bodies or other persons from whom licences were required and persons requiring licences or organisations claiming to be representative of such persons. Regulations dealing with the procedure before the Tribunal have been made under Section 29 (3) of the Act: see Government Notice R2530 published in *Government Gazette 6252* of 22 December 1978, as amended. Regulation 27 (3) provides that, subject to the regulations, the Tribunal may regulate the procedure

before it, in accordance with the provisions of the Uniform Rules of Court of the Supreme Court of South Africa (now the High Court).

3.1.18. As noted in paragraph 2.2.5 above, the MITT identified what it described as the major problems of the music industry. These included "inadequate and outdated copyright legislation, particularly with regard to needletime" (needletime gives performers the right to receive remuneration when their recordings are broadcast, transmitted in a diffusion service or communicated to the public). It referred to the fact that, unlike composers and authors, performers enjoyed no copyright protection. It pointed out that this lack of protection was "out of keeping with international trends in which needletime regulations are the norm". It also said that South Africa's non-accession to the Rome Convention was anomalous and that "[t]he absence of needletime legislation [was] one of the key obstacles to the development of local music and the music industry". It accordingly recommended that a draft amendment prepared by the Standing Advisory Committee on Intellectual Property "should be implemented without delay". The recommendation continued:

> The MITT is unanimous in its concern about the length of time that this issue has been under discussion. It recommends that time frames be incorporated into the amendment of the Act, providing for negotiations between the broadcasters on the one hand and the producers and performers on the other hand, regarding the establishment of the appropriate rate. [In a footnote, it added that there was "a minority view that the time restriction should be at the discretion of the Minister rather than written into the Act".] Should agreement not be reached within the stipulated time period, the Minister of Trade and Industry is asked to intervene.

3.1.19. In 2002, Parliament accepted the MITT's recommendation that legislation be amended to provide for royalties to be paid for needletime. It passed two Acts, one amending the Performers' Protection Act by, inter alia, substituting a new Section 5, and the other amending the Copyright Act by, inter alia, substituting a new Section 9 and 9A. (The texts of the new Sections 9 and 9A of the Copyright Act and the new Section 5 of the Performers' Protection Act are set out in Appendix 4A.) The effect of the amendments may be summarised as follows:

The new Section 9 of the Copyright Act gives to the holders of the copyright in sound recordings exclusive rights to broadcast or authorise the broadcasting of their sound recordings, their transmission in diffusion services and their communication to the public. The new Section 9A in effect gives users who broadcast a sound recording, transmit it in a diffusion service or communicate it to the public, a statutory licence to perform these acts, provided they pay royalties to the owners of the relevant copyright (i.e. the copyright under Section 9 (c), (d) or (e)). The cost of the royalty is to be agreed between the user and the owner of the copyright and the performer or their representative collecting society or, in the absence of such an agreement, determined by the Copyright Tribunal or an arbitrator to whom the question was referred by the parties. The owners of the copyright who receive payment of royalties under the section are obliged to share the royalties with any performer whose performance is featured on the recording in question and on whom a right to receive a royalty is conferred by Section 5 of the Performers' Protection Act. The performer's share is to be determined in terms of an agreement between the copyright holder and the performer or their representative collecting societies. In the absence of such agreement, the determination is to be made by the Copyright Tribunal or an arbitrator to whom the parties have referred the matter. Sub-section (3) of the new Section 5 of the Performers' Protection Act in effect gives users of commercial recordings a statutory licence to broadcast, transmit in a diffusion service or communicate to the public these recordings, provided they pay the performers royalties agreed between the users and the performers or their representative collecting societies, or in the absence of such agreement determined by the

Copyright Tribunal or an arbitrator. In the absence of agreements to the contrary, performers who have authorised the fixation of their performances are deemed to have granted to the persons who arranged their recording the exclusive right to recover their royalties (Section 5 (4) (a)).

3.1.20. Although the above amendments came into operation on 25 June 2002, the Collecting Society Regulations that the Minister was empowered to make under Section 39 (*c*A) of the Copyright Act (which had been inserted in the Act by Act 9 of 2002) were only promulgated on 1 June 2006. In an introductory note to the regulations, it stated that there were common understandings during stakeholder consultations that "all rights in the copyright regime [sc. created by Section 9A of the Copyright Act and Section 5 (3) of the Performers' Protection Act] should be managed through collecting societies in future" and that the regulations would not apply to community radio stations. (The text of the material provisions of the regulations is to be found in Appendix 4B.) Whether these common understandings, which are not incorporated in the two Acts, have the force of law is by no means clear.

3.1.21. The regulations describe the right that a right holder has to receive a royalty, in terms of Section 9A of the Copyright Act or Section 5 (1) (b) of the Performers' Protection Act, as a 'public playing right'. They provide (in Regulation 3) for the accreditation of persons or licensing bodies intending to act as representative collecting societies, language which indicates that collecting societies need not be strictly so-called. On the other hand, Regulation 5 (1) speaks of a representative collecting society being "open to all persons either directly or through the membership of a collective organisation representing a particular group of rights holders having a similar interest", and Regulation 5 (3) says that each member must have at least one vote – language which indicates that a society properly so-called *is* required. Regulation 3 (1) also provides for representative collecting societies to administer rights to receive payments of royalties under Section 9A of the Copyright Act or Section 5 (1) (b) of the Performers' Protection Act or both and for their accreditation by the Registrar. In the case of a society having as members both the owners of copyright in sound recordings and the performers, Regulation 5 (2) provides that the governing structure of the society must provide for equal representation of both classes of members in the decision-making process of the highest executive organ and in the general assembly of members. Also dealt with in the regulations are the powers and functions of the Registrar of Copyright (Regulation 4), the membership structure of collecting societies (Regulation 5), the administration of rights (Regulation 6), licensing (Regulation 7) and distribution (Regulation 8).

3.1.22. Sub-regulation (4) of Regulation 7 provides for the approval and publication by the Registrar of a tariff accepted by the collecting society and the trade association in question or by representative bodies or user groups. It further provides that "any potential user falling within the scope of the tariff as published and complying with its terms shall be granted a licence by the collecting society upon assuming the obligation of the payment of the royalties established under the tariff". Sub-regulations (5) and (6) deal with the situation where a tariff proposed by a collecting society is not accepted by the trade associations and representative bodies or the potential users, user groups or individual users. In that event, provides sub-regulation (5),

> such potential users and user groups shall have the option to pay the amount demanded by the collecting society into an escrow account, pending the outcome of a referral to the Copyright Tribunal or, if the parties so agree, pending the outcome of a referral for arbitration under the Arbitration Act, Act no. 42 of 1965, as amended. Any potential user or user group in respect of which a deposit is being made, and who furnishes the required information to the collecting society to allow for the later distribution of the funds placed in escrow, shall provisionally be allowed to engage in the use that is

subject to the payment of a royalty as provided for in Section 9A of the Copyright Act, 1978, and Section 5 (1) (b) of the Performers' Protection Act, 1967. ('Escrow' is an American expression used to describe a deposit or fund held in trust.)

3.1.23. Sub-regulation (6) provides that a collecting society may, pending a referral to the Copyright Tribunal or an arbitration, apply to the Tribunal or "the designated body in accordance with the provisions of the Arbitration Act" for a ruling requiring any potential user or user group to pay into an escrow account the amount demanded by the collecting society and to furnish the information required for the later distribution of the funds once the applicable tariff has been determined by the Tribunal or arbitrator.

3.2 EVENTS FOLLOWING THE ENACTMENT OF NEEDLETIME LEGISLATION

3.2.1. After the enactment of needletime legislation, the Record Industry of South Africa (RiSA), a trade association whose members own or control through exclusive licences an estimated 95% of the commercially released sound recordings currently broadcast by licensed South African commercial stations, established the South African Music Performing Rights Association (SAMPRA). SAMPRA was accredited as a collecting society under the Collecting Society Regulations to administer on RiSA's behalf the rights of its members to receive royalties under Section 9A of the Copyright Act.

3.2.2. SAMPRA set about identifying different types of usage and creating tariffs. Thereafter it licensed about 3 500 different licensees to whom several of the tariffs applied and who agreed to pay royalties based thereon in exchange for the right to enable their customers and other members of the public on their premises to listen to sound recordings, whether being played directly or on a radio station. By the end of 2010, approximately R94 million had been collected from the licensees and about R6 million in interest earned on the money collected. In the first half of 2011, a further R25 million was collected. This means that after operating costs are deducted, more than R100 million is available for distribution. (As will appear from what is said below, about half of that is yet to be distributed to performers.)

SAMPRA submitted its first distribution account to the Registrar of Copyright for his approval under the regulations. But he refused to approve the plan, inter alia, because it did not provide for the royalties collected in the case of each sound recording to be shared equally between the copyright owner and the performer, in the absence of any agreement entered into between them. SAMPRA replied that the Registrar's approach was not in accordance with the provisions of the Copyright Act and the Performers' Protection Act. It stated that when the proposed needletime legislation was being considered, RiSA and the representatives of the performers agreed that the legislation should provide for the equal distribution of needletime royalties between the owner of the copyright recording and the performer whose performance was embodied in the recording. However, this proposal was not adopted by the legislature, which instead enacted that the shares of the copyright owner and the performer were to be determined between themselves by agreement or, failing such agreement, by the Copyright Tribunal or an arbitrator.

3.2.3. SAMPRA thereafter instituted review proceedings against the Registrar in the North Gauteng High Court, seeking, inter alia, orders setting aside the Registrar's refusal to approve the distribution plan and ordering him to approve it. The Minister of Trade and Industry was joined as second respondent. SAMRO, which has been accredited under the regulations as a collecting society in respect of performers and is involved in the proceedings as the third respondent, has also opposed the relief sought. The other accredited collecting

society, the South African Recording Rights Association Ltd (SARRAL), which was accredited to represent performers and the owners of copyright in sound recordings and which is the fourth respondent in the matter, has since been placed under liquidation. As the proceedings are still pending and the issues raised are *sub judice,* it is not appropriate for the CRC to express its views thereon.

3.2.4. SAMPRA was not able to issue licences to other users of sound recordings, namely the broadcasters and a group of retailers who communicate to the public sound recordings owned or exclusively controlled by the members of RiSA. This was because the broadcasters and retailers refused to accept the tariffs proposed by SAMPRA. The disputes between the broadcasters (represented by the National Association of Broadcasters (NAB)), retailers and SAMPRA have been referred to the Copyright Tribunal for determination and are due to be heard in 2012.

3.2.5. The NAB contended that the Copyright Tribunal could not proceed because the Minister of Trade and Industry had not promulgated regulations governing the conduct of referrals brought under Section 9A of the Copyright Act. This contention was rejected by the Tribunal and, leave to appeal having been refused, NAB unsuccessfully applied for leave to appeal to the Supreme Court of Appeal. Despite SAMPRA's success in this part of the case, the taking of the point has led to what its chairperson, Mr Keith Lister, described in his evidence before the Commission as a "huge delay and cost".

3.2.6. In the referral to the Tribunal, SAMPRA asked not only that the applicable royalty rate be fixed, but also that the broadcasters be obliged to provide information as to their usage of the sound recordings in respect of which the copyright was owned or exclusively controlled by SAMPRA. The Act does not impose an obligation in this regard on users of sound recordings, but Sub-regulations (5) and (6) of Regulation 7 deal with the matter. The broadcasters disputed the validity of the Sub-regulations and refused to provide the information sought. Mr Lister stated that SAMPRA would ask the Tribunal, either before or at the hearing, to order the broadcasters to provide the information not only prospectively, but also retrospectively.

3.2.7. Another issue before the Tribunal in the referral between SAMPRA and NAB is the date from which needletime is payable. Is it: (a) the date when the amending Acts of 2002 came into operation (25 June 2002); (b) the date when the regulations came into operation (1 June 2006); or (c) when payment was first demanded?

3.2.8. The broadcasters have declined to pay any amounts into an 'escrow' account pending the determination of the dispute regarding the appropriate tariff. The tariff proposed by SAMPRA in respect of the broadcasters was explained as follows by Mr Lister in his evidence:

> [It] is based on a very simple proposition that says if a broadcaster broadcasts no editorial content at all, other than music sound recordings, that the tariff should then be 10% of its income and if music sound recordings constitute 70%, then 7% and so on.

3.2.9. When asked for his estimate of the nature of the loss performers are suffering because of the absence of a binding tariff and the failure of the broadcasters to pay royalties for sound recordings used, he said:

> Our estimate of broadcasters at the moment is that on average the music stations use about 65% of their time to broadcast music and their net revenues are of the order of R3 billion a year. So if you take 6.5% of R3 billion, you get a figure of about R200 million. That would be the top-end per annum from broadcasters, if we were to get the tariff that

we believe is fair. If the tariff was half of that it would be R100 million. So, if you want a ballpark figure of broadcasters, it is somewhere between R100 million and R200 million a year and we believe on legal advice that the claim is backdated to 2002.

(It must be pointed out that this is Mr Lister's view and that the NAB does not agree.)

3.2.10. Mr Lister also said that in their most recent application to court, NAB's senior counsel conceded that the accumulated claims against the broadcasters are of the order of R1 billion. Mr Lister said that, in its most recent report, the SABC contended that the amount in dispute with the national broadcaster is R132 million. In evidence given before the CRC, the representatives of the SABC said the broadcaster had provided in its books for a liability under this head of R52 million, with an extra R35 million as a contingent liability. The amount of R52 million was neither in a separate account, nor was it ring-fenced.

3.2.11. In view of the fact that the Tribunal is seized of the matters and the *sub judice* rule applies, it is not appropriate for the CRC to express an opinion on the royalties payable, the date from which they are applicable, or whether any 'escrow' payments are to be made in the interim. What is clear, however, is that whatever the Tribunal may decide, a substantial amount of money should become available to performers whose sound recordings have been broadcast as well as to the owners of the copyright in the sound recordings. It appears that those entitled to whatever is owing them have been kept out of their money for an inordinate period of time because of what looks like a prolonged filibuster designed to postpone the day when broadcasters will have to pay needletime. If this is the case, it is unfortunate that the main beneficiary of this alleged filibuster is the national broadcaster. If the Tribunal judgement goes against the broadcasters, it is likely that they will seek to appeal (as is their right) and this may further delay the payment of needletime royalties by another two years or more. Even if payment into an 'escrow' account is ordered, distribution will not be possible until the matter is resolved.

3.2.12. A factor that has led to the delay in resolving the matters in the Copyright Tribunal is that it is presided over by a judge of the North Gauteng High Court who, as far as the Tribunal is concerned, is a part-time judicial officer. According to Mr Lister, the Tribunal could not sit for a period of approximately six months because of the illness of the judge dealing with the matter.

3.2.13. Royalties payable in respect of 'mechanical rights' (i.e. rights falling under Section 9 (a) of the Copyright Act) are currently collected by SAMRO and NORM, an incorporated association collecting mechanical royalties on behalf of about 300 South African music publishers and composers. Originally, the sole licensing body in South Africa was SARRAL, which is now under liquidation. During the 1990s, NORM started licensing and collecting licence fees on behalf of its members. From 2002 onwards, the SABC paid NORM and SARRAL for mechanical rights. According to the evidence given to the CRC by representatives of the SABC and NORM, NORM and SARRAL submitted monthly invoices to the SABC, which were paid. There was no written agreement between the SABC, NORM and SARRAL. Instead there was what one of the SABC representatives described as "a gentlemen's agreement". The SABC representatives were unable to explain how the SABC auditors were able to satisfy themselves each year that the amounts paid were correct. From 2002, the SABC paid NORM monthly amounts of R458 000; there was no increment of any kind. In September 2009, the payments stopped. According to the SABC representatives, this occurred when there was a due diligence on all contracts. Even though the SABC had stopped paying, it continued to use the mechanical rights. The operating income of NORM was substantially reduced, largely due to the fact that the SABC had halted its payments, and NORM was forced to increase its collection commission rate, which normally stood at 10 to 12,5%.

3.2.14. With the liquidation of SARRAL, SAMRO expanded its collections to include mechanical royalties, and composers whose royalties had been collected by SARRAL moved over to SAMRO. An overlap developed in that the combined number of composers for whose mechanical rights NORM and SAMRO were collecting exceeded 100%. The boards of NORM and SAMRO signed a memorandum of understanding to work together and approach the SABC in an endeavour to get a single blanket agreement in respect of mechanical rights.

3.2.15. Ms Jill Galanakis, who appeared before the CRC on behalf of NORM, described the negotiations with the SABC as being “a really tough road. Many meetings were held and many others were cancelled at the last minute.” When asked why NORM had not taken the SABC to court, Galanakis said NORM did not have the funds to do so and, therefore, kept trying to negotiate. She said the mechanical royalties that NORM received were paid to the music publishers, who shared them with the composers in terms of the contractual arrangements between them, which commonly provided for an equal split.

3.2.16. The SABC representatives said there had been difficulty in getting a mandate from the Board, which was only obtained in 2010. They stated that negotiations were under way and undertook to write a letter to the CRC on 31 July 2011 to report the resolution of the issue of payment for mechanical rights and a further outstanding matter relating to music videos, with the result that the only outstanding issue would relate to needletime. Early in August 2011, the CRC received a letter from the SABC in which it was reported:

> The SABC can confirm that it has reached agreements with NORM and SAMRO on the following terms: [a] a provisional licence fee of R9,5 million to NORM covering the period November 2009 to 31 July 2011; [b] a provisional licence fee of R10,5 million to SAMRO covering the period September 2009 to 31 July 2011; and [c] a provisional licence fee of R1 million per month from August 2011, which will be shared equally by NORM and SAMRO. The amounts payable by the SABC will remain provisional until a final determination by the Copyright Tribunal of the reasonableness or otherwise of the licensing schemes proposed by the collecting societies.

3.2.17. In consequence of the broadcasters' and retailers' failure to pay anything up to this time in respect of needletime, and the SABC's failure to pay royalties for mechanical rights since September 2009, musicians have been deprived of substantial sums of money. Mr Sibisi, who appeared as a consultant for the SABC before the CRC and had previously been in the employ of the national broadcaster, agreed that the issues referred to above “should have been resolved a long time ago”. He agreed that “certain things could have been done better and that going forward the SABC does need to get its house in order”. Sibisi added that “there is a genuine will and feeling from the team [who were dealing with the matter on behalf of the SABC] that all of these issues are going to be resolved by the end of July.” He conceded that the impact of the SABC's failure to pay was “far-reaching” and said he did not think that the SABC could “run away from the fact that as a consequence of non-payment, collecting societies and the artists suffered as a result”. Later he said:

> ... we are not proud of the history of non-payment. I don't think as we sit here we take away any joy in the SABC having been tardy ... in the manner in which it has dealt with this matter ... [T]here have been challenges at the SABC, which resulted in some of these things not being resolved timeously and in a manner that is satisfactory to all the parties.

3.2.18. The SABC was also involved in a dispute over non-payment for the broadcasting of music videos. When the representatives of RiSA appeared before the CRC on 13 July 2011, they were informed that it was unnecessary for them to deal with this dispute as the SABC had informed the CRC that it would pay the outstanding amounts in respect of music videos to RiSA before the end of July 2011. The SABC told the CRC that it was going to pay

a provisional licence fee of R27 577 756 to RiSA “to settle the past” and a provisional licence fee of R2 million per quarter ‘moving forward’. The CRC was led to believe that this would happen by the end of July 2011.

3.2.19. Subsequently, on 6 September 2011, Mr Lister, the chairperson of RiSA, wrote to the chairperson of the CRC, stating that the SABC had not complied with the undertaking given to the Commission in this regard and requesting that the chairperson convene an urgent meeting with the parties involved to establish, as Mr Lister put it, “why the SABC had reneged on the undertaking”. The CRC considered Mr Lister's request and concluded that it would not be able to accede to it, but would deal with the matter in its report and allow the facts to speak for themselves.

3.2.20. Copyright in music videos, being ‘cinematograph films’ as defined in Section 1 of the Copyright Act, is governed by Section 8 of the Act. Among the acts, in respect of which exclusive rights are conferred on the owners of the copyright, is that of broadcasting music videos (Section 8(1) (c)). The definition of ‘cinematograph film’ in Section 1 (1) of the Act provides that “cinematograph film ... includes the sounds embodied in a soundtrack associated with the film”. No compulsory licence is created so the broadcasting of a music video without the permission of the copyright owner is an infringement.

3.2.21. Before the end of March 2007, in terms of a licence agreement concluded with RiSA, the SABC made use of music videos, the copyrights of which belong to South African and foreign owners who are members of RiSA. In November 2005, at the SABC's request, RiSA sent the SABC a video licence proposal providing for different royalty rates for the broadcast use of videos in different slots and dealing with different types of usage, i.e. whether as content in an editorial programme or as ‘fillers’ between programmes. Pending finalisation of an agreement in respect of the matters dealt with in the proposal, it was agreed that the SABC would make quarterly provisional payments to RiSA under the current agreement. By the end of March 2007, when that agreement expired, the SABC had not responded to RiSA's proposal. The SABC executive management requested RiSA to grant the broadcaster an extension of the existing interim licensing agreement, to which RiSA agreed, providing that the SABC made further provisional payments from 1 April 2007. The SABC executive management agreed to this, but the broadcaster failed to make any interim payments pending the finalisation of the new licence agreement. It, however, continued to make use of music videos controlled by RiSA. Numerous meetings were held in an attempt to reach agreement on the terms of the licence, and other meetings scheduled to discuss the matter were cancelled on short notice by the SABC. The negotiating team representing the SABC was frequently changed and negotiations often had to recommence from the beginning. Eventually, in April 2010, RiSA instituted an action in the South Gauteng High Court claiming payment of arrear interim royalties for the broadcasts of music videos. The SABC defended the action, claiming that the executives who agreed to the extension of the licence and to the payment of provisional interim royalties (the Chief Financial Officer and the Head of Content Enterprises) were not authorised to conclude the agreement. The SABC denied that RiSA's members owned the copyright of the videos that the SABC had continued to broadcast without payment. After these defences were raised, RiSA launched an application for an interdict preventing the SABC from broadcasting music videos, the copyrights of which are owned by members of RiSA.

3.2.22. The undertaking given by the SABC to the CRC was that R27 575 756 would be paid “to settle the past” and further quarterly payments would be made “moving forward”. It appears that the negotiations between the parties have broken down over the contract in respect of future broadcasts. However, agreement was reached on the terms of the contract “to settle the past” by the making of a provisional payment in respect of the use of music videos from 1 April 2007 to 31 March 2010, pending the determination by the Copyright Tribunal of

the final rate or rates to be applied. If the amount for the arrears differed from that computed in terms of the Tribunal's determination, there would be either a partial refund by RiSA or an extra payment by the SABC. Despite the fact that the SABC's representatives confirmed that the two agreements were not linked, it appears that the SABC's refusal to implement the undertaking it gave to the CRC in respect of the arrears is based on RiSA's refusal to accept the SABC's proposals based on future use and its insistence on extra terms, which the SABC does not find acceptable.

3.2.23. The CRC hopes it is not too late for the parties to resume negotiations on the issues outstanding and resolve them satisfactorily.

3.3 LESSONS TO BE LEARNED FROM EVENTS SINCE THE ENACTMENT OF NEEDLETIME LEGISLATION

3.3.1. The fact that nine years after the enactment of the needletime legislation, not a cent has been paid to those whose sound recordings have been broadcast shows that the provisions in the Copyright Act and Performers' Protection Act dealing therewith, as well as the Collecting Societies Regulations, are defective and require amendment.

3.3.2. Section 9A (1) (a) of the Copyright Act and Sub-sections (1) (b) and (3) of Section 5 of the Performers' Protection Act put in place a statutory licence for those who intend to perform the acts referred to in Section 9 (c), (d) and (e) of the Copyright Act without the permission of the rights holders. Unlike the legal rules relating to rights enjoyed, for example, by composers, which from a jurisprudential point of view can be described as 'property rules', the rules relating to the use of rights (Section 9 (c)-(e)) subject to the payment of royalties in terms of Section 9(A(1)(a)) of the Act can be described as 'liability rules'. 'Property rules' describe how an owner of property may control the use of his or her property by a stranger, subject to the power of the Copyright Tribunal, under Section 33 (3) and (5) of the Copyright Act, to overrule a refusal by an owner to give permission for the use of the property or the grant of permission on unreasonable terms (in which case the permission is granted by the Tribunal and must exist before the stranger uses the property). 'Liability rules' permit a stranger to use the rights without the owner's permission, but subject to the incurrence on the user's part of liability to pay the owner of the right a royalty, to be quantified by agreement with the owner of the right or determined by the Copyright Tribunal or an arbitrator. The distinction between property and liability rules was expounded by Guido Calabresi and A Douglas Melamed in "Property Rules, Liability Rules and Inalienability, One View of the Cathedral", 85 *Harvard Law Review* 1089 (1972). The statutory licence in respect of needletime does not adequately protect the position of the holders of the rights to which the licence relates, and this lack of protection led directly to the unsatisfactory situation outlined above. (In this respect, it differs markedly from the corresponding provisions in the British Copyright, Designs and Patents Act, 1988, as amended, on which many of the recommendations set out below are based.)

3.3.3. The Act simply requires the statutory licensee (the user) to pay a royalty when agreed or determined, without specifying that the agreement or determination is to exist before the use, giving rise to the liability to pay the royalty. If there is no agreement as to the royalty and no reference to arbitration, a reference to the Copyright Tribunal could take a long time before being finalised. The Tribunal's decision may be taken on appeal to a full Bench in the High Court and even to the Supreme Court of Appeal if the necessary leaves to appeal are granted, all of which could lead to further delays. This puts the performer in an even worse position. The performer does

not have an unfettered right to prohibit the needletime use of his or her performance. Section 5 (2) provides a needletime right for all fixed performances published for commercial purposes, subject to the payment of a royalty.

3.3.4. An attempt to provide some protection to the rights holder is contained in the regulations, but only applies if the performer and copyright owner are members of a collecting society or societies and if such a society has proposed a tariff in respect of the intended use. Where the proposed tariff is accepted by the intending user or his or her representatives, and the user assumes the obligation to pay the royalty under the tariff, he or she is entitled to a licence (Regulation 7 (4)). In cases where the potential user does not accept the tariff proposed, he or she has the 'option' to pay the money into an 'escrow' account. Once the money is deposited, and the information furnished for the later distribution of the funds, the user is granted a provisional statutory licence (Regulation 7 (5)). If this does not happen, and the matter is referred to the Tribunal or arbitrator, the collecting society may apply to the Tribunal or arbitrator for an order that the potential user pay the amount demanded into the 'escrow' account and provide the necessary information for later distribution (Regulation 7 (6)). (The broadcasters contend that these regulations are *ultra vires*.)

3.3.5. Apart from whether these regulations are *ultra vires*, other questions arise:

- Why should a potential user have to pay what could be an exorbitant amount demanded by a collecting society in order to get a provisional statutory licence?
- Why should that portion of the demanded royalty that the potential user admits is reasonable, be retained in the 'escrow' account and not be distributed to the rights holders?

3.3.6. To address the above difficulties and ensure that the rights holders are adequately protected in cases where potential users wish to obtain statutory licences to perform the acts set out in Section 9 (c), (d) and (e), the CRC recommends that the Copyright Act be amended to provide for the following:

3.3.6.1. That before a potential user begins to perform any of the acts set out in Section 9 (c), (d) or (e) of the Act (unless an agreement exists with the copyright owner or the relevant collecting society), the potential user must:

3.3.6.1.1. Give the copyright owner or collecting society notice of the intention to perform the act in question and ask the copyright owner or collecting society to propose terms of payment;

3.3.6.1.2. After receiving the proposed terms of payment or the expiry of a reasonable period, give reasonable notice to the copyright owner or collecting society of the date when the potential user proposes to perform the act in question and the terms of payment in accordance with which the potential user intends do so;

3.3.6.1.3. Give notice to the Copyright Tribunal of the intention to perform the act and the date on which it is proposed that this will be done;

3.3.6.1.4. Apply to the Tribunal to settle the terms of payment; and

3.3.6.1.5. The conditions on which the potential user may provisionally be permitted to perform the acts are:

(a) that payment is to be made to the copyright owner or collecting society as required at no less than quarterly intervals in arrears;

(b) that the amount to be paid is to be as settled by the Copyright Tribunal or, where no such determination has been made, in accordance with the proposal made by the copyright owner or the relevant collecting society;

(c) where the potential user alleges that the amount proposed is unreasonably high, the potential user is to pay:

(i) the amount which the potential user alleges is appropriate to the copyright owner or collecting society; and

(ii) the difference between that amount and the amount proposed (or such portion of such difference as the Tribunal considers is reasonable in the circumstances) into the trust account of an attorney nominated by the copyright owner to be held in trust until a decision is given by the Tribunal on the appropriate royalty to be paid (or the parties agree that it may be paid out in the manner agreed), after which such amount shall be paid over to the copyright owner or collection society as represents the difference, if any, between the amount determined as the appropriate royalty and the amount already paid to the copyright owner or collecting society, any balance left over to be repaid to the potential user.

(d) If the amount paid into the trust account is insufficient to cover the amount determined as the appropriate royalty, the balance outstanding must be paid by the potential user to the copyright owner or collecting society.

(e) Amounts paid to the collecting society in terms of sub-paragraph (c) (i) may be distributed by the collecting societies to which they are paid, even if the appropriate royalty has not yet been determined.

3.3.7. The CRC recommends that it should not be necessary (as Section 9A (1) (b) of the Copyright Act presently requires) for the determination of the royalty payable under Section 9A (1) (a) that the performer, or a collecting society acting on his or her behalf, should agree thereto. In this regard, the CRC accepts the contention of SAMPRA that the current provision is likely to lead to substantial problems in practice because of the difficulty of procuring the participation of a significant number of performers in a multiplicity of tripartite negotiations with potential users and copyright owners. The CRC agrees further with the contention raised by SAMPRA that commercial reality will lead the copyright owners to seek an optimal royalty and that the performers' rights will be fully protected by virtue of their entitlement to share in all such royalties.

3.3.8. The CRC further recommends that Section 9A 2 (b) of the Copyright Act be amended to provide that the royalties payable for the use of sound recordings be divided equally between (a) the copyright owner or owners, and (b) the performer or performers. It was common cause before the CRC that the representatives of record companies and performers had agreed before the Portfolio Committee that such a provision be included in the Act. It was not, and instead the present provision was included whereby the division of royalties is to be made in accordance with an agreement between the parties or, in the absence of such an agreement, with a determination by the Tribunal or an arbitrator. This provision is impractical because it requires an agreement in

every case (or a determination if such an agreement is absent). This has resulted in problems with regard to the distribution of royalties collected and to differences between the Registrar and SAMPRA. The CRC was informed that those who drafted the 2002 Act departed from what the industry and the performers agreed was the appropriate division because of a fear that such a provision would be unconstitutional in that it might interfere with contracts between the parties concerned. The CRC is of the view that this fear is groundless. Our Constitution (unlike the American Constitution: see Article I, 10 thereof) does not contain a 'contract clause' and the proposed provision is not likely to be struck down by the Constitutional Court.

3.3.9. It also became apparent to the CRC that the present statutory provisions dealing with the Copyright Tribunal require substantial amendment to enable the Tribunal to perform effectively in the various matters that may come before it.

3.3.10. In a memorandum submitted to the CRC, the Registrar of Copyright stated that the delays in finalising the two matters before it relating to needletime royalties were "the result of unclear and vague regulations, which do not prescribe the procedure to be followed". He recommended that a new set of rules be drafted to regulate the procedure of the Tribunal and that such rules should create effectiveness and efficiency, and where possible provide for the tariff of fees payable by unsuccessful litigants to be lower than in the High Court. He recommended that the Tribunal's jurisdiction be extended to cover infringement cases and all other copyright disputes, including those relating to cinematograph films. In addition, he recommended that the Tribunal be distinguished from the court of the Commissioner of Patents, and that the Judge President of the North Gauteng High Court, who designates the Commissioner of Patents and therefore the presiding judge in the Tribunal, should designate a full-time commissioner to make the Tribunal a specialised copyright court.

3.3.11. The CRC recommends a more extensive amendment of the provisions relating to the Tribunal than that proposed by the Registrar. In its opinion, the Tribunal should consist of:

(i) a President and a Deputy President, both of whom should be High Court judges appointed by the President of the Republic on the recommendation of the Judicial Service Commission (JSC); and

(ii) three other members appointed by the President of the Republic on the recommendation of the JSC, each of whom have at least five years' experience at a high level in industry, commerce, business, public administration education or the practice of a profession.

The sittings of the Tribunal should be held at such places and times as the President of the Tribunal determines. A quorum of the Tribunal should be constituted by one member, unless a party to a matter before the Tribunal requests that it be constituted by more than one member, in which event it should be constituted by not less than two members, one of whom should be the President or the Deputy President. (The proposals in this paragraph are based on the provisions of the Australian Copyright Act of 1968.)

3.3.12. The CRC is of the view that the Registrar's other suggestions (together with a proposal first made to the Hoexter Commission that there should be a special intellectual property court) should be referred to the Standing Advisory Committee for consideration.

3.3.13. The Commission recommends that the Copyright Act be amended to place an obligation on persons making use of the statutory licences (granted by Section 9A of the Copyright Act and Section 5 (1) (b) of the Performers' Protection Act) to provide collecting societies that control recordings used by such statutory licensees with

information as to their use to enable the societies concerned to distribute the royalties payable as a result of such use.

4 COPYRIGHT AND THE LAW

4.1 THE RISE OF THE DIGITAL MUSIC DELIVERY

4.1.1. Digital music has been hailed by many as 'the future of music'. Digital channels now account for 29% of global music industry revenues. One of the vital elements of the European music industry's digital strategy is the partnerships that record companies, ISPs and mobile operators have forged. New ventures, such as 'cloud' music, offer licensed services that grant users access to music stored on remote servers for use on a wide array of devices.

4.1.2. According to new data from PricewaterhouseCoopers' (PwC) first edition of its *South African Entertainment and Media Outlook: 2010-2014*, the South African recorded music market has experienced a physical decline over the past two years, losing 17,3% in 2009. Vicki Myburgh, Director of Entertainment and Media for PwC Southern Africa, said:

> Spending on physical formats is expected to decrease to R810 million in 2014 from R1,4 billion in 2009, a 10,4% compound annual decline.

4.1.3. The licensed digital market has developed relatively slowly in South Africa due to bandwidth limitations. Mobile connectivity has greater penetration in South Africa and mobile downloads continue to dominate the market. Matt Stone (www.trrdigital.com) notes that with the proliferation of smart phones and other mobile devices capable of high-speed connections, digital content cannot only be accessed by mobile, but also paid for through the mobile service provider. Mobile content is also more affordable. PwC's Myburgh notes that:

> Prices for digital formats are significantly lower than that for physical formats and this will result in a shift in the consumption between the two.

4.1.4. It has been noted in an article in *Business Report* (cited in the list of books and articles at the end of this report) that despite the digital music market infancy, spending in South Africa is expected to treble to R425 million in 2014, from R130 million in 2009, representing an average compound annual growth of 26,7%.

4.1.5. For any digital content provider aiming to capture a large audience on this continent, a mobile solution is a key instrument.

4.1.6. Statistics for royalty income for digital music sales pose a dark picture for South Africa. It is of the utmost importance that mobile royalties be managed efficiently, particularly in light of the increasing importance of the digital delivery of music. As will be noted *infra*, South Africa's antiquated legislation has led to uncertainty and hampered the efforts of collecting societies to license digital content providers. A second factor is the low level of compliance by mobile service providers. Although some mobile service providers have obtained the necessary copyright licences to offer online music products, the majority remain unlicensed.

4.2 DIGITAL COPYRIGHT LAW

4.2.1. Traditional understandings of music performance, reproduction and distribution face new challenges in a world of podcasts, webcasts and the streaming of music.

4.2.2. The 'analogue' reproduction right is translated to the digital era with ease. The downloading of a work on a mobile device is, for example, a reproduction and one of the exclusive rights reserved for the copyright owner.

4.2.3. However, the digital transmission of copyright works on networks falls outside the traditional notion of 'making works available to the public' (performing, broadcasting and diffusion), and the interactive nature of digital transmissions exacerbates the problem.

4.2.4. An additional factor that distinguishes the digital from the traditional, physical distribution of music is the 'incidental' or 'cached' reproductions that are made while digital music travels to its final destination. (In the US, music publishers have demanded royalties for these ephemeral reproductions – see Day 2010 204-206; Cardi 2007 at 855-856; Loren 2003 at 702-703.)

4.2.5. To deal effectively with digital acts of exploitation, such as the uploading of a work to a server or the streaming of sound recordings, a new right, namely 'communicating the work to the public' was devised. In December 1996, WIPO adopted two new treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), together commonly referred to as the 'Internet treaties'.

4.2.6. The WCT and WPPT entered into force in March 2002 and May 2001 respectively. Key aspects of these treaties are:

- the right of authors of literary and artistic works to authorise the communication of works to the public;
- the right of making available a performance and a phonogram;
- performers are granted moral rights;
- the management of rights information and the anti-circumvention provisions; and
- the extension of limitations and exceptions to the digital environment.

4.2.7. The WCT and WPPT oblige members to provide legal remedies against the circumvention of technological measures to protect the rights of the copyright holders. Copyright owners are increasingly taking advantage of technical protection measures (TPMs) to protect their intellectual property. TPMs include:

- measures for access control and anti-copy devices;
- proprietary viewer software;
- encryption;
- passwords;
- watermarking;
- fingerprinting (user-authentication);
- metering and monitoring of usage;
- digital registration of the works at various institutions; and
- remuneration systems.

The WCT and WPPT oblige members to adopt legislation to prohibit users from removing or deactivating data that is necessary for the management of copyright, i.e. collection and distribution of royalties.

4.2.8. A new right of communication to the public was created in Article 8 of the WCT. Copyright owners obtained an additional and new exclusive right, namely the right to communicate a work to the public interactively and on demand at a time and place chosen by the user. The uploading of a work to a server and the streaming of music works on the Internet will fall under the communication of the work. This new right has been adopted in the copyright laws of most other jurisdictions.

4.2.9. A new right of 'making available' was created in Articles 10 and 14 of the WPPT, under which performers and producers of phonograms respectively enjoy the exclusive right to authorise the 'making available' to the public their performances and phonograms by wire or wireless means in such a way that members of the public may access them from a place and time individually chosen by them.

4.2.9. Although South Africa was one of the signatories of the WCT and WPPT and the treaties have been in force for almost a decade, an overall impact study has not been completed, and the country has not ratified them (this study should be completed as soon as possible). Furthermore, the Copyright Act and Performers' Protection Act have not been amended to grant copyright owners and performers the right to control the communication of their works on networks. The Copyright Act grants the copyright owner of music, literary work and sound recording the exclusive right to distribute his or her work by broadcasting and transmitting it in a diffusion service. The copyright owners of sound recording and the performers have the additional right to communicate the sound recording or fixed performance to the public.

4.2.10. Broadcasts and programme-carrying signals are technologically specific. Section 1 of the Copyright Act defines a broadcast as:

> a telecommunication service of transmissions consisting of sounds, images, signs or signals which (*a*) takes place by means of electro-magnetic waves of frequencies of lower than 3 000 GHz transmitted in space without an artificial conductor; and (*b*) is intended for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite.

A programme-carrying signal is defined as 'a signal embodying a programme which is emitted and passes through a satellite'. During the 'up-leg' of a transmission, a programme-carrying signal is a broadcast. Once the broadcast passes through a satellite, it is transformed from a broadcast to a programme-carrying signal. Mobile communication protocols, combinations of wired and wireless communication systems and converged communication platforms fall outside their realm. Webcasting and interactive on-demand systems cannot be characterised as relying on either broadcasts or programme-carrying signals.

4.2.11. A diffusion service is defined in Section 1 of the Copyright Act as "a telecommunication service of transmissions consisting of sounds, images, signs or signals, which takes place over wires or other paths provided by material substance and intended for reception by specific members of the public". One may thus argue that the streaming of a work to mobile subscribers could amount to the 'making available' of a work in a diffusion service if wireless communication could by analogy be extended to other paths provided by material substances. At best, the definition of a diffusion service should be amended by the inclusion of wireless transmissions.

4.2.12. The exclusive right in Section 9 (e) of 'communicating the sound recording to the public' was inserted into the Copyright Act by the Copyright Amendment Act 9 of 2002. The phrase 'communicating to the public' is neither defined in the Copyright Act nor the Performers Protection Act. At first blush, it would seem that South Africa had adopted the 'making available' right expounded in the WPPT for sound recordings and fixed performances. However, Section 9 A makes a cross-reference to Section 9 (e) and clearly states that no one may 'play' a sound recording as contemplated in Section 9 (e) without the paying of a royalty. The exclusive right is thus limited to the playing of a sound recording in public.

4.2.13. South Africa has, however, partially implemented the prohibition on the circumvention of TPMs. Section 86 of the Electronic Communications and Transactions Act 25 of 2002 (ECT Act) creates a new cyber-offence relating to the unauthorised access to, interception of or interference with data. Section 86 prohibits the manufacture or possession of an anti-circumvention device or the use of such a device to circumvent security measures. The anti-circumvention prohibition is not copyright-specific and applies to all data. The negative aspect of this partial implementation is that it disturbs the balance of public and private rights. These provisions of the ECT Act could potentially limit the public domain and undermine copyright exceptions and limitations as the provisions of the ECT Act apply to common law and statutory law alike.

4.2.14. It is clear that South African copyright law lags behind in the digital era. It does not grant copyright owners a communication or 'making available' right. The Performers' Protection Act grants performers neither the 'making available' right nor any moral rights. Collecting societies are consequently not able to collect royalties where third parties make sound recordings available to the public in an interactive manner. Performers and producers of sound recordings are accordingly deprived of an important source of revenue by the outdated Copyright Act and Performers' Protection Act.

4.2.15. The law should be amended to provide copyright owners with the right to control the communication of their works to the public.

4.2.16. The amendment of the Copyright Act will enable copyright owners to reap the full benefits of the new digital streams of revenue. In addition, the CRC is of the opinion that the drafters of the provisions relating to the management of rights information and the anti-circumvention prohibitions should be mindful of users' rights to have access to works. The adoption of anti-circumvention legislation should strive to create a balance between private and public rights.

4.3 THE ROLE OF MOBILE CONTENT PROVIDERS

4.3.1. The Wireless Application Service Provider Association (WASPA) is a self-regulating body that was established in 2004 and has more than 250 members.

4.3.2. WASPA membership has been made compulsory by the Mobile Network Operators (MNOs), namely Vodacom, MTN, Cell C and 8ta. The MNOs are not members of WASPA, even though they may offer value-added services.

4.3.3. In 2000, Wireless Application Service Providers (WASPs) started selling mobile content and, specifically, the offering of music in the form of polyphonic ringtone downloads for cellular phones. Only mechanical rights were payable in respect of music and literary works as WASPs were selling monophonic and polyphonic ringtones.

Once the handset technology changed, it became possible to offer full music downloads. Agreements were then entered into with the record labels to sell master recordings of music.

4.3.4. The digital exploitation of music has developed significantly and current offerings can be described as:

4.3.4.1. **Permanent downloads:** transfers of music from a website to a mobile device, for example, for permanent retention. A full-track download entails the making of a permanent copy of the original sound recording.

4.3.4.2. **Limited downloads or on-demand services:** the consumer's use of the copy is restricted by associated technology that makes the file unusable when a subscription ends and/or an offering is streamed to the listener to enable him to listen once, twice or a number of times during the period he subscribes to that service. This would typically include the Spotify model [www.spotify.com] and is regarded as a streaming service. A RingBackTone (RBT) service is regarded as the streaming of a sound recording because it is never downloaded. The user subscribes to the RBT service and when he/she receives a call, the MNO streams the track so that the caller hears it.

4.3.4.3. **Special webcasting:** This is a service where the user can choose a stream of music, usually from one source, i.e. from an artist, a group/ensemble or the record of a particular concert.

4.3.4.4. **Premium or interactive webcasting** (so-called 'intermediate services'): This form of webcasting includes personalised services such as LAUNCHcast and Pandora in the UK.

4.3.4.5. **Pure webcasting:** a stream of pre-programmed (non-interactive) back-to-back music.

4.3.5. In general, South African WASPs offer subscription and limited download or on-demand services, but some do offer permanent downloads of sound recordings. Most subscription services involve the payment of an access fee, usually through daily or weekly billing. Once users have paid this fee, they are able to access a mobi site where they can choose and download content. This is a permanent file and does not expire after the user's subscription comes to an end. Once users have been successfully billed, they have full access to the download portal and can claim their tracks as offered by the service. Some services may offer the right to download one song per day, whereas others offer unlimited downloads. Although offerings may differ, the subscription model remains the same.

4.3.6. WASPS offer services on a subscription and à la carte basis. Apple (SA), iTunes (SA), eXactmobile, the Nokia Music Store (launched on 23 September 2010), Africori, Next Music and many more are indicative of the inevitable online trend.

4.3.7. Limited download or on-demand services are regarded as streaming services and are offered by MNOs in South Africa through RBTs. Streaming of music through a RBT service entails the distribution of a work in a diffusion service. A 'public performance' licence is necessary for the streaming of music through RBT services and for the transmission of sound recordings through Internet radio stations. According to a WASPA representative, only MNOs offer the distribution of sound recordings through RBT services; WASPs may not offer these services. However, not all MNOs offer RBT services. According to a WASPA representative, 8ta has not launched such a service. Cell C noted in a written response to the CRC that it had not sold ringtones since

2009 and that its platform providers (Exact Mobile and IOGlobal) have in the past made royalty payments to the relevant collecting societies.

4.3.8. According to the information made available to the CRC, only one MNO entity has an agreement with SAMRO, namely Vodacom (July 2011).

4.3.9. Special, premium and pure webcasting fall within the realm of broadcasters. South African radio stations put up streams for public consumption on their websites.

4.3.10. As noted above, WASPs have been selling ringtones since 2000. The CRC is aware of the fact that some WASPs have been paying mechanical royalties to NORM since 2000. Only Vodacom has signed SAMRO's mechanical licence agreement. An overwhelming majority of WASPS have paid no royalties as they are not licensed and have profited 100% from the digital exploitation of authors' copyright works for almost a decade.

4.3.11. The licensed mobile entities have been paying 60% of the retail price to record companies and 7,5% royalties to SAMPRA for making sound recordings available to download.

4.3.12. According to representations made to the CRC, only 14% of all WASPS have agreements with NORM to pay mechanical rights royalties. The percentage of WASPS that have agreements with SAMRO is significantly smaller.

4.3.13. The compliant mobile entities report use of content to the collecting societies and pay upon invoice. Mobile entities that are not invoiced for their customers' downloading of works do not pay any royalties to copyright owners. The share of the record companies' royalties that goes to the performers is governed by the recording contract.

4.3.14. From 2007 onwards, SAMRO contacted WASPs and alleged that a performance royalty was payable on the downloading of music works. This liability was denied by WASPs. WASPA formed a Royalty Working Group to discuss the demands from SAMRO and obtained a legal opinion that supported its position. Although SAMRO threatened litigation, the matter was not pursued. The Royalty Working Group was dissolved in 2009. At this stage, WASPA agreed that mechanical royalties must be paid for all downloads, and that performance royalties must be paid for any kind of streaming of sound recordings or music. The representative from SAMRO noted:

> The point is that our dispute with them has not been on the tariff, our dispute with them has been on the principle of licensing performing rights.

4.3.15. In a recent case in the US (*re Application of Cellco Partnership D/B/A Verizon Wireless* (case 1:09-cv-0774-DCL filed 10/14/2009)), the court declined to hold that a sound recording (set as a ringtone) is performed in public each time a user's phone rings. The court held that Version (a mobile service provider) did not need a public performance licence for musical compositions because it provides ringtones to its customers. This, of course, did not exonerate the service provider from paying the mechanical royalties, the communication right to the copyright owner and the 'making available' right for every sound recording it delivers to a customer.

4.3.16. In 2009, in what was coined a 'ringtone royalties wrangle', NORM instructed corporate and commercial law firm, Werksmans, to issue a letter to WASPA. John Fishlock, board member of NORM, explained:

> We're not here to take people to court, but it's been a three-year-long battle to get digital service providers on board legitimately. With the action we're taking now, we're confident that our composers will be properly recompensed for their works.
>
> We have requested WASPA to forward correspondence to all its members, to whom we have sent download agreements ... If they have not signed before the end of August 2009, they will not enjoy the standard discounted rate as all other service providers who have concluded agreements with NORM already. If they fail to sign by the deadline, that preferential rate will fall away and they will have to account at the base rate.

4.3.17. Janine Hollesen, an attorney representing NORM, said download agreements are being signed by mobile operators and major digital service providers. She noted:

> Although a number of WASPA members have been in contact with NORM and have signed the agreement, pursuant to the correspondence sent to them, there are many WASPA members who are unenthusiastic about giving composers their due. Their continued use of composers' works without paying royalties is unauthorised in terms of the Copyright Act and constitutes an infringement of the composer's rights as administered by NORM.
>
> The Copyright Act makes it a criminal offence to knowingly use copyrighted works without authorisation. WASPA members will not be able to plead ignorance if one considers WASPA's code of conduct and that many of its members, including one of its biggest, Exactmobile, have signed the NORM agreement.

4.3.18. The WASPA representative noted that WASPA had made huge efforts to educate WASPs and encouraged licensing at every opportunity. All WASPA members were advised to contact NORM and SAMRO and to sign the licensing agreements. The WASPA representatives argued that it was not their role to ensure that members actually entered into licensing agreements with the collecting societies as it is a self-regulating body.

4.3.19. WASPA representatives have argued that the main issue in the collection of the royalties is that collecting societies lack processes to identify whom they represent, making it difficult to send invoices timeously. Allegations were made that NORM tended to focus on a few individual players rather than the whole market.

4.3.20. It was also argued that the collecting societies have not been proactive in exploiting and enforcing their members' rights in the digital market. It was noted by the representatives of WASPA – and reiterated by a representative from the Internet Service Providers Association (ISPA) – that collecting societies are not empowered to deal authoritatively with the challenges of online music exploitation. This is refuted by the fact that SAMRO has prepared licensing agreements for all online music services described in 4.3.4 above as well as 'Burn-on-Demand' services, 'Digital Juke Boxes' and web-page advertising.

4.3.21. A RiSA report (*Digital Music Statistics*) on digital music statistics estimates that approximately 3,6 million songs are illegally downloaded in South Africa on a monthly basis, translating into monetary losses of R36 million monthly and R432 million annually. A PricewaterhouseCoopers report (*Entertainment and Media Outlook Report* (2010)) estimates that if the current trend continues, by 2014 the potential revenue loss due to copyright infringement will be in excess of R500 million per year.

4.3.22. It is of the utmost importance that the Copyright Act and the Performers' Protection Act be amended to effectively govern the digital exploitation of copyright works. There is room for the improvement of the management of rights in the digital environment. The CRC agrees with the statement made by the representative from WASPA:

> Digital is the future and delivering it over mobile handsets is the future ... we have got to find the right way forward and everybody has got to sit around the table and make it work.

4.4 LIABILITY OF SERVICE PROVIDERS

4.4.1. Technology is changing the way that copyright goods can be illegally copied and distributed. In the electronic environment, it is a relatively simple matter to infringe intellectual property rights. Monitoring copyright violations, on the other hand, is far from simple, particularly when content exists in the electronic, not physical, form and can be distributed instantaneously, cheaply and easily in the form of digital copies, the quality of which is indistinguishable from that of the original. The liability of Online Service Providers (OSPs) for the infringement of intellectual property rights remains controversial in intellectual property law.

4.4.2. When the liability of a particular OSP is to be determined, one should remember that the law of delict and copyright impose liability for acts or omissions in a specific instance. So an OSP's liability will depend on the role it plays in a particular transaction. Where an OSP makes unauthorised reproductions of a protected work (for example, for technical reasons such as caching) it may be liable for direct infringement of copyright. But where it merely transmits or facilitates access to copyright infringing material, it may be liable for 'contributory infringement' at common law.

4.4.3. Although the principle of 'contributory infringement' has not been established in any reported decision on South African copyright law, there are indications that our courts may be prepared to accept it.

4.4.4. A 'service provider' can be defined as "any person providing information system services". This compound definition encompasses the basic functions and services needed by users to access the Internet and enjoy its benefits. It does not encompass everyone using the Internet, only those who perform the functions that make the Internet available to users.

4.4.5. The availability of delictual remedies against an OSP is limited to cases where the OSP satisfies the two threshold requirements (see "Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers" (Government Notice 1283 in *Government Gazette* 29474 of 14 December 2006) and performs certain stated functions or acts:

4.4.5.1. Transmission, routing and provision of connections to unlawful material (the 'mere conduit' limitation);

4.4.5.2. System caching and storing, infringing material at the direction of a user (the 'hosting' limitation); or

4.4.5.3. Linking or referring users to infringing material (the 'linking' limitation).

4.4.6. In exchange for the above limitations, OSPs have agreed to an injunctive procedure commonly known as 'notice and take-down', covered by Section 77 of the ECT Act. In terms of this procedure, when someone becomes aware of unlawful material residing on or unlawful action taking place on an OSP system or network, he or she may notify the OSP of the infringement and require it to remove or disable access to the unlawful material or activity.

4.4.7. The Act further provides in Section 77(3) that a "service provider is not liable for wrongful take-down in response to a notification". Strangely, this sweeping exemption does not require the OSP to have acted in good faith. Nor are OSPs under a general obligation to monitor the data they transmit or store, or actively to seek facts or circumstances that indicate unlawful activity.

4.5 DEVELOPMENT OF THE '3 STRIKES' INTERNATIONALLY

4.5.1. Countries such as France, the UK and New Zealand have introduced a system of graduated responses to infringements that culminates in the suspension of access services to individuals.

4.5.2. In France, this is commonly known as the HADOPI system.

4.5.2.1. HADOPI is an acronym of the French government agency created to administer the system – *Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet*.

4.5.2.2. This law was introduced during 2009 as a means to control and regulate Internet access and encourage compliance with copyright law (*Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la creation sur internet* [Law 2009-669 of June 12 2009 on Promoting the Distribution and Protection of Creative Works on the Internet]).

4.5.2.3. *Billboard.biz* reports that it is unknown how many file sharers receive warnings from France's new P2P infringement authority, but French labels are sending 25 000 complaints a day to HADOPI.

4.5.3. In the United Kingdom:

4.5.3.1. The Digital Economy Act, which regulates digital media, came into force on 8 June 2010.

4.5.3.2. The Act *inter alia* adopted measures to curb the online infringement of copyright. The Act provides that the Office of Communications (Ofcom) must take responsibility for putting in place:

- Technical measures – which may limit Internet access, including suspending access entirely;
- Appeals process – a tribunal providing for an independent appeal;
- An obligation on ISPs and copyright owners – a fine of up to £250 000 levied on those in contravention; and
- Blocking Internet locations from which a substantial amount of material has been, is being or is likely to be made available in infringement of copyright.

4.5.3.3. Internet service providers in the UK are currently challenging the constitutionality of certain provisions of this law.

4.5.3. In New Zealand, the situation is as follows:

4.5.3.1. The Copyright (Infringing File Sharing) Amendment Act 2011 of New Zealand amends the Copyright Act 1994 to provide owners of copyrighted works with a chance to address peer-to-peer file sharing. This Act came into force on 1 September 2011.

4.5.3.2. The '3 strikes' rule comes in the form of detection notice, warning notice and enforcement notice. Penalties range from NZ$275 to NZ$15 000 and/or the suspension of a user's Internet account for up to six months (suspension is only expected to come into force in 2013).

4.5.3.3. The holder of the Internet account is liable, even if he or she was not the person who broke the law, and the penalty is paid to the copyright owner.

4.5.3.4. The law will apply to infringements on mobile networks from 1 October 2013.

4.6 THE ROLE OF THE INTERNET SERVICE PROVIDERS ASSOCIATION (ISPA)

4.6.1. ISPA, which has been in existence for almost a decade, has more than 100 members and represents network and service licensees. Vodacom, MTN and Telkom are not members of ISPA, but Cell C is. Numerous ISPs are not licensed.

4.6.2. The ISPA representative who addressed the CRC mentioned that a specific take-down notice was created for RiSA members (see http://ispa.org.za/code-of-conduct/lodge-a-risa-specific-takedown/) and SAMRO, but that ISPA had not received a single take-down notice from SAMRO.

4.6.3. On a question regarding the feasibility of adopting a provision similar to the '3 strikes' law (for example, the HADOPI law of France), the ISPA representative noted that:

> Just before EG8 in Paris, which I think was April this year, the French came out and very embarrassingly indicated that actually technically it was not operational.

4.6.4. A contrary opinion has been expressed in the PwC *South African Entertainment and Media Outlook: 2010-2014* report, which notes that digital piracy is a reality that is inhibiting growth in the legitimate digital market. The report states:

> Internet service providers in a number of countries have managed to slow digital piracy and in some cases graduated response measures have been introduced to warn consumers of suspected infringements.

4.7 CONCLUSION

South African copyright owners do not share the same optimism regarding digital opportunities for a variety of reasons:

1) The CRC has found that the growth of the digital music industry in South Africa has been hampered by a lack of compliance by mobile service providers. According to evidence provided to the CRC, only 14% of all mobile

operators are licensed by NORM to provide downloads of sound recordings and ringtones to consumers, and only Vodacom has concluded a mechanical rights licence with SAMRO. This means that the majority of mobile providers (and, by implication, consumers) are dealing in infringing sound recordings and may be held criminally liable for copyright infringement;

2) Secondly, South African copyright and performers' protection legislation is outdated and does not provide for all forms of digital exploitation;
3) A third problem is the reluctance on the part of the self-regulatory body for mobile entities, WASPA, to play a pro-active role in ensuring that all content providers pay the necessary royalties;
4) ISPA is opposed to the adoption of a '3 strike' rule to curb piracy; and
5) Lastly, representations were made to the CRC that the collecting societies do not have the requisite knowledge and insight to protect adequately their members' interests in the digital environment.

4.8 RECOMMENDATIONS

4.8.1. All MNOs and WASPs should be barred by the Minister of Communications from distributing content unless they are licensed by the relevant collecting societies.

4.8.2. South Africa should amend its Copyright Act by adopting provisions suitable for the digital environment *inter alia* the right to communicate literary and musical works to the public and the right to make available copies of sound recordings. This should be done regardless of whether South Africa decides to ratify the Internet treaties.

4.8.3. WASPA should amend its Code of Conduct to provide for the suspension of members that fail to conclude a licence with the collecting societies and/or pay the necessary royalties.

4.8.4. The ECT Act and the Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers should be amended to require ISPs to adopt a graduated response for repeat infringers culminating in the suspension of access services of an individual.

4.8.5. Collecting societies should take proactive measures to ensure that they efficiently collect royalties for the digital exploitation of the works they administer.

5 STRUCTURE OF COLLECTING SOCIETIES IN SOUTH AFRICA

5.1 BACKGROUND

5.1.1. Copyright confers exclusive rights that are vested in the owner, giving the owner the right to forbid others to exploit his or her work without authorisation. In theory, these rights can be exercised on an individual basis by agreement between parties.

5.1.2. There are, however, certain rights that are difficult, if not impossible, to exercise individually and so rights owners have banded together to exercise these rights on a collective basis. The need for such collective

administration of rights was felt by composers and music publishers from the end of the second quarter of the 19th century as regards the performance of non-dramatic music works in places of public entertainment.

5.1.3. The establishment of the first collective licensing body predates the adoption of the Berne Convention for the Protection of Literary and Artistic Works in 1886. In France in 1852, SACEM (a society of authors, composers and music publishers) was established to administer public performance rights in musical works. Following the adoption of the Berne Convention, which recognises the public performance as a principal feature of the protection to be afforded to all authors from the Berne Union countries, it became apparent to authors in many other countries that in practice it was impossible to safeguard such a right on an individual basis. By the turn of the century, technical developments led to the advent of new categories of works protected by copyright. Following the recognition of public performance rights in sound recordings, collecting societies were established to represent authors and performers in countries that recognise these rights. The emergence of radio and television broadcasting as a major user of copyright works in the first half of the 20th century, as well as other new technologies that have developed in the interim and given rise to new users of work (such as reprography, satellite transmission and cable distribution, commercial rental, computer storage of protected works in database, digital storage and distribution of works via Internet) have led to the extension of collecting societies to new areas.

5.1.4. The term 'collecting society' is generally used to describe the organisations set up by the various categories of rights owners to administer their rights collectively. The EU and UK definitions differ, but still amount to the same thing. The EU definition reads "any organisation which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes". In the UK, the term 'licensing body' is used to describe a society or other organisation which has as its main purpose the negotiation or granting (either as owner or agent for the owner) of copyright licences, and whose objectives include the granting of licences covering works of more than one author.

5.1.5. In the UK and some EU member states, collecting societies or licensing bodies are private organisations established and controlled by the rights owners themselves. However, in other countries, for the protection of the public, there is some kind of government supervision or control over the practices of these societies. The 1988 Act of the UK provides a regulatory framework for the operation of the licensing bodies in certain areas and also provides for the Copyright Tribunal. In general, whether collecting societies are government-supervised or privately owned, some degree of control by the government is imminent as is evident in a country like South Africa. Overall, collecting societies are established on six key principles:

1) To do for members of collecting societies what they cannot practically and economically do for themselves, by providing a service to enable rights owners to enforce and administer certain of their copyrights effectively and cheaply;
2) To provide a service to users by facilitating access to copyright works and making it possible for users to comply with their obligations under the copyright law;
3) To guarantee users immediate access to the licensor's repertoire;
4) To keep administration costs incurred by users and owners as low as possible;
5) To provide for the use of copyright of recordings that have yet to be made; and
6) To meet the needs of owners and users whatever the scale of their business.

5.1.6. The CRC is satisfied that the establishment of collecting societies is the best available mechanism for licensing copyright works.

5.2 FUNCTIONING OF COLLECTING SOCIETIES

5.2.1. In a system of collective administration, the owners of copyright authorise one or two collecting societies to administer their rights. The societies generally make available to prospective users their entire repertoire, national and foreign, for certain purposes and for a prescribed period.

5.2.2. Licences are granted in return for royalties, and the societies collect and distribute the resulting remuneration among the copyright owners. These societies acquire from their members copyright by assignment or act as agents or licensees on behalf of their members to enforce copyright belonging to their members.

5.2.3. Besides the collective administration of rights, collecting societies undertake additional activities on behalf of their members. These include the provision of social and legal services to rights owners, educational and public relations activities aimed at ensuring a better understanding and respect on the part of the public and users for the rights they administer, and representation of their members' interests in relation to government departments and intergovernmental organisations.

5.2.4. Rights owners trying to exercise their rights on an individual basis could find that their personal standing or size puts them in a weak bargaining position in relation to powerful users. The marketing power of the individual rights owners is increased by putting them on the same footing.

5.2.5. In certain instances, there is a need for rights owners to mandate more than one collecting society because some of these societies administer only one particular right for one category of rights owner. For example, SAMRO administers public performance rights, while SARRAL administered composers' mechanical rights. The same applies to the UK, with the Performing Rights Society (PRS) and Phonographic Performance Ltd (PPL).

5.2.6. Given that the national collecting societies control the rights administered by their sister societies in other countries (by means of reciprocal representation agreements concluded with societies which are members of International Confederation of Societies of Authors and Composers (CISAC), a body that represents collecting societies globally), rights are generally safeguarded against infringements, whatever music or sound recordings are being exploited.

5.2.7. The convenience offered by such collective administration to both the owner and the user of copyright cannot be matched by any other means. In the absence of such administration, individual users and copyright owners would be at a serious disadvantage in negotiating and subsequently enforcing contractual arrangements for the exploitation of rights.

5.2.8. In conclusion, collecting societies make the copyright system more effective and efficient, promote the dissemination of works and tend to enlarge the choice of works made available to the public. They benefit rights owners and users alike and, in principle, operate for the benefit of the public. Collective administration of rights through such societies operates worldwide. While the precise nature, representation and practices of collecting societies vary from country to country, the existence of such societies is standard all over the world.

5.3 'GOOD PRINCIPLES' OF COLLECTING SOCIETIES

5.3.1. Given the complexity of collective management, as a rule, only one organisation for any one category of rights owners should be open for membership on reasonable terms to all rights owners of that category. A long-established exception to this principle is the alliance between Adami and Spedidam (societies representing performers in France), which, by virtue of their existence, represent featured and non-featured artists. By means of reciprocal representation agreements with foreign societies or federations of societies, a collecting society should represent in its territory both national and foreign rights owners. Competing societies in respect of the same right lead to duplication of functions and reduction in economies of scale and thus are unlikely to bring benefits to their members.

5.3.2. Collecting societies must have valid mandates to act as agents or licensees of their members, or take assignment of their individual rights and have the legal personality required to:

- Enter into binding contracts, at both national and international level;
- Exercise the mandate or assignment received from their members; and
- Enforce their members' rights by means of legal action, where necessary.

5.3.3. Societies should provide an efficient, transparent and equitable service to their members. Members should receive regular, detailed information about the manner in which their rights are being exercised.

5.3.4. In many countries, the establishment and operation of collecting societies is subject to some form of supervision, which may be exercised in various ways. Some countries make the establishment of a collecting society conditional upon the approval of a competent authority, Minister of Culture, the Ministry of Justice or the Patent Office. In France and Spain, for example, authorisation to operate as a collecting society must be obtained from the respective Ministry of Culture. Due account is taken of the degree to which the proposed society is representative of the category of rights holders it purports to represent, the volume of potential users, the suitability of its statutes, and the means whereby it proposes to achieve its aims. In France, however, if for any reason the Ministry should refuse to authorise a society to operate, the courts have jurisdiction to decide the matter after assessing the professional qualification of the founders of such society, and the human and material means they intend to use to collect royalties and exploit their repertoire. In Senegal, the collecting society is established by law and is a public institution with professional character established under the name of the Copyright Office of Senegal (Bureau Senegalais Du Droit D 'Auteur, BSDA), under the authority of the Minister of Cultural Affairs. In Germany, the Patent Office is the supervising authority for collecting societies.

5.3.5. The methods and rules of collecting societies regarding the distribution of royalties, on the basis of a statistically valid sampling procedure, should be approved by the rights owners. There should be no discrimination between rights owners, members or non-members, national or foreign. Government supervision of and interference in the establishment and operation of tariffs and other licensing conditions applied by collecting society organisations, which are in a de facto monopoly position vis-à-vis users, are justifiable to the extent that such supervision is required to prevent abuse of such position.

5.3.6. Various jurisdictions have dealt differently with the reality that collecting societies, having a de facto monopoly position, may abuse that position. The UK, Australia and South Africa have some form of compulsory special tribunal having jurisdiction to review the activities of collecting societies or vary the rates charged, and to order

the grant of licences. Article 17 of the Berne Convention deals with the right of governments to take measures to control the circulation, performance and exhibition of works for the preservation of public order. Under the Convention, tribunals and other supervisory bodies may only interfere with the setting of tariffs and other licensing conditions in cases where there is an actual abuse of monopoly position. Such tribunals may not be used arbitrarily to impose a regime of statutory control over the exercise of the exclusive rights guaranteed to authors under the Convention.

5.3.7. In drawing up their rules, the collecting societies must take account of all relevant interests in such a manner that a balance is struck between the requirement for:

a) Maximum freedom for authors, composers, performers and publishers to dispose of their works; and
b) Effective management of their rights.

They should not impose obligations on their members that are not absolutely necessary for the attainment of the objective of collective licensing or encroach unfairly on their members' freedom to exercise their copyrights.

5.3.8. The International Confederation of Societies of Authors and Composers (CISAC), which was established in 1926, groups 210 societies in 109 countries to enforce the rights of their members.

5.3.9. The International Bureau of Societies Administering the Rights of Mechanical Recordings Reproduction (BIEM) was founded in 1929 and groups 44 national societies in 42 countries. It is concerned with the collective administration of authors' rights to authorise the reproduction of works in the form of sound recordings or audio visual fixations, referred to as mechanical rights. The principal function of BIEM is to act as a centralised negotiating body, fixing the conditions for the use of the repertoire of its member societies.

5.3.10. The International Federation of the Phonographic Industry (IFPI) was established in 1933 to create and promote the rights of producers of phonograms (sound recordings) and videograms (music videos) nationally through statutes, case law or contracts, and internationally through conventions and agreements and, where such rights already exist, to defend, preserve and develop them.

5.3.11. The International Federation of Reproduction Rights Organisation (IFRRO) was established in 1988 to facilitate, on an international basis, the collective and/or centralised management of reproduction and other relevant rights in 'copyright-able' works through the co-operation of national Reproduction Rights Organisations (RROs). Its aim is to foster the creation of RROs worldwide, to facilitate formal and informal agreements and relationships, and to increase public and institutional awareness of copyright.

5.3.12. International co-operation between national collecting societies is promoted and supervised by means of the joint activities of two international NGOs:

- The International Federation of Musicians (FIM), representing musicians of all genres; and
- The International Federation of Actors (IFA), representing actors, technicians, etc.

5.3.13. The effect of the de facto monopoly position of collecting societies prevails generally in respect of both the rights owners, who are the members of the organisation, and the users. As a rule, rights owners do not have any choice other than to entrust the administration of their rights to a particular collecting society representing their respective category of rights owners. In some countries, there is government supervision of the establishment and operation of collecting societies to guarantee their effectiveness and benefit to their members.

5.3.14. The WIPO paper, Collective *Management of Copyright and Related Rights*, clearly defines the reasons for collective management. It states that the fabric of our cultural lives is enriched by the genius of creators. In order to develop their talent and encourage them to create, we have to ensure that incentives are available, namely remuneration, in return for permission to make use of their works. The membership of the collective management organisation is open to all owners of copyright and related rights, being:

- authors
- composers
- publishers
- writers
- photographers
- musicians

5.3.15. The collective management organisation allows for the use of works and for payment for their use to be made to the correct owners of the right. The works declared by the organisation's members are the national or local repertoire. The WIPO paper illustrates the work of collective management, from traditional organisations to rights clearance centres and one-stop shops. It also touches on the field of musical works, where documentation, licensing and distribution are the three pillars on which the collective management of the rights of public performance and broadcasting is based. Taking into account the national treatment principle enshrined in both the Berne and Rome conventions, foreign rights owners are treated in the same way as nationals in their respective countries.

5.3.16. The paper also makes the point that one of WIPO's aims is to assist developing countries, upon their request, in establishing collective management organisations, and to strengthen existing organisations to ensure that they are fully efficient and effective in their response to the challenges of the digital environment.

5.3.17. It deals with the socioeconomic and cultural dimension, service to the world of music and other creative arts. The system is rewarding the creators for their work and they, in turn, are more inclined to develop and apply their talents in an environment that provides adequate copyright and related rights protection and an efficient system for the management of those rights. It is undeniable that these factors have a favourable impact on national economies. Cultural industry contribution to the Gross Domestic Product and income from the collective management of copyright and related rights account for a substantial part of the percentage.

6 LEVEL OF COLLECTING SOCIETIES' COMPLIANCE WITH REGULATIONS

6.1 ACCREDITED COLLECTING SOCIETIES

6.1.1. Since the promulgation of Collecting Society Regulations in 2006, the Registrar of Copyright accredited three societies to collect royalties for sound recordings, namely SAMPRA, SARRAL and SAMRO. In 2010, the accreditation for SARRAL was withdrawn after the court issued a liquidation order in 2009.

6.1.2. SAMRO and SARRAL were accredited as collecting societies for performers based on Regulation 3 (1) (b) and SAMPRA was accredited as a collecting society for the copyright owners in 2008 based on Regulation 3 (1) (a).

6.1.3. The CRC's assessment of the appropriateness of the accreditation for these societies, based on the requirements of the regulations, revealed the following cases of non-compliance:

6.1.3.1. In terms of Regulation 3 (3) (d) of the Collecting Society Regulations, "The Registrar is satisfied that the applicant is able to comply with the obligations set out in these regulations." SARRAL's audited annual financial statements for the year ended 31 December 2003 and for the year ended 31 December 2005 were issued in June 2005 and October 2006 respectively. This was a contravention of Section 304 of the Companies Act of 1973 (as amended). Based on this, it would have been incorrect to assume that SARRAL was going to be able to comply with Regulations 4 (3) (e), if it was already not complying with the Companies Act. Regulation 4 (3) (e) requires the accredited collecting societies to issue the audited financial statements within six months after the end of the financial year. Therefore, it was inappropriate to accredit a collecting society with a track record of non-compliance.

6.1.3.2. According to Regulation 3 (3) (g), "The Registrar is satisfied that the accreditation of the applicant does not conflict with, undermine or diminish the adequate, efficient and effective administration of the right to receive payment of a royalty in terms of Section 9A of the Copyright Act, 1978, or Section 5 (1) (b) of the Performers' Protection Act, 1967, as undertaken by a collecting society already accredited and established under the Copyright At, 1978." SAMRO was accredited as the performers' collecting society. The copyright owners for the sound recordings are the sound producers and, accordingly, the performers cannot assign the rights they do not own. Therefore, SAMRO would not be able to license the sound recordings rights to the users and, accordingly, could not function independently (as a performers' collecting society for sound recording) without relying on another collecting society mandated by the sound producers. Although Regulation 3 (1) (b) allows for the performers' collecting societies to exist, such societies cannot operate independently. Regulation 6 (2) (a collecting society may not retain more than 20% of the total collections) does not deal with the situation where more than one collecting society is involved in one collecting transaction. Due to the above-mentioned complication, this requirement could not be fulfilled.

6.1.3.3. SAMPRA, as a collecting society for the sound producers, is entitled to issue licences, collect royalties and distribute them to its members, but has no responsibility towards the performers. With regard to the performers, SAMPRA can either transfer the performers' portion to a performers' collecting society or distribute the share via the sound producers. Transferring funds from one collecting society to another is inefficient because the collection costs could potentially double. Distributing the performers' share via the sound producers is risky and inappropriate because the conduct of the sound producers is not regulated.

6.1.4. Based on the above assessment, it is clear that in accrediting the sound recording collecting societies, the level of compliance was less than satisfactory. The most concerning case is in respect of SARRAL, which was accredited despite the fact that it had received a qualified audit report for three consecutive years, had failed to comply with the Companies Act with regard to the issuance of the audited financial statements, and had a pending case about its financial status. The lesson arising from this saga is that a comprehensive investigation is required before any accreditation process can be concluded.

6.1.5. The accreditation of SAMPRA and SAMRO resulted in a court case involving the Registrar, SAMPRA and SAMRO regarding the distribution of the performers' share of royalties. As a result, no distributions have been made for needletime royalties.

6.2 COMPLIANCE BY COLLECTING SOCIETIES WITH REGULATIONS

6.2.1. Due to the legal dispute involving SAMPRA, SAMRO and the Registrar, SAMRO has not yet performed any activities associated with the collection and distribution of sound recording royalties and as a result compliance matters are not relevant to the society.

6.2.2. The cases of non-compliance to the Regulations by SAMPRA are set out in Table 1.

Table 1: Cases of Non-Compliance to the Regulations by SAMPRA

	Refers to the Regulations	Regulations Requirements	SAMPRA'S Response to the Requirements	Remarks
a.	4(2)	"… the Registrar shall be invited to attend the annual or special general meetings of an accredited collecting society ..."	The Registrar was not invited to the last AGM of SAMPRA / RiSA held on 23 February 2011.	The relevant documents pertaining to the AGM were subsequently forwarded to the Registrar (non-compliance).
b.	4(2)	"... the Registrar shall receive an annual activity report from each collecting society, setting out information on its activities, financial records and other records within 30 days after the end of the financial year ..."	The activity reports for SAMPRA were submitted to the Registrar after 30 days.	None
c.	4(3) (e)	"An accredited collecting society shall furnish the Registrar annually with annual audited financial statements".	The audited financial statements for the last two completed financial periods have not yet been submitted to the Registrar.	According to SAMPRA, the delays were due to the dispute with the Registrar.
d.	6 (2)	A collecting society shall distribute at least 80% among its members, and not more than 20% shall be retained by the collecting society after distribution to defray its costs or apply otherwise.	No distribution has been made due to the dispute with the Registrar.	The matter has been referred to the court.

6.3 RECOMMENDATIONS AND CONCLUSION

6.3.1. The Registrar needs to be appropriately resourced so that his or her office is equipped to investigate and make appropriate decisions. Funding sources for the Office of the Registrar have to be identified. The CRC's recommendation is that state funding should be provided for the first three years, during which time the Registrar should develop an appropriate funding model that can be supported by the industry from year four.

6.3.2. The Copyright Act should be amended to allow the Registrar to take over the administration (as opposed to the withdrawal of accreditation) of any relevant collecting society (SAMPRA, NORM or SAMRO) if the Registrar has reason to believe that there has been a material breach of the Copyright Act or Regulations.

6.3.3. SAMPRA should be given one year to rectify all areas of non-compliance.

6.3.4. The CRC recommends that the legislation be amended to allow for one collecting society per set of rights with regard to all music rights governed by the Copyright Act of 1978 (performance, needletime and mechanical rights). Currently, only the needletime collecting societies are supervised by the Registrar. Due to the recent collapse of SARRAL and inadequate protection of its members, the CRC believes it appropriate to regulate all relevant collecting societies. Due to administration problems (consistently voiced by users and interested parties) associated with the multiple collecting societies and the international trends for both developed and developing countries, the CRC believes that 'one society one right' is the answer for the current situation. As part of this change, it proposes that all collecting societies be mixed (e.g. a collecting society for needletime should cater for both performers and record companies) and existing societies should be given a period of two years to merge, failing which an appropriate process should be used to appoint the mixed collection societies. The suggested merger of collecting organisations is as follows:

- For mechanical rights, it is suggested that NORM's and SAMRO's mechanical rights units merge to form one collecting society for mechanical rights;
- For needletime, SAMPRA should merge with SAMRO's needletime unit to form one collecting society for needletime; and
- SAMRO should remain with performance rights.

7 LEVEL OF CORPORATE GOVERNANCE COMPLIANCE BY COLLECTING SOCIETIES

7.1 BACKGROUND: COLLAPSE OF SARRAL

7.1.1. SARRAL was a collecting society looking after the mechanical rights of composers. SARRAL's objective was the protection, reinforcement and enhancement of composers' rights. The court ordered the liquidation of SARRAL almost three years ago due to insolvency. A significant number of music composers and artists lost huge amounts of monies between 2003 and 2008 due to legal costs, reduced collections and other increased costs arising as result of legal disputes.

7.1.2. The following facts should be kept in mind:

7.1.2.1. SARRAL's change of business model or accounting policies (between 2003 and 2004) resulted in a breach of contract with members. An extract from SARRAL's standard member's contract is as follows: "In consideration therefore SARRAL shall be entitled to retain a commission of 7,5% of the gross total of royalties collected." The consequences of the change in business model or accounting policies were that the members only received between 50% and 60% of the collections instead of 92,5% (100% minus 7,5%) as per their agreements with SARRAL. Without altering the members' contracts, SARRAL unilaterally decided not to honour the agreements (See Appendix 5 for a copy of SARRAL's contract with one of its members).

7.1.2.2. According to the external auditors, they could not verify receipts from the SABC and distributions to the members for the three consecutive financial periods of 2003, 2004 and 2005. (See Appendix 6 for copies

of the audit reports for the respective periods.) The amounts involved are significant and warranted a formal investigation. Based on the investigations carried out, the members were never provided with satisfactory answers as to what happened to the money.

7.1.3. The CRC believes that sound corporate governance would have been able to deal with the above-mentioned sources of the problems. Examples of where corporate governance failed SARRAL are listed in Table 2:

Table 2: Examples Where Corporate Governance Failed SARRAL

	Corporate Governance Gaps	King II Requirements	Potential Implications of Non-Adherence
a.	The constitutive documents (the Memorandum and Articles of Associations) were badly worded and contradictory. For example: Section 48 of the Articles of the Association says, "The Board shall pay and defray the expenses and liabilities of the company, incurred in the exercise or enforcement of the rights vested in or controlled by the company, out of the money received by company." The extract from Rule 17: "The board of directors may from time to time determine the rates of commission. It will charge any member or non-member." Both cannot be done. It is either a 'recovery of expenses' or 'commission-based'.	King II is silent on the matter.	Due to this ambiguity, the directors thought that they could apply any of the two principles, depending on the circumstances. For about 40 years, they applied a 'commission-based principle' and when they noticed a deterioration of the financial position of the company, the other principle was adopted.
b.	The constitutive documents (the Memorandum and the Articles of the Association) were in conflict with the Companies Act of 1973 (amended). According to the Articles of Association, the quorum for the Special Resolutions was three members and the simple majority was required for Special Resolution. The directors were not prohibited from voting and all directors were the members.	According to Section 56 and 62 of the Companies Act of 1973 (as amended), for a Special Resolution to be effective at least 75% of the members present should vote in favour of it. The quorum for the Special Resolution is one-fourth of the total membership.	The directors (three members constituted a quorum) could pass a Special Resolution without the participation of any of the ordinary members.

	Corporate Governance Gaps	King II Requirements	Potential Implications of Non-Adherence
c.	All Board members were representatives of composers / authors and publishers and, accordingly, there were no independent Board members.	The majority of non-executive directors should be independent as this reduces the possibility of conflicts of interest and promotes objectivity. Every Board should consider whether diversity and demographics make it effective. Diversity applies to academic qualifications, technical expertise, relevant industry knowledge, relevant experience and other items.	The fact that the membership was a pre-requirement for becoming a director reduced the pool of candidates who were capable of being directors for SARRAL. As a result, the Board had an inadequate number of qualified accountants with auditing and financial management experience. Objectivity and impartiality expected from the independent Board members was not possible.
d.	The Chairperson of the Board was also the Managing Director of SARRAL.	(Section 2.3.1) There should be a clearly accepted division of responsibilities at the head of the company, to ensure the balance of power and authority, such that no one individual has unfettered powers of decision-making.	There is no evidence that the Board took appropriate actions against the Chairperson of the Board for failing to implement the relevant controls within the organisation as the managing director. The external auditors issued a qualified audit report for three consecutive years (2003, 2004 and 2005) due to the fact that they could not verify the receipts and distributions. The failure to verify the transactions could only arise as a result of missing supporting documentation.
e.	Effective internal audit function was not in place.	(Section 3): Internal audit is responsible to both the Board and executive management, providing them with reasonable assurance regarding the effectiveness of the company's corporate governance, risk management processes and systems of internal control.	The external auditors could not verify the receipts from the SABC and the members' distributions (an indication of systems break-downs). The internal audit would have assisted with the investigations and designing appropriate controls to prevent the systems' collapse.
f.	Effective risk management and internal control systems not in place.	(Section 3.2.1) A comprehensive system of internal control should be established by the Board to ensure that the risks are mitigated and that the company's objectives are attained. The control environment should also set the tone of the company and cover ethical values.	The external auditors issued a qualified audit report for three consecutive years (2003, 2004 and 2005) for failing to verify the receipts and distributions. A good internal control would have created good audit trails, which would have allowed the auditors to audit.

7.2 COLLECTING SOCIETIES (SAMRO, SAMPRA AND NORM) VERSUS KING III

7.2.1. To minimise the risks of another collapse, it is important to analyse the state of corporate governance for the remaining collecting societies.

7.2.2. The collecting societies play a significant role in ensuring that there is an efficient system of licensing, collection and distribution of royalties. Based on the importance of their role, the CRC believes that the standard of corporate governance needs to be at the appropriate levels.

7.2.3. In South Africa, the latest report on corporate governance is referred to as King III, which was compiled by the King Committee. King III adopts an 'apply or explain' rather than a 'comply or explain' approach to governance compliance. In other words, governance is voluntary and not legislated.

7.2.4. The CRC's assessment for the three collecting societies with regard to corporate governance (as per King III) revealed non-compliance in areas listed in Table 3.

Table 3: Areas of Non-Compliance with King III Requirements

	King III Principle	King III Requirements	SAMRO	SAMPRA	NORM
a.	6.1	The Board should ensure that the company complies with applicable laws and considers adherence to non-binding rules, codes and standards.	The Memorandum of Association has been in conflict with the Companies Act of 1973 for 37 years and it is in conflict with the Companies Act of 2008.	The audited financial statements for the last two completed financial periods have not yet been submitted to the Registrar of Copyright, contrary to the requirements of the Collecting Society Regulations and in contravention of the Companies Act.	The audited annual financial statements for the year ended 31 December 2010 were not ready by 20 July 2011.
b.	2.16	The Board should elect a Chairperson who is an independent non-executive director.	The current Chairperson is not an independent non-executive director (representative of the publishers).	The current Chairperson is not an independent non-executive director.	The current Chairperson is not an independent non-executive director.
c.	2.18	As a minimum, two executive directors should be appointed to the Board, being the chief executive officer and the director responsible for finance function.	There are two executive directors who are the members of the Board: CEO and COO. The head of finance reports to the COO.	The CEO is one of the members of the Board.	The Board is made-up of non-executive directors.
d.	3.10	The audit committee report should be incorporated on the annual report.	The audit committee report is not part of the annual report.	The audit committee report is not part of the annual report.	The audit committee report is not part of the annual report.

	King III Principle	King III Requirements	SAMRO	SAMPRA	NORM
e.	2.18	The majority of non-executive directors should be independent.	There are no independent directors. The pre-requirement for becoming a non-executive director is membership of SAMRO. The Articles of the Association are not in line with the Code of Good Governance.	There are no independent directors. The pre-requirement for becoming a non-executive director is membership of SAMPRA (representatives of the recording companies).	There are no independent directors. The pre-requirement for becoming a non-executive director is membership of NORM (representatives of publishers).
f.	2.18	Every Board should consider whether its size, diversity and demographics make it effective. Diversity applies to academic qualifications, technical expertise, relevant industry knowledge, experience and others.	The members of the Board have a wide range of experience which includes: law, music publishing, business management and all music-related activities. Experience in financial management, auditing and collections is limited within the current Board (non-executive members of the Board). This is due to the fact that the Board members are only drawn from the members of SAMRO and, if there is a skills shortage within the membership, the search does not go wider than the current membership.	The details of directors' expertise were not provided to the CRC.	The members of the board have a wide range of experience, which includes: law, music publishing, finance, auditing, business management and all music-related activities.
g.	2.10	The board should ensure that there is an effective risk-based internal audit.	Internal audit unit is in the process of being established.	Internal audit unit is not in place.	Internal audit unit is not in place.

	King III Principle	King III Requirements	SAMRO	SAMPRA	NORM
h.	8.1	Companies should ensure equitable treatment of shareholders.	According to SAMRO's Memorandum of Association, which was drafted in 1960, the Board may unilaterally terminate the membership of any of the members. SAMRO's requirement that full members (i.e. those entitled to be elected to the Board) have to be approved by the Board is not appropriate. The objective criteria applied in practice should be incorporated in its constitutive documents.	SAMPRA's accountability is limited to the copyright owners.	No comments.
i.	2.26	Companies should disclose the remuneration of each individual director and certain senior executives.	No disclosure is done on the annual financial statements.	No disclosure is done on the annual financial statements.	The non-executive directors are not remunerated.
j.	2.25	Directors should remunerate directors and executives fairly and responsibly.	For the year ended 30 June 2010, the nine non-executive directors were paid R224 000 (an average of R24 890 per director per annum or R6 220 per meeting per director). The average pay is much less than that for similar size organisations, which is in excess of R10 000 per meeting.	The non-executive directors are not remunerated.	The non-executive directors are not remunerated.

	King III Principle	King III Requirements	SAMRO	SAMPRA	NORM
			For the same period, the two executive directors were paid R5 million in total (including bonuses), an average of R2,5 million per director. The CRC could not access the split between the basic and bonus payments for these directors. The CRC could not assess the fairness of the amounts paid to the executive directors due to the unavailability of the split between the basic pay and bonus component.	The pay for the CEO is not disclosed separately and the entity could not provide the CRC with details of his pay. The CRC could not assess the fairness of the amount paid to the CEO.	There are no executive directors.
k.	S30 of Companies Act of 2008	A company must issue audited annual financial statements within six months after end of the financial year.	Full compliance.	The audited financial statements for two consecutive financial periods are not yet issued.	The audited financial statements for the year ended 31 December 2010 were not issued by 20 July 2011.

7.3 CONCLUSION

7.3.1. The CRC noted that SARRAL's collapse was preceded by corporate governance failure, the highlights of which include:

- The breakdown or significant weaknesses in internal controls (the auditors issued qualified audit reports for 2003, 2004 and 2005 for failing to verify receipts from the SABC and distribution of royalties to members), the internal rules which were in conflict with the constitutive documents;
- The fact that the managing director was also the chairperson of the organisation;
- The outdated constitutive documents, which were also in conflict with the Companies Act of 1973; and
- The changes in accounting policies, which resulted in breaching of the members' contracts.

It is clear that the internal control and audit functions were not overseen by an effective audit committee.

7.3.2. With regard to SAMRO, the following gaps were identified in its corporate governance structure:

- Constitutive documents are outdated and in conflict with the Companies Act;
- There are no independent directors;
- An internal audit function is not in place;
- Disclosure of the executive directors' remuneration is limited (contravention of the Companies Act of 2008 and the King III);

- The members' rights are disempowered by these outdated constitutive documents; and
- There is limited transparency with regard to the categorisation of membership.

7.3.3. SAMPRA's situation is as follows:

- The audited financial statements for the last two completed financial years have not been issued;
- There are no independent directors;
- No disclosure for executive directors' remunerations;
- The annual reports are not published; and
- No reports are provided to the members with regard to the status of the internal control environment.

7.3.4. With the exception of the issuance of the audited financial statements, the situation for NORM is not different from SAMPRA.

7.4 RECOMMENDATIONS

7.4.1. With regard to the collapse of SARRAL, there are two recommendations for the liquidators:

7.4.1.1. They should consider initiating a civil claim against SARRAL's former auditors for failing to issue a qualified report regarding SARRAL's breach of members' contracts by retaining more than the 7,5% of the total collections (SARRAL deducted between 30% and 40% to settle the liabilities of the company between 2003 and 2008) as opposed to 7,5%, which was stipulated in the members' contracts.

7.4.1.2. They should consider initiating a civil claim against SARRAL's former directors for allowing the company to breach the members' contracts.

7.4.2. In order to improve the level of compliance to good corporate governance principles, the following recommendations are made:

7.4.2.1. The law should be amended to allow for all music-rights collecting societies (SAMRO, NORM and SAMPRA) to fall within the ambit of the regulations issued under the Act.

7.4.2.2. The Registrar should be empowered to take over the administration of any collecting society should he or she be satisfied that such society is being run in a manner that is detrimental to the respective rights holders;

7.4.2.3. Adherence to the good principles of corporate governance should be compulsory for collecting societies;

7.4.2.4. SAMRO should amend its constitutive documents in order to be aligned with the latest Companies Act and acceptable standards of corporate governance; and

7.4.2.5. The existence of independent qualified directors (at least one-third of the Board membership) within collecting societies is encouraged and recommended.

8 COLLECTION OF MUSIC ROYALTIES

8.1 OVERVIEW OF COLLECTION ACTIVITIES

8.1.1 Background

8.1.1.1. The total music royalties collected for performance, sound recordings and mechanical rights over the last three years are reflected in Table 4.

Table 4: Total Music Royalties Collected via Collecting Societies

Refs	Sources of Music Royalty Revenue	Paragraph. Refs	2010 Rm's	2009 Rm's	2008 Rm's
a.	Radio stations	8.1.2	78,8	72,2	68,5
b.	Television stations	8.1.3	90,9	86,1	89,6
c.	Community TV and radio stations	8.1.4	3,0	2,8	2,6
d.	Foreign sources of income	8.1.5	8,1	7,9	7,3
e.	General (licensing) music users	8.1.6	121,9	96,3	79,4
f.	Mechanical rights	8.1.7	19,8	27,5	20,8
g.	Others		35,4	29,6	25,4
h.	**TOTAL**		**357,9**	**322,4**	**293,6**
	Growth		**11%**	**10%**	

8.1.1.2. The total collections for 2010 amounted to about R357,9 million compared to R322,5 million for 2009 and R293,7 million for 2008 (as per Table 4 (h)). Collections include performance, sound recording, and mechanical rights collected by the relevant collecting societies.

8.1.1.3. The total collections of R357,9 million equates to 0,0128% of the total GDP, compared with 0,0417% for the UK and 0,0468% for France. The growth of 11% and 10% over the last two years was largely due to increases in sound recording royalties arising as result of growth in SAMPRA's collections. SAMPRA commenced with the collections of sound recording royalties in 2008.

8.1.2 Radio stations

8.1.2.1. Currently, both public and private radio stations pay for performance rights at an average rate of 3,25% (on gross advertising revenue) per annum. Due to the pending tariffs case against SAMPRA, no payment has been made for sound recordings.

8.1.2.2. Based on the CRC's comparative exercise in respect of tariffs in both developed and developing countries, an average of 3,25% (currently paid by local radio stations) is extremely low as a total rate of music cost for an average music radio station. The CRC believes that a minimum rate of between 6,5% and 8% (performance rights plus sound recording rights) is appropriate for most radio stations in South Africa. This is based on the average of 8,06% for the countries selected for benchmarking determined in paragraph 8.2.4.4. Based on this suggested minimum rate, there is a shortfall of approximately 3,25% (6,5% minus 3,25%). Based on the shortfall of 3,25%, currently, the total annual leakage for radio stations is at least R80 million per annum, which is largely due to non-payment for sound recordings by broadcasters and the fact that tariffs for performance rights are not competitive in relation to benchmarked countries.

8.1.2.3. DMX Music is a background and foreground music service provider, providing pre-programmed music and genre-specific audio channels to subscribers.

8.1.2.4. In December 1995, DMX Music concluded an Audio Service Distribution Agreement with pay television operator Multichoice. Under the agreement, DMX Music supplies the service to Multichoice for use in residential homes in the form of 40 programmed genre-specific audio channels, which are updated at periods determined by Multichoice and DMX Music.

8.1.2.5. For 16 years (as from 1995), no payment has been made by DMX for performance rights and, for the past eight years, no payment has been made for sound recordings. Accordingly, DMX contravened the Copyright Act of 1978 by playing music publicly for 16 years without the appropriate licences.

8.1.2.6. The CRC believes that it is inappropriate for Multichoice to provide a music broadcasting platform to broadcasters who are not licensed to play music.

8.1.3 Television Stations

8.1.3.1. Public television relates to all stations that are owned by the SABC (including SABC1, SABC2 and SABC3).

8.1.3.2. The total amount paid for performance rights with regard to public television for 2010 amounted to R51,5 million.

8.1.3.3. Based on the benchmarking exercise performed against both developing and developed countries, there are no material leakages in this area arising from these tariffs.

8.1.3.4. The total amount paid by private TV stations in respect of performance rights for 2010 amounted to R39,4 million, and there are no material collecting leakages arising from the tariffs based on the benchmarking exercise performed.

8.1.4 Community Broadcasters

8.1.4.1. There are about 150 community radio stations licensed by ICASA. Most have licences with SAMRO, but do not honour their commitments of paying annual royalty fees. The majority are in arrears with payments.

8.1.4.2. Needletime royalties are not payable by community radio stations, as per the recommendations of the Collecting Society Regulations. This is not in line with international trends. Based on the CRC's international comparative study, the trend for both developed and developing countries is that community radio stations pay for both performance and sound recording rights.

8.1.4.3. Table 4 shows that in 2010 the music industry generated about R357, 9 million in royalty income, which is inadequate. The industry is not subsidised and, accordingly, it was inappropriate to exempt community radio stations from paying for sound recordings. Whether the present position should continue is a matter that should be referred to the Standing Advisory Committee for consideration.

8.1.4.4. There are about 10 community television stations and SAMRO is in the process of issuing music licences to them.

8.1.5 Foreign Sources of Income

8.1.5.1. For 2010, income generated by foreign sources constituted 2,24% of the total collections. The CRC noted that there is a high consumption of local music by Swaziland, Lesotho, Namibia, Zambia and Zimbabwe, but the amounts collected from these countries were insignificant.

8.1.5.2. SAMRO has reciprocal agreements with various collecting societies around the globe.

8.1.5.3. SAMPRA does not have any reciprocal agreements with other collecting societies and claims that these agreements do not form the basis on which the copyright in sound recordings is administered collectively around the world. The overwhelming majority of international rights owners are represented locally and elsewhere under exclusive licence agreements with licensees in each country. It is through these agreements that the collecting societies are granted the right to issue performance rights licences on their behalf.

8.1.5.4. The CRC disagrees with the above statement by SAMPRA. PPL (the UK's sound recording collecting society) has about 52 reciprocal agreements with foreign collecting societies, which are used as mechanisms for distributing foreign sound recording royalties generated in the UK and for collecting the royalties generated by the foreign countries. SPRE of France also has multiple foreign agreements.

8.1.6 General (Licensing) Music Users

8.1.6.1. This category relates to non-essential users of music such as retailers, hotels, restaurants, offices, telephone music-on-hold and others. By and large, those that have licences honour their commitments. Due to the fact that music is not their core business and the tangible benefits arising from the use of music are not always visible, there is little appreciation for payment. The understanding of copyright issues is generally shallow and the differences between private and public use and performance rights (managed by SAMRO) and sound recording rights (managed by SAMPRA) are consistently questioned. Most users do not want to deal with multiple parties with regard to royalty payments; their concern is with regard to the total cost of consuming music within their premises (it is irrelevant whether it is for SAMRO or SAMPRA). A significant number of users prefer to deal with one collecting society to take care of all music-related issues as opposed to having to deal with two or more service providers.

8.1.6.2. Currently, there is a pending court case between SAMPRA and some of the major retailers with regard to the magnitude of tariffs proposed by SAMPRA in respect of sound recordings. Their payments are currently being paid to an 'escrow' account. Based on the comparative exercises, the local tariffs for retailers are not higher than the international average.

8.1.6.3. Although SAMRO has been in operation for about 50 years, there are still a significant number of users that are not in possession of SAMRO licences. According to SAMRO, the following categories of users do not pay for the use of music rights: Internet service providers (ISPs), digital service providers, narrowcasters, most of the community broadcasters, some government departments (e.g. Correctional Services, the South African National Defence Force), taxis (taxi associations) and some parastatals (e.g. Transnet and the South African Post Office). It is estimated that at least 50% of taxis play music as part of their operation and, according to SANTACO, there are approximately 130 000 units in operation. Based on the current tariffs, the taxi industry should be paying at least R43 million per annum for music rights (R20 million for performance rights and R23 million for needletime rights). According to one of the submissions to the CRC, SAMRO does not collect royalties from churches for the use of copyright music during services. SAMRO is expected to maximise income for its members and, where there are exceptions, the mandate should be sought from the members.

8.1.6.4. According to SAMRO, the reasons for non-payment include:

- Inadequate and ineffective legislation;
- National culture of non-compliance;
- Cumulative effect of cost of licences for multiple rights;
- Commercial viability of community radio broadcasters; and
- Cost and difficulty associated with enforcement.

8.1.6.5. SAMPRA has licensed about 4 000 users (or about 12 000 sites) for sound recordings. This is too low in relation to the number of commercial music users in the country. Based on the current list of SAMPRA's licensed users, the following categories have not been licensed: telephone music-on-hold for bigger corporations, municipalities, bigger portion of restaurants, universities, music schools and others. Excluding broadcasters and retailers, who are disputing the tariffs, the CRC believes that SAMPRA is currently collecting only a third of what it should be.

8.1.7 Mechanical Rights

SAMRO and NORM are responsible for collecting mechanical rights. One of the main challenges is the overlap of members between SAMRO and NORM and there is a claim by some of the users that they are being charged twice for one and the same repertoire of songs. In order to eliminate this potential duplication of functions and payments, SAMRO and NORM are considering merging their mechanical rights operations. The current challenges in this area include:

8.1.7.1. Non-payment by the SABC of all mechanical rights for the last 18 months amounting to approximately R18 million (payable to both NORM and SAMRO). The amount has subsequently been paid.

8.1.7.2. Over the past five years, private television stations have not paid SAMRO for the use of its repertoire.

8.1.7.3. Vodacom and MTN did not pay SARRAL (or SARRAL's liquidators) for its share of mechanical rights.

8.1.7.4. For the past five years, Vodacom made no payments to SAMRO in respect of mechanical rights. However, on 28 June 2011, Vodacom finally concluded an agreement with SAMRO. MTN has not yet taken a licence with SAMRO and has made no payment for mechanical rights.

8.1.8 Conclusion and Recommendations

8.1.8.1. The average total collections for the past three years for performance, mechanical and needletime rights collected by SAMRO, SAMPRA and NORM amounted to R325 million per annum. Taking into account the high levels of music usage by entities that use it as an essential part of their business (broadcasters, jukebox operators, disc jockeys and operators of diffusion services) and those that use if for background purposes, the CRC believes that the current collection levels are too low. This is confirmed by the comparative study analysis in Chapter 14. As indicated above, reasons for such low collections include non-payment of needletime royalties by broadcasters, retailers and mobile entities. There are also other challenges. Firstly, SAMPRA, which commenced with its operations in 2008, is still growing and a significant number of music users are not yet licensed with the society. Secondly, a significant number of users (such as DMX and those in the taxi industry) have not yet taken licences with the relevant collecting societies. While several attempts have been made to collect from these users, the desired results have not been achieved. The CRC believes that a collaborative approach by the collecting societies and relevant government agencies is required to grow the industry. It also believes that it would be appropriate for the industry to set its own annual collection target. The CRC believes that collections worth R1 billion per annum should be achievable in five years' time. (Of course, this is subject to the approval of the relevant tariffs by the Tribunal if the parties do not agree.)

8.1.8.2. The collecting societies should consider initiating legal action against all major music users who operate without the appropriate licences.

8.1.8.3. Collecting societies should intensify their licensing and collecting activities. A large number of general music users are not licensed and no action has been taken against them.

8.1.8.4. SARRAL's liquidators should consider and assess the appropriateness of the mechanical rights monies payable to it by some of the broadcasters and mobile telephone operators as a result of the use of these rights between 2000 and 2007.

8.2 TARIFFS ASSOCIATED WITH LICENSING AGREEMENTS

8.2.1 Background

8.2.1.1. Anybody who wants to use music (subject to copyright) in public needs a licence to do so. The licence fee, or royalty, depends on the type of use. Royalty rates are set in tariffs. Music does not have the same value for a radio station as it does for a restaurant or concert hall. That is why there are more than 40 different tariffs for the various forms of use.

8.2.1.2. In South Africa, the tariffs are determined by the respective collecting societies. Should a dispute arise between the users and the collecting societies regarding tariffs, the matter may be referred to the Copyright Tribunal.

8.2.1.3. The process followed by SAMRO in determining tariffs is undertaken within its Business Development Department. The department is usually requested to initiate the process by the Sales Division after the identification of the need for a new tariff. The Business Development Unit performs the research, which entails:

- Identification of the users of the musical works in question;
- The way in which the music is being used;
- Where the musical works are being used, the audience and method of fixation;
- International benchmarking is undertaken to ensure SAMRO tariffs are on a par with international norms; and
- The tariffs are reviewed by the tariff committee before submission to the executive committee for approval.

Due to the pending court cases, SAMPRA could not disclose the processes it uses to determine tariffs.

8.2.2 Commercial Radio Stations – Performance Rights

Table 5: Radio Stations Tariffs for Performance Rights

<table>
<tr><th colspan="2">PRS (UK)</th><th colspan="2">SPRE (FRANCE)</th><th colspan="2">SUISA (SWITZERLAND)</th><th colspan="2">IPRS (INDIA)</th><th>SAMRO</th></tr>
<tr><th>Annual Broadcasting Revenue</th><th>Rates</th><th>Annual Broadcasting Revenue</th><th>Rates</th><th>Music Usage Level</th><th>Rates</th><th>Music Usage Level</th><th>Rates</th><th rowspan="6">Average tariff of 3,25%</th></tr>
<tr><td rowspan="2">Up to R7,6 million</td><td rowspan="2">3%</td><td>Up to R5,1 million</td><td>4%</td><td>Less than 20%</td><td>1%</td><td>30% and less</td><td>3%</td></tr>
<tr><td>Between R5,1 million and R30,6 million</td><td>5%</td><td>Between 20% and 30%</td><td>2%</td><td>41% to 50%</td><td>4%</td></tr>
<tr><td>Between R7,6 million and R13,9 million</td><td>4%</td><td>Between R30,6 million and R132,6 million</td><td>6%</td><td>Between 30% and 40%</td><td>3%</td><td>51% to 60%</td><td>5%</td></tr>
<tr><td rowspan="2">R13,9 million and more</td><td rowspan="2">5,25%</td><td rowspan="2">R132,6 million and above</td><td rowspan="2">7%</td><td>Between 40% and 50%</td><td>4%</td><td>61% to 70%</td><td>6%</td></tr>
<tr><td>Between 50% and 60%</td><td>5%</td><td>71% to 80%</td><td>7%</td></tr>
</table>

PRS (UK)		SPRE (FRANCE)		SUISA (SWITZERLAND)		IPRS (INDIA)		SAMRO
Music is less than 15% of the total broadcast	1%			Between 60% and 70%	6%	81% to 90%	8%	
				Between 70% and 80%	7%	91% to 100%	9%	
				Between 80% and 90%	8%			
				Between 90% and 100%	9%			

8.2.2.1. SAMRO has an average rate of 3,25% for radio broadcasters, but the published tariffs are different. According to the published tariffs, SAMRO uses a sliding scale of between 1% and 10% in accordance with music usage. For the purposes of this analysis, the average tariffs (of 3,25%) were used.

8.2.2.2. The global norm is the sliding scale based on either the music usage or revenue generated.

8.2.2.3. SAMRO ranks lowest when compared with the performance rights collecting societies of the UK, Switzerland and India (as per Table 5). Most local music radio stations allocate about 70% of their airspace to music and generate more than R30 million in revenues per annum. Comparable figures are reflected in Table 6 at 70%.

Table 6: Radio Stations Tariffs for Radio Stations with at least 70% Music Airspace and at least R30 million Annual Revenue

PRS (UK)	SUISA (Switzerland)	IPRS (India)	SAMRO
5,25%	7%	7%	3,25%

8.2.2.4. Based on Table 6, it is clear that SAMRO rate at 3,25% compares unfavourably to 7% for IPRS, 5,25% for PRS and 7% for SUISA and 6% for SPRE. Talk radio stations such as Radio 702 and SAFM would benefit under the SUISA model because they would pay only 1%. The SPRE and SUISA tariffs relate to both performance rights and sound recording rights. Without taking into account the sound recording rights, it is clear that SAMRO's tariffs are at least 3% below those of the other collecting societies.

8.2.3 Commercial Radio Stations – Sound Recordings

Table 7: Radio Stations Tariffs for Sound Recording Rights

PPL (UK)		SPRE (FRANCE)		PPL (INDIA)	SAMPRA
Net Broadcasting Revenue	**Rates**	**Net Broadcasting Revenue**	**Rates**		
Less than R7,3 million	2%	Up to R5,1 million	4%	Flat rate of 2% based on the advertising revenue	The tariffs are not available since the matter was referred to the Copyright Tribunal
Between R7,3 million and R14,6 million	3%	Between R5,1 million and R30,6 million	5%		
Above R14.6 million	5%	Between R30,6 million and R132,6 million	6%		
		R132,6 million and above	7%		

8.2.3.1. For sound recordings in Table 7, PPL (UK's sound recording collecting society) charges 5% for all radio stations generating revenues in excess of R14 million. The Indian PPL has a flat rate of 2% for all radio broadcasters. There is no separate charge in respect of the sound recordings for France and Switzerland. The royalties collected by SPRE (with regard to France) are shared by all relevant role players (composers, songwriters, publishers, music producers and performers). The same principle applies to Switzerland.

8.2.4 Consolidated Costs for Commercial Radio Stations – Performance Rights Plus Sound Recordings

Table 8: Combined Radio Stations Tariffs with 70% Music Airspace or at least R30 Million Annual Revenue

		Details		
		Performance Rights	**Sound Recording Rights**	**Total Liability (Sum of both Rights)**
UK	**Collecting society**	PRS	PPL	
	Rates	5,25%	5%	10,25%
SWITZERLAND	**Collecting society**	SUISA(inclusive for both rights)	No separate charge	
	Rates	7%	-	7%

		Details		
		Performance Rights	**Sound Recording Rights**	**Total Liability (Sum of both Rights)**
FRANCE	**Collecting society**	No separate charge	SPRE (inclusive both rights)	
	Rates	-	6%	6%
INDIA	**Collecting society**	IPRS	PPL	
	Rates	7%	2%	9%
SOUTH AFRICA	**Collecting society**	SAMR	SAMPRA	
	Rates	3,25%	-	3,25%

8.2.4.1. The average total liability in Table 8 for music royalties (performance and sound recording rights excluding mechanical rights) amounts to 10,25% for the UK's bigger radio stations.

8.2.4.2. In France and Switzerland, there is one collection point for both rights and the overall average is 6% for France and 7% for Switzerland.

8.2.4.3. In India, the average total liability for music radio stations (for at least 70% music usage) is 9%.

8.2.4.4. Currently, the average total music royalty liability (excluding mechanical rights) for all radio stations in South Africa is 3,25% compared to 10,25% in England, 6% in France, 7% in Switzerland and 9% in India. There is a shortfall of at least 4% between the current total local tariffs and the average international comparative tariffs (8,06%).

8.2.5 Comparative Study Performed by NAB on Radio Stations

8.2.5.1. In 2008, NAB performed a comparative study analysis. The tariffs used were in place in 2008 for the respective collecting societies. See Table 9.

Table 9: Comparative Analysis Performed by NAB on Radio Stations Tariffs Charged by Different Collecting Societies in 2008

APRA (Australia)	SOCAN (Canada)	GEMA (Germany)	PRS (UK)		SACVEN (Venezuela)
			Annual Broadcasting Revenue	**Rates**	
3,85% (assuming 100% of radio broadcast relates to APRA's works)	3,2% on first R10,9 million of annual revenues and 4,4% on the rest. The effective rate is 4% for a radio station with income equal or more than R30 million per annum.	Flat rate of 6,2%	Below R6,4 million	3%	0,18% of the gross revenue
			Between R6,4 million and R12,8 million	4%	
			R12,8 million and above	5,25%	
			Music is less than 15% of the total broadcast time	1%	

8.2.5.2. Based on NAB's comparative study, SAMRO's tariffs for radio broadcasting at approximately 3,25% are lower than APRA's tariffs of 3,85% and not comparable to GEMA at 6,2%. Venezuela's SACVEN is the only collecting society that the CRC has identified with lower radio station tariffs at 0,18%. The NAB study also confirmed that current local tariffs are not competitive.

8.2.6 Commercial TV Stations

Table 10: Comparison of TV Stations Tariffs

SPRE (France)	SUISA (Switzerland)	SAMRO
2% of revenue	4,4% of revenue	2,5% of revenue

The tariffs for IPRS, TONO, PRS and ECAD could not be ascertained. Based on the available data, SAMRO's TV tariffs are in line with the comparable collecting societies.

8.2.7 Comparative Study Performed by NAB on TV Channels

Table 11: Comparative Study Performed by NAB on TV Channels

SOCAN (Canada)	GEM (Germany)	SACVEN (Venezuela)	SAMRO
1,9% of station's gross Income	2,25% of revenue	1,2% of income	2,5% of revenue

Based on the comparative study performed by NAB, the average tariffs for television are competitive.

8.2.8 Community Radio Stations

Table 12: Community Radio Stations Tariffs

<table>
<tr><th>PRS (UK)</th><th colspan="2">PPL (UK)</th><th>TONO (Norway)</th><th>IPRS (India)</th><th>SAMRO</th></tr>
<tr><td></td><td>Net Revenue</td><td>Royalties Payable</td><td></td><td></td><td></td></tr>
<tr><td rowspan="4">6% with a minimum</td><td>Less than R0,391 million</td><td>R 6 832</td><td rowspan="4">The greater of R11 400 or compensation of R650 per music hour multiplied by a ratio of 00,58</td><td>Non-profit entity greater of R23 255 or 5% of advertising revenue</td><td rowspan="4">The greater of R10 000 or 3,25% of the total revenue</td></tr>
<tr><td>R0.391 to R7,3 million</td><td>2%</td><td rowspan="2">Universities greater of R25 503 or 5% of advertising revenue</td></tr>
<tr><td>R7,3 million to R14,6 million</td><td>3%</td></tr>
<tr><td>Above R14,6 million</td><td>5%</td><td>Well established educational institution greater of R7 700 or 5% of the advertising revenue</td></tr>
</table>

The community radio tariffs (in Table 12) are unfavourable at an international level, with most of the collecting societies charging higher tariffs.

8.2.9 Ringtones

Table 13: Ringtones Tariffs

PRS (UK)	TONO (Norway)	IPRS (India)	SAMRO
Greater of 15% of revenue or R1,75 per transaction or 12% of revenue if licensed with the record labels	12% of revenue	2,5% of revenue	No royalty income is derived from the ringtones.

No revenue is generated in respect of performance rights due to the fact the Copyright Act does not deal with digital communication to the public.

8.2.10 Music on Hold (for 100 lines)

Table 14: Music on Hold Tariffs for 100 Lines

PRS (UK)	TONO (Norway)	IPRS (India)	SAMRO	PPL (UK)	SAMPRA
R5 238	R4 121	R31 783	R2 819	R5 093	R4 653

The tariffs for IPRS (the Indian Performance Rights Society) are at least 13 times higher than SAMRO's tariffs and four times higher than PRS tariffs. India is the global market leader for business processing outsourcing and call centre businesses and there is high demand for telephone music on hold. This has created room for higher tariffs in India.

8.2.11 Background music – Departmental Stores and Warehouses (for 2 000 square metres)

Table 15: Tariffs for Departmental Stores for 2 000 Square Meters

PRS (UK)	TONO (Norway)	IPRS (India)	SAMRO	PPL (UK)	SAMPRA
R8 789	R15 876	R2 790	R2 262	R7 437	R6 707

SAMRO is the lowest entity in this category at R2 262 per 2 000 square metres.

8.2.12 Conclusion and Recommendations

The local tariffs are generally lower than the average tariffs for the countries selected for benchmarking.

Collecting societies should be encouraged to review and benchmark the tariffs every five years to ensure that they remain competitive.

8.3 AGREEMENTS BETWEEN BROADCASTERS AND COLLECTING SOCIETIES

8.3.1. Broadcasters have agreements with local collecting societies with regard to performance and mechanical rights; they do not have agreements with foreign collecting societies and individual parties such as songwriters, composers, publishers, performers and music producers. With regard to performance rights, the broadcasters have agreements with SAMRO. Most of these agreements are limited to SAMRO's repertoire (including the sister societies' repertoire) and others are blanket agreements. Regardless of the terms of the agreements, SAMRO is paid in full for all songs played by broadcasters. It is SAMRO's responsibility to distribute all royalties (including the non-members' portions and the foreign parties' portions). This arrangement is practical, but not necessarily correct. The number of collecting societies for performance rights is not limited by statute to only one, which means that it is possible to have more than one collecting society for performance rights. Based on the above, SAMRO can only legally issue licences limited to its repertoire. If a second collecting society for performance rights is created, SAMRO's 'blanket gentlemen agreement' will fall away. If a recommendation of 'one right one collecting society' is made and legislated, this potential problem would fall away.

8.3.2. With regard to the mechanical rights, the situation is different because more than one collecting society is responsible for the collection, i.e. NORM and SAMRO. In this case, the contract is for the repertoire submitted

by a collecting society. A rights holder who does not belong to a collecting society can theoretically claim his or her share of royalties from the broadcasters.

8.3.3. Owing to the tariffs dispute, there are currently no agreements in place between SAMPRA and the broadcasters for sound recordings.

8.3.4. SAMRO has an agreement with the SABC for performance rights, which was signed in 1987 and to which no amendments have been made. This agreement covers all radio and television stations owned by the SABC and is indefinite, with no provision for a review date. Since 1987, the SABC has restructured its radio and TV stations several times and some of the radio stations (e.g. Radio Highveld) have been sold and new channels introduced. The technology has significantly changed and so have the tariffs. The current agreement does not take into account the above-mentioned points. There is no agreement between SAMRO and the SABC with regard to mechanical rights. The SABC initially paid SAMRO arbitrary amounts (with no scientific basis) for a couple of years and then in September 2009 halted payment.

8.3.5. SAMRO has performance rights agreements with M-NET and e.tv. The M-NET agreement was signed in 1990 and no subsequent reviews have been conducted. A mechanical rights agreement between SAMRO and M-NET is still being negotiated. There is nothing abnormal about e.tv's agreement, which was signed in 1999. With regard to mechanical rights, there is no agreement with SAMRO. It should be noted that both M-NET and e.tv had no agreements with SARRAL in respect of mechanical rights.

8.3.6. Multichoice has no agreement with SAMRO based on the fact that it is not a broadcaster but provides a platform for broadcasters. The content service providers are responsible for obtaining broadcasting licences.

8.4 CONTRACTS BETWEEN COLLECTING SOCIETIES AND GENERAL MUSIC USERS

8.4.1. Several contracts between SAMRO, SAMPRA and the respective music users were examined.

8.4.2. With regard to SAMRO's contracts, the following areas are earmarked for improvement:

8.4.2.1. SAMRO's contracts are indefinite and make no provision for review. Some have been in place for more than 20 years without any reviews.

8.4.2.2. There is conflict between SAMRO's practice and the written agreements with users. According to the contracts, usage is limited to SAMRO's repertoire, but, in practice, SAMRO claims to have blanket agreements with users.

8.4.2.3. Where a licensee has multiple sites governed by one contract, the contracts do not provide guidance as to what should happen if sites are acquired or disposed of during the period.

8.4.2.4. The contracts are silent on issues of change of ownership (e.g. merger, acquisition or restructuring).

8.4.2.5. The contracts do not recommend any processes to be followed by the parties should a contractual dispute arise.

8.4.2.6. The contracts are silent about the penalties that may arise as result of late payments (e.g. interest on long overdue balances).

8.4.2.7. The contracts are silent about the parties' ability to cede their contracts, should the necessity arise.

8.4.3. With regard to SAMPRA's contracts, the following deficiencies were noted:

8.4.3.1. Where a licensee has multiple sites governed by one contract, the contracts do not provide guidance as to what should happen if sites are acquired or disposed of during the period;

8.4.3.2. The contracts are silent on issues of change of ownership (e.g. merger, acquisition or restructuring);

8.4.3.3. The contracts do not recommend any processes to be followed by the parties should a contractual dispute arise.

8.4.3.4. The contracts are silent about the penalties that may arise as result of late payments (e.g. interest on long overdue balances).

8.4.3.5. The contracts are silent about the parties' ability to cede their rights and obligations, should the necessity arise.

8.5 CONCLUSION AND RECOMMENDATIONS

8.5.1. Collecting societies should address the above-mentioned gaps on all new contracts and develop a preferable standard contract template.

8.5.2. All contracts should provide for review or renewal dates so that the terms can be reviewed or revisited and, where appropriate, amended.

9 LICENSING AGREEMENTS BETWEEN TERTIARY INSTITUTIONS AND COLLECTING SOCIETIES

9.1 BACKGROUND

9.1.1. Licensing agreements regarding the reprographic reproduction of literary works have been concluded between various tertiary institutions in South Africa and the Dramatic, Artistic and Literary Rights Organisation (Pty) Ltd (commonly known as DALRO).

9.1.2. DALRO is a private company with limited liability registered under the companies' legislation. It is a wholly owned subsidiary of SAMRO, which is its only member. (References in its financial statements to its 'members' are erroneous, as its representatives who gave evidence before the CRC conceded.) It is a copyright licensing

agency, its rights being derived from individual mandates granted to it by its local and foreign principals (who are the rights holders).

9.1.3. DALRO was founded in 1967 with the objective of providing copyright protection and licensing services to authors and publishers of literary, dramatic and dramatico-musical works. Originally, its main activity was the licensing of dramatic and dramatico-musical works for stage and radio. It also hired out or sold rehearsal and performance materials, such as scripts and musical scores. In response to appeals from the international copyright community for the establishment of a reprographic reproduction organisation (RRO) to bring the photocopying of copyright-protected works under licensed control, it established its Reprographic Rights Licensing Division in 1993. This division produces the major part of DALRO's income, viz 88% to 92%, while the dramatic and dramatico-musical licensing division produces the remaining 8% to 12 %.

9.1.4. In a written submission to the CRC (from which most of the information contained in this section of the report is derived), DALRO representatives described the 'core function' of the Reprographic Rights Division as being the licensing of the reproduction of extracts from books and articles from journals and magazines on behalf of local and foreign rights holders. There is a great need for this service in the Higher Education (HE) sector, where study material is compiled and disseminated to students by way of course packs and handouts or institutional Intranets or electronic reserves. All public HE institutions have obtained licences from DALRO to provide their students with supplementary study materials reproduced in terms of blanket (i.e. pre-authorised) or transactional (i.e. pay as you copy) licences.

9.2 FUCNTIONING OF DALRO AS A COPYRIGHT LICENSING AGENT

9.2.1. In order to provide these licences, DALRO has acquired mandates from all major South African publishers, especially those which publish for the academic, scholarly and FET sectors, as well as a growing number of newspaper publishers. It is thus able to offer educational institutions licensed access to what it describes as “a near-inclusive repertoire of copyright-protected works”. It is also a full member of the International Federation of Reproduction Rights Organisations (IFRRO), as a result of which it is a member of an international network of RROs and has entered into agreements of reciprocal representation with 24 foreign RROs, including organisations in the UK, the US, Germany, France, the Netherlands, Australia, New Zealand, Latin America, Kenya and Zimbabwe. These agreements duly mandate DALRO to grant licences for reproduction from books, journals, magazines and, in many instances, newspapers published in the countries in which the RROs with which it has agreements operate.

9.2.2. The blanket licences issued by DALRO involve the granting of permission to make copies from works in the repertoire administered by DALRO in return for an upfront payment, followed by retrospective reporting by the licensee on copies made. By arrangement with DALRO's foreign associates and the rights holders, blanket licences are available to institutions in the public HE sector with what DALRO describes as “a proven record of copyright compliance through transactional licensing and with the requisite infrastructure to support and sustain full reporting on institutional copying”. The blanket licence tariff, which was negotiated with the HE institutions in collaboration with the Department of Education in 1999, is annually adjusted for inflation and is currently R88,65 (plus VAT) per full-time equivalent (FTE) student at a university and R66,47 (plus VAT) at a university of technology.

9.2.3. As regards DALRO's transactional licensing service, application forms are made available to all institutions for completion in respect of each item to be copied for students. The forms require full bibliographical information relating to the individual items to be copied, as well as:

(i) The number of pages making up the extract to be copied from the book;

(ii) The number of pages of the entire book (so that the percentage of the book to be copied can be calculated);

(iii) The number of pages from a journal article to be copied (magazine and newspaper articles are charged for on a 'copy per article' basis); and

(iv) The number of copies of the extract from a book or journal or magazine or newspaper article to be made. (Blanket licensees are required to provide the same information in their usage reports.)

The transactional base rate was set in 1993 when reprographic licensing began: it has since been adjusted only to allow for inflation. The default rate for public HE institutions is R0,52 (plus VAT) per copy per page for books and journals. The HE default rate for magazine and newspaper articles (which was introduced more recently) is R5 per copy per article (plus VAT).

9.2.4. Blanket licence revenue is distributed (i.e. paid over to DALRO's principals) once a year in May, accounting on copies made during the previous academic year. Transactional licensing income is distributed twice a year, in February, covering royalty collections during the second half of the previous year, and August, covering the collections during the first half of the year in question. These three distributions are title-specific. One further distribution is made in tandem with the blanket licence distribution, viz. a supplementary distribution to local rights holders only of income retained from countries with which DALRO has an IFRRO Type B bilateral agreement, which entitles the parties to retain the income collected for each other's repertoires for distribution to their own rights holders, supplemented by non-title-specific income DALRO receives from certain RROs.

9.2.5. In the 2010 calendar year, the total amount collected from licensing was R28 582 389 and the total amount distributed R21 601 415 (of which R 9 477 661 was distributed to local rights holders).

9.2.6. DALRO is permitted to deduct commission from theatrical rights licensing of between 5% and 15%, depending on the agreement with the rights holder. On the reprographic rights licensing side, the majority of DALRO's reciprocal agreements with foreign RROs and local rights holders provide for a 25% deduction for commission.

9.2.7. DALRO's licensing and royalty revenue for reprographic reproduction for the financial year ending 30 June 2010 amounted to R26 842 183.

9.2.8. As DALRO's executive chairperson, Mr Gerard Robinson, pointed out to the CRC during the oral presentation by the representatives of DALRO, the licences granted by DALRO relate to two rights covered by the Copyright Act, which, as he put it, are intertwined; namely:

(i) The copyright in the literary work (which vests in the author), which includes the exclusive right to reproduce “the work in any manner or form” (Section 6 (a) of the Act), and

(ii) The copyright in the published edition (which vests in the publisher), which is “the exclusive right to make or authorise the making of a reproduction of the edition in any manner” (Section 11A of the Act), such as by photocopying the typographical arrangement of an already published work.

Mr Robinson said DALRO assumed the publishers that gave it the mandate to license the reproduction of their publications were permitted by the holders of the copyrights in the literary works to authorise DALRO in turn to license the reproduction of the literary works as well as the typographical arrangement thereof. In a subsequent conversation with the chairperson of the CRC, Mr Robinson stated that DALRO assumed that the publishers paid over to the authors such portions of the royalties received as they were entitled to. The documentation accompanying the payment by DALRO clearly identified each author and how much of his or her work had been copied. He added that if requested to do so, and given the address or banking details of the authors, DALRO would be able and willing to make the necessary payments to the authors.

9.2.9. The tariffs, subject to which both blanket and transactional licences are issued, and the commissions payable to DALRO appear acceptable. They are the product of negotiation between the parties. The blanket licence tariff was negotiated in collaboration with the Department of Education. The CRC, however, has a problem with licences that permit Section 6 (a) rights to be exercised. From information received by the CRC, it appears that some of the authors of articles (of which the authors hold the copyright in the literary work) published in South African journals and reproduced under licences issued by DALRO, have neither authorised the reproduction of the articles nor received any portion of the royalties paid to the publishers by DALRO.

9.3 RECOMMENDATIONS

9.3.1. While the CRC accepts that the assumptions made by DALRO, to which Mr Robinson referred, were made in good faith, it strongly recommends that DALRO take urgent steps to satisfy itself that the local publishers that mandate it to license articles are entitled to give such mandates, not only in respect of Section 11A rights, but also in respect of rights arising under Section 6 (a) and, furthermore, where articles have been copied under licences issued, that the persons who hold the Section 6 (a) rights receive the royalties to which they are entitled.

10 DISTRIBUTIONS OF MUSIC ROYALTIES

10.1 OVERVIEW OF ROYALTY DISTRIBUTIONS

Table 16: Utilisation of Royalty Collections

Refs.	Details	2010 Rm's	2009 Rm's	2008 Rm's
a.	Total Royalty Income Collected (as per Table 4)	357,9	322,4	293,7
b.	Unclaimed Royalties Written Back	25,5	40,4	29,4
c.	NORM's Collections	(17,8)	(20,6)	(11,4)
d.	Administration Expenses	(103,2)	(94,2)	(75,3)

Refs.	Details	2010 Rm's	2009 Rm's	2008 Rm's
e.	Social and Cultural Allocations	(16,3)	(14,5)	(14,6)
f.	Net revenue for SAMPRA (unavailable for distributions)	(30,5)	(20,1)	(15,1)
g.	Undocumented Works and Non-Members Royalties	Not yet available	(33,0)	(27,5)
h.	Transfers from / (to) Reserves and Tax	Not relevant	(1,2)	(21,1)
i.	SAMRO's Cash Available for Distributions	Not yet available	179,2	158,1

Table 17: Cash Distributed by SAMRO

Refs.	Details	2009		2008		2007	
		RM's	%	RM's	%	RM's	%
j.	Local Composers and Authors	43,2	24,1	39,6	25,1	30,5	24,9
k.	Beneficiaries	1,4	0,8	1,1	0,7	0,9	0,7
l.	Publishers	57,4	32,1	49,7	31,4	38,6	31,4
m.	Foreign Collecting Societies	77,2	43,0	67,7	42,8	52,6	42,9
n.	Total Distributions (As in Table 16)	179,2	100,0	158,1	100,0	122,6	100,0

10.1.1. The total collections for music royalties (performance, needletime and mechanical rights) for 2010 amounted to approximately R357,9 million. Over and above the royalty collections, SAMRO has investments in excess of R300 million in different classes of assets. Over the last three years, these investments generated income of between R41 million and R66 million per annum. The investment income is eligible for distribution.

10.1.2. The administration expenses pertain to the overhead costs for the two collecting societies (SAMRO and SAMPRA).

10.1.3. SAMRO is the only local collecting society that sets aside cash for social and cultural activities.

10.1.4. Due to the legal case involving SAMPRA, SAMRO and the Registrar, SAMPRA has not yet managed to distribute royalties for sound recordings. The total net amount (excluding investment income) collected by SAMPRA during the last three completed financial periods is R66,2 million (R15,2 million + R20,5 million + R30,5 million).

10.1.5. Royalty payments are made after the completion of the financial year in which they were collected from the users. The distribution details for the 2010 financial year were not available at the time of compiling this report and so the details for the 2007 financial year were included in Table 17 to compare the three-year trend.

10.1.6. The distribution to publishers in Table 17 (l) includes both local and foreign components of royalties. Multinational publishers such as EMI and Sony collect on behalf of their principals and, as a result, the foreign distributions reflected in Table 17 (m) are understated. SAMRO could not provide the split between foreign and local publishers. The share of the local composers and authors of 24,1% for 2009 reflected in Table 17 (j) is correct.

10.2 COST-TO-ROYALTY INCOME RATIO

Table 18: Comparison Analysis of Cost-to-Royalty Income Ratio Among Collecting Societies

Details for 2010	PRS (UK)	SUISA (Swiss)	TONO (Norway)	EAD (Braz.)	IPRS (India)	SAMRO	PPL (UK)	SAMPRA
Cost as % of Royalty Income	10,63%	20%	14,39%	24,5%	15,04%	30%	13,88%	17,82%

10.2.1. Of the entities selected for benchmarking, SAMRO has the highest cost-to-royalty income ratio of 30%. Reasons include:

- Tariffs used by SAMRO are generally lower than the other collecting societies;
- SAMRO has the highest portion of non-royalty income;
- The significant costs of managing non-royalty income; and
- The ratio of collections to labour cost is the lowest among the selected societies, which means they get the lowest returns on collections for every rand spent on labour cost.

It is clear that to comply with Regulations, which require a maximum of 20%, SAMRO will have to improve its levels of collection and reduce cost.

10.2.2. At 17,82%, SAMPRA's cost ratio is higher than most of the collecting societies. This is largely due to fact that broadcasters and major retailers have not started paying SAMPRA for sound recordings because of the pending court dispute (the amount involved is between R80 million and R100 million per annum), SAMPRA is still in growth phase and a significant portion of the market is not yet captured. The CRC believes that a further R30 million worth of collections could be generated from the general users.

10.2.3. NORM is compensated on commission basis and the rate currently stands at 12% per annum.

10.3 SOCIAL AND CULTURAL CONTRIBUTIONS

Table 19: Social and Cultural Contributions

DETAILS FOR 2010	PRS (UK)	SUISA (SWISS)	TONO (NORWAY)	IPRS (INDIA)	SAMRO	PPL (UK)	SAMPRA
Social and Cultural as % of collections	0,34%	7,6%	7,3%	Nil	5,4%	2,1%	Nil

10.3.1. SAMRO is the only collecting society in the country that contributes to social and cultural contributions. SAMPRA, as a collecting society for record producers, does not have a mandate to make such contributions.

10.4 NON-ROYALTY INCOME

Table 20: Non-Royalty Income for 2010

Collecting Society	**Non-Royalty Income as % of collections**	**Nature of Non-Royalty Income**
PRS (UK)	0,6%	Short-term money market
SUISA (SWISS)	7%	Investment and other income from service rendered
TONO (NORWAY)	3%	Short-term money market
IPRS (INDIA)	7%	Short-term money market
SAMRO	14%	Long-term investments
PPL (UK)	0,4%	Short-term money market
SAMRPA	9%	Short-term money market
NORM	7%	Short-term money market

10.4.1. SAMRO generates a significant portion of its income from investments. For the year ended 30 June 2010, R39 million was generated from investments and R6,4 million from other activities (income from subsidiaries). This income supplements royalty income. The total investment for SAMRO as at 30 June 2010 amounted to about R218 million (excluding investment in direct properties and cash on call).

10.4.2. According to SAMRO, the strategic reason for retaining these investments was to supplement the members' income under difficult economic conditions. SAMRO acquired a property in Braamfontein (with a carrying value of R94 million) to house its operations and save on future rental costs.

10.4.3. The CRC believes SAMRO's decision to set aside money for investments and the acquisition of property was sound. There are, however, two possible problems with this arrangement:

10.4.3.1. New members join SAMRO on an on-going basis and so a high level of cross-subsidisation exists between new and old members.

10.4.3.2. For the year ended 30 June 2010, more than 80% of SAMRO's members received less than R5 000 as total royalty income for the year. Would they prefer SAMRO to invest on their behalf or should the money be paid to them directly?

The CRC believes it would be appropriate for members to decide for themselves.

10.4.4. Most of the other collecting societies do not retain any cash for investments; 100% of the collections received are paid out to members. The non-royalty income relates to the interest earned on cash-on-hand (i.e. waiting for distribution).

10.4.5. SAMPRA's non-royalty income (generated by the cash-on-call accounts) constitutes 9% of the total collections. The higher income is a result of cumulative undistributed cash, which has been collected over the last three years.

10.5 RECIPROCAL AGREEMENTS

10.5.1. SAMPRA grants licences in respect of repertoire owned by members of RiSA, whereas NORM grants licences in respect of repertoire owned by its members.

10.5.2. SAMRO and DALRO are affiliated to numerous similar organisations around the world. They have a number of reciprocal agreements in terms of which these societies administer the music of SAMRO's members in their countries, having been authorised to do so by licences or assignments of copyright effective in the countries in which they operate. SAMRO, in turn, is authorised to administer the repertoire of these societies in South Africa. These societies apply the principle of national treatment in accounting for royalties, with the result that the terms on which SAMRO and DALRO collect and account to foreign affiliates are the same as those upon which they collect on behalf of South African composers and publishers. SAMRO acts as an assignee of the rights of its members and is the owner of the rights it administers. However, upon resigning from SAMRO, each member is entitled to the re-assignment of his or her rights.

10.5.3. DALRO acts differently. It administers on behalf of its principals, who retain ownership of the rights. No rights are alienated to third parties without the consent of the owner of the rights. DALRO does not have authority to administer Section 6 rights on behalf of all authors.

10.5.4. There are no reciprocal agreements in the copyright regime between states; a state such as South Africa cannot direct how reciprocal agreements should be structured in terms of Section 4 of the Performers' Protection Act.

10.5.5. Globally, the majority of collecting societies have 'blanket agreements' with broadcasters, while others operate as if 'blanket agreements' exist. In countries where there are multiple collecting societies for each right, such as Brazil and France, single collecting agents are responsible for collecting royalties from the users on behalf of these multiple societies. In almost all cases, the broadcasters pay the royalty liability to the collecting societies or agents. The responsibility for locating the relevant beneficiaries rests with the collecting societies or agents. If a song written, composed and published in South Africa is played in another country where no reciprocal agreements exist, the royalties pertaining to that song are paid by the broadcaster in question together with all other royalties to the relevant foreign collecting society. As part of the process of identifying the recipients or non-members, the relevant country and collecting society will be identified and the money will be forwarded to that society. It will be the responsibility of the local collecting society to identify the relevant beneficiaries (author, composer and publisher). The fact that there are no reciprocal agreements and that they are not members of any collecting society does not take away their rights to be compensated, provided the countries involved are signatories to the Berne Convention. The importance of the reciprocal agreements is to regulate

the relationship between the collecting societies in terms of the frequency of payments, administration fees, interest on cash-on-hand, and dispute-resolution mechanisms.

10.6 FOREIGN DISTRIBUTIONS

Table 21: Foreign Distributions versus Foreign Collections

Refs.	Collecting Societies (2010)	PRS (UK)	SUISA (Swiss)	TONO (Norway)	EAD (Brazil)	IPRS (India)	SAMRO
a.	Foreign distributions as % of total distributions	26%	38%	49%	23%	5%	43% plus international publishers' component
b.	Foreign collections as % of total collections	38%	9%	7%	7%	25%	2%

10.6.1. SAMRO was not able to provide a complete schedule of the total amount of foreign distributions to the CRC because a significant portion of the distributions is paid to the local agents of the foreign publishers (e.g. EMI, Universal and Sony).

10.6.2. At least 43% of the total distributions for SAMRO are distributed to foreign parties via foreign collecting societies. This is due to the fact that the local content targets are too low (25% for commercial radio stations). In SAMPRA's case, the situation will not be different when it commences with distribution.

10.6.3. With regard to the problem with local content targets, PRIMEDIA's assessment is as follows:

10.6.3.1. English-speaking countries (other than the US) typically have lower levels of consumption of local content than those countries with unique languages. So Australia and Canada struggle to achieve high levels of local content outside of public policy initiatives to develop their domestic music industries, while Brazil or Italy seem to have an easier run of it.

10.6.3.2. People like to consume music in their home language or, at the very least, languages they understand.

10.6.3.3. Top musicians coming out of the US have a number of advantages, including a massive domestic market against which to amortise investment and, as a result, the ability to invest more money in sound recordings, video and concert production, and brand-building. It is this basic economic structure that allows for the emergence of massive global superstars such as Beyoncé and Madonna, and it is these mega-stars against whom South African musicians producing in English need to compete. In effect, such South African musicians are competing for airtime space against the world's best and, inevitably, have a harder time than those who are competing for airtime space in a language other than English. Those who produce music in a language that is restricted to that of their own country have an easier time getting radio and consumer attention. There is the immediate cultural affinity of 'music in an understandable language' coupled with the fact that a considerably smaller group of musicians are competing for airplay in that language. So, English-speaking countries have a bigger local content battle on their hands than countries protected by unique languages, simply because the competitive set is bigger and better resourced.

10.6.3.4. South African English-listening consumers are exposed to music from these highly competitive music markets. In this context, music programmers have a wider array of musicians to choose from when compiling playlists and need to satisfy listeners who are familiar with and expect to hear these musicians. Therefore, stations licensed to broadcast in English will typically have lower levels of local content because there is more choice available, and South African music recordings will have to compete against those artists with multimillion-rand investments behind them.

10.6.4. While the statements by PRIMEDIA are logical with regard to Canada and Australia, the same cannot be said of India, Indonesia, Nigeria, Zimbabwe and Zambia. Music imports for airplay in India (via the IPRS) constituted only 3% of the total music consumption in 2010 (including English radio stations) and the same can be said of the other countries. In 2010, the IPRS generated 25% of its collections outside India. In 2010, 67% of the total foreign royalty revenue generated by PRS was from non-English-speaking countries. The YFM radio station's average (English station) local content for 2010 amounted to 53%.

10.7 ROYALTY DISTRIBUTION CYCLES

10.7.1. NORM distributes royalties to the respective parties every six months.

10.7.2. SAMPRA has not distributed anything due to the pending case against the Registrar.

10.7.3. SAMRO distributes royalties in two primary distributions:

- Radio and general distributions in or around February (for the preceding financial year); and
- TV distributions in or around April (for the preceding financial year).

10.7.4. In addition, SAMRO has secondary distributions:

- Foreign distributions are done twice a year;
- Supplementary distributions for undocumented works are done three times a year and relate to the distribution of royalties for all works that were documented subsequent to the primary distributions;
- Supplementary distributions for non-members' works are done twice a year; and
- Rights holder adjustment distributions occur several times a year and relate to the distribution of royalties to the correct rights holder (cases where the rights holder's primary information was incorrectly supplied or documented).

10.8 UNDOCUMENTED WORKS / ROYALTIES FOR NON-MEMBERS

Table 22: SAMRO's Unclaimed Royalties versus Unclaimed Royalties Written Back after Three Years

Refs.	Details	2010 Rm's	2009 Rm's	2008 Rm's
a.	Undocumented Works / Non-Member royalties	33,0	27,5	18,1
b.	Unclaimed Royalties Written Back	25,5	40,4	29,4

10.8.1. SAMRO and its music users have 'blanket agreements' whereby the users pay SAMRO the full liability pertaining to the performance rights. The responsibility for splitting the amounts is held by SAMRO. Royalties

that cannot be distributed (such as those payable to non-members or to members with invalid accounts or in respect of undocumented works) are retained by SAMRO.

10.8.2. SAMRO retains the unclaimed royalties, which includes those in respect of undocumented works, for three years. Over the three-year period, attempts are made to trace the beneficiaries of the unclaimed monies. In the case of non-members, those who are successfully traced are asked to join SAMRO and paid their share of distributions. After three years, the unclaimed monies are written back to income and distributed to the members based on the normal distribution criteria.

10.8.3. The CRC was not satisfied with the success rate of the tracking process. See paragraphs 10.12.2, 10.12.7, 15.1.19 and 15.2.5 below.

10.8.4. The amounts that have been written back as untraceable over the last three years are listed above in Table 22 (b).

10.9 MUSIC USAGE INFORMATION (MUSIC LOG SHEETS)

10.9.1. It was noted that music log sheets are kept mainly by broadcasters, and that general music users tend not to retain any log sheets. Collecting societies are, therefore, not able accurately to distribute royalties based on music usage. In cases where there are no log sheets, collecting societies use the available usage information as a mechanism for distributing unlogged royalties.

10.9.2. The use of local music content by private commercial radio stations is low (less than 30%). These stations submit their monthly cue sheets to the collecting societies. In the absence of appropriate log sheets from general music users, the collecting societies make use of these cue sheets to determine distributions. General music users tend to play more local music than private commercial radio stations and, therefore, the current distribution mechanism does not favour local music role-players.

10.9.3. Some of the submissions to the CRC requested an amendment to the legislation to force every music user to retain cue sheets in order to eliminate the above-mentioned problem.

10.9.4. Some users (based on the current tariffs) are only liable to pay R1 000 per annum for their licences. If a legislation is passed that will force them to log every song played, the cost associated with the administration could be three times more than the licence fees payable, and could discourage music users.

10.9.5. For essential music users, the CRC believes that the legislation should be amended to make it compulsory for them to retain music usage information records.

10.9.6. For background music users where usage information records are not retained, the CRC believes it would be more appropriate for collecting societies to determine the appropriate distribution bases for unlogged royalties by using statistical sampling based on a survey performed on different types of users and locations. Such a survey should be commissioned.

10.10 CONTRACTUAL RELATIONSHIPS BETWEEN RECORDING ENTITIES AND ARTISTS

10.10.1. The pre-2002 contracts could not be examined because the relevant parties could not submit them to the CRC. The post-2002 contracts for the big four recording companies were examined. Those contracts that recognise the existence of needletime rights make provision for an equal split between the performers and the recording entities. Other contracts make no reference to needletime rights. Advance contracts do not make a distinction between different types of royalty sources; the advances are repayable against any type of income payable to the artists. In terms of these contracts, the needletime royalty income may be used to repay the outstanding advances. (All contracts of the big four recording entities were in agreement on this issue.) Almost all contracts examined were exclusive, i.e. artists are not allowed to contract with more than one recording entity concurrently.

10.10.2. The following areas of improvements were noted on the sample of contracts examined:

10.10.2.1. The artists are generally not protected by these contracts (only recording entities are protected). For example, if there is disagreement between the parties, the recording entities prevail.

10.10.2.2. The contracts provide for two payments from the recording entities to artists per annum, while the recording entities receive cash throughout the year. The contracts make no provision for interest payable to the artists as a result of the timing differences between the cash receipt dates for the recording entities and those for the artists. It is a known fact that recording entities earn interest on monies waiting for distribution.

10.10.2.3. Most of the contracts examined provide for a commission of about 20% on live performance income generated by the artists. The value added by a recording entity is not clear in these cases.

10.10.2.4. Some of the recording contracts provide for publishing service (forcing the artists who are also composers to contract for publishing).

10.10.2.5. In most cases, income generated via the use of music videos is not shared with the artists.

10.10.2.6. The contracts permit the recording entities to terminate or suspend the agreements, should the necessity arises, but there is no provision permitting the artists to do the same.

10.10.2.7. The contracts do not provide for independent mediation or arbitration in contractual disputes.

10.10.2.8. Some contracts are automatically renewed on the expiry dates without providing artists with opportunities to negotiate.

10.10.2.9. The contracts make no provision for a detailed audit trail listing of all transactions (including all computations made) to be provided to the artists so that they can trace the relevant transactions. The contracts provide for statements of account. There is a difference between a statement and an audit trail. A statement simply lists the transactions and does not provide computations or the sources of each individual transaction.

10.10.2.10. Three of the four contracts examined made no reference to the sharing splits of sound recording royalties (needletime rights).

10.10.2.11. Two of the four contracts examined did not deal with the artist's right to initiate an audit on the recording company in order to satisfy him or herself about the manner in which his or her financial transactions are handled by the recording entity.

10.11 CONCLUSIONS

10.11.1. SAMRO has investments in shares, unit trusts and properties, which generate significant amount of income that is, in turn, distributed to the members. While there is merit in investing on behalf of members, one should bear in mind that more than 80% of the members receive less than R5 000 as their individual shares of royalties per annum. There is no sense in retaining members' income if they cannot afford to meet their daily needs.

10.11.2. SAMRO's administration cost are higher (as a percentage of collections) than other comparative collecting societies.

10.11.3. The CRC believes that the mechanisms used by SAMRO to trace beneficiaries are ineffective and that there are far too many unclaimed royalties.

10.11.4. The unclaimed royalties for SAMRO are written back to income after three years. The CRC believes that this does not allow sufficient time to trace beneficiaries.

10.11.5. Less than 3% of the royalties are generated outside the country, compared to 43% plus the foreign portion of the publishers share of royalties, which is generated domestically for foreign countries (due to low local music quotas).

10.11.6. There are significant areas for improvement in the contracts between recording entities and artists.

10.11.7. The transparency around the flow of funds between the various sources of income and the recording companies, and the computations of income available for distribution to the artists is limited. Owing to confidentiality, the CRC could not assure itself that the artists are appropriately paid their share of the royalty income by the recording companies.

10.12 RECOMMENDATIONS

10.12.1. The scope of the Collecting Society Regulations should be enlarged to include other collecting organisations such as SAMRO and NORM. Collecting societies that currently fall outside the ambit of the Regulations should be given three years after the date of amendments to reduce their administration costs in order to be in line with the requirements of the Regulations.

10.12.2. The Regulations should recommend the appropriate period for retention of unclaimed royalties. It is recommended that the minimum retention period be five years and any unclaimed royalties older than that should only be used for social-related activities and cultural projects that will benefit local artists.

10.12.3. As part of the annual returns submitted to the Registrar, all collecting societies within the ambit of his or her jurisdiction should report the total and individual amounts paid to foreign entities via foreign collecting societies or through the agencies of the foreign publishing houses, as well as the individual amounts collected from the foreign sources.

10.12.4. The legislation to be amended as follows: retention of music usage information to be compulsory for essential music users and, where the music usage information is not retained by the background music users, appropriate statistical sampling techniques to be used by the collecting societies to determine the appropriate split of the distributions.

10.12.5. **The dti** should develop a standardised template for contracts between performers and recording companies that will deal with all the above-mentioned loopholes and should encourage performers and recording companies to use this contract.

10.12.6. Each year, for at least five consecutive periods, **the dti** should initiate and fund an audit on behalf of at least 10 randomly selected artists. This audit should examine all financial transactions processed via recording entities for the selected artists. The outcome of such audits should be reviewed by both **the dti** and the respective artists to ascertain the trends and the level of integrity among recording entities.

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10.12.7. SAMRO's practice of distributing unallocated revenues is unacceptable. Thorough and effective means of tracing those persons entitled to royalties should be introduced, providing inter alia, for details of missing rights owners to be published on the Internet, in newspaper advertisements and newsletters to members of SAMRO. .

10.12.8. SAMRO should seek a mandate from its members (via a Special Resolution) for the utilisation of cash resources for investment purposes.

10.12.9. Notwithstanding the fact that South Africa is a member of the World Trade Organisation (WTO) and affords national treatment to foreign copyright works, an exception has been created in respect of sound recordings. Sound recordings made in foreign countries will only enjoy copyright protection in South Africa to the extent that the sound recording enjoys the same protection in that country of origin (see General Notice No. 136 of 1989 GG No. 11717 of 3 March 1989). Similarly, Section 4 of the Performers' Protection Act provides that performances of foreign origin shall only enjoy needletime rights if corresponding protection is conferred on South African performances in that country. Consequently, sound recordings that were made in countries such as the USA, which do not recognise needletime rights, will not be granted that right in South Africa. These performers and producers of sound recording should not be compensated for the use of their works by the radio stations and other public users. In line with the legal principles set out above, the CRC recommends non-payment for needletime rights where sound recordings from countries that do not recognise such rights were broadcast, played or communicated to the public.

10.12.10. A significant amount of royalty distributions does not accrue to the relevant artists due to the fact that their rights were assigned to third parties. These assignments normally arise as a result of disparate circumstances

(such as immediate cash flow problems or ignorance about copyright matters) that are generally faced by young artists. The fairness of the valuations placed on these assignments is questionable. The CRC believes that the assignees should be able to recoup their investments within the first 20 years. To provide the artists or their heirs with the opportunities to reduce the level of losses that arise as a result of the disparate circumstances referred to above, the CRC recommends an amendment to the legislation to allow for automatic reversions of assigned rights after 25 years (from the date of assignment). The recommendation is based upon the relevant provision in the US Copyright Act. But the period proposed is 25 years and not 35 years, in view of the fact that the period of copyright protection in the US is much longer than in South Africa.

11 STATUS OF LOCAL MUSIC CONTENT

11.1 BACKGROUND

11.1.1. It is a known phenomenon in South Africa that foreign music enjoys far greater market share and airplay (as per the analysis in Table 17) than local music. In response to this, music content quotas were introduced as far back as 1996. Royalty distributions reflect the music usage patterns, with the result that a greater proportion of music rights royalties are distributed to foreign rights holders (be it directly to affiliated societies or via local publishers).

11.1.2. Collecting societies cannot arbitrarily determine that more royalties be distributed to South African rights holders, as opposed to foreign rights holders. This is because royalty payments are based on the actual usage of a person's music, not some subjective calculation. A collecting society would be contravening copyright law, especially the national treatment principle embodied in the Berne Convention and incorporated in national laws, if it were arbitrarily to decide to keep more royalties in South Africa as opposed to paying them over to foreign rights holders.

11.1.3. An attempt is being made to close the loopholes currently hindering the generation of royalty income. If successful, significant income will be generated.

11.2 ICASA'S ROLE WITH REGARD TO LOCAL MUSIC CONENT

11.2.1. The Independent Communications Authority of South Africa (ICASA) is the regulator for the South African communications, broadcasting and postal services sector. ICASA was established by the Independent Communications Authority of South Africa Act of 2000, as amended.

11.2.2. ICASA conducts inspections and undertakes content monitoring of the broadcasting industry. This is to ensure that sound and TV broadcast licensees comply with the Electronic Communications Act, No. 36 of 2005, the Broadcasting Act, No. 4 of 1999, prescribed regulations, as well as the terms and conditions of their licences. It also compiles Annual Compliance Reports.

11.2.3. As part of its mandate, ICASA sets the targets for the radio and television broadcasters (e.g. local content targets), monitors the level of compliance by the respective parties and takes corrective action where compliance is inadequate. It does not, however (as the CRC recommends it should), impose as a condition for a

licence that the licensee comply with needletime and copyright obligations, with the rider that repeated failures to do so will lead to the cancellation of the licence. Broadcasters who are repeatedly in breach of these obligations should not be permitted to broadcast. Conditions along the lines suggested would be the most effective means of ensuring that broadcasters pay royalties.

11.3 SOME OF THE MITT RECOMMENDATIONS

11.3.1. As stated earlier in this report, the Music Industry Task Team (MITT) was appointed by the Minister of Arts, Culture, Science and Technology in response to an expression by musicians and their representative organisations of problems within the music industry. The MITT's findings with regard to compliance and monitoring were:

1) The IBA (Independent Broadcasting Authority, ICASA's predecessor) was not effective in enforcing and monitoring the local content quotas and, as a result, many broadcasters were not adhering to the local quota; and
2) The local content quota of 20% for commercial radio stations was too low.

11.3.2. The MITT recommended that a significant improvement was required from IBA with regard to the enforcement and monitoring of the local content quotas. The MITT also recommended an increase of the local content quota from 20% to 50% for commercial radio stations.

11.4 ICASA'S LOCAL MUSIC CONTENT TARGETS VS PROGRESS TO DATE

11.4.1. ICASA's targets and progress to date with regard to public radio stations are detailed in Table 23.

Table 23: ICASA's Targets Versus Achievements by Public Radio Stations in 2010

	Radio Station	Music Local Content Targets	Recent Actual Content Achieved
a.	Ukhozi FM	40%	80%
b.	SAFM	40%	71%
c.	RSG	40%	83%
d.	Lotus FM	40%	27%
e.	Umhlobo Wenene FM	40%	81%
f.	Lesedi FM	40%	85%
g.	Thobela FM	40%	78%
h.	Motsweding FM	40%	84%
i.	Ligwalagwala FM	40%	83%
j.	Munghana Lonene	40%	83%
k.	Ikwekwezi FM	40%	92%
l.	Phalaphala FM	40%	84%
m.	XK FM	40%	93%
n.	Radio 2000	40%	84%

11.4.2. The local music content target is currently 40% for all public radio stations. Stations included in this category are listed in Table 23.

11.4.3. Between 1980 and 2000, the average local music content for these public radio stations (with the exception of SAFM and XK FM) varied between 70% and 80%. ICASA's target of 40% is therefore inappropriate because it is not consistent with the achievements to date. In 1996, average local music content for these stations was already at 80%.

11.4.4. Despite the lower targets for local music content, most of the public radio stations have consistently maintained a higher level of such content.

11.4.5. Based on the CRC assessment, the monitoring process for the fulfilment of the licence conditions can be improved. The CRC assessment is based on the following:

- There were significant discrepancies between the local content as per ICASA's records versus the records of the various radio stations;
- The assessment files for 2010 for the following radio stations could not be submitted to the CRC by ICASA: RSG, Thobela FM, Munghana Lonene, Phalaphala FM, Metro FM, East Coast Radio, Kaya FM, 567 Cape Talk, Classic FM, 94.5 KFM, OFM and Radio 2000. Accordingly, ICASA could not confirm whether these stations had fulfilled their licence conditions in 2010; and
- The CRC was not provided with evidence that corrective action is taken against the broadcasters for failing to achieve the local content targets.

Table 24: ICASA's Targets versus Achievements by Commercial Radio Stations in 2010

Ref.	Radio Station	Music Local Content Targets	Recent Actual Content Achieved
a.	Metro FM	25%	28%
b.	Jacaranda FM	25%	26%
c.	East Coast Radio	25%	Details could not be provided by the respective parties.
d.	YFM	50%	53%
e.	5 FM	25%	27%
f.	94.7 Highveld Stereo	25%	27%
g.	Kaya FM	25%	Details could not be provided by the respective parties.
h.	Good Hope FM	25%	28%
i.	Algoa FM	25%	25%
j.	702 Talk Radio	Exempted from local music content target.	4,77%
k.	567 Cape Talk	Exempted from local music content target.	4,77%
l.	Classic FM	25%	Details could not be provided by the respective parties.
m.	94.5 KFM	30%	30%
n.	OFM	25%	Details could not be provided by the respective parties.

11.4.6. The details of ICASA's targets and progress (2010) with regard to commercial radio stations are as follows:

- The local content target for private radio stations is 25% (except for YFM, which is 50%). The CRC believes that 25% is too low to make any significant impact on the royalty income for local artists; and
- ICASA has no targets for talk radio stations and, as a result, Radio 702 and Cape Talk are currently achieving only 4,77% with regard to local music content. Based on the CRC assessment, the recommendations made by the MITT in 2000 have not been implemented.

11.4.7. The situation with regard to television is as per Table 25:

Table 25: ICASA's Requirements with Regard to the TV Stations

	TV Station	Overall Local Content Target	Content Achieved)	Remarks	Music Local Content Targets	Actual Music Content Achieved (2010)
a.	M-NET	10%	15,76%	The target is too low and the economic impact insignificant.	Targets are not in place for ICASA and the internal targets for the TV station were not provided to the CRC.	No records are maintained by ICASA.
b.	MultiChoice	10%	15%	As in (a) above	As in (a) above	As in (a) above
c.	e.tv	45%	48,3%	No comments	As in (a) above	As in (a) above
d.	SABC TV	55%	75%	No comments	As in (a) above	As in (a) above

11.5 IMPLICATIONS OF LOW LOCAL MUSIC CONTENT

11.5.1. The proportion of local music content for broadcasters is important for local artists because:

- The royalty distributions payable by the broadcasters in terms of Section 6 and Section 9 of the Copyright Act are distributed among the relevant music service providers (authors, composers, publishers, music producers and performers) based on usage levels..
- Broadcasters are the only music users that keep complete cue sheets and collecting societies use these sheets as a base for distributing the music royalties generated from other users.

11.6 DEFINITION OF SOUTH AFRICAN MUSIC

11.6.1. The Electronic Communication Act, No. 36 of 2005 ('the EC Act') regards music performed by South African citizens, irrespective of authorship or composition, as South African music. Section 61 (2) (c) of the Act states that a musical work broadcast by a broadcasting service licensee qualifies as South African music if such work complies with at least two of the following criteria:

1) If the lyrics were written by a South African citizen;
2) If the music was written by a South African citizen;
3) If the music or lyrics were principally performed by musicians who are South African citizens;
4) If the musical work consists of a live performance that is recorded wholly in the Republic; or
5) If the musical work is performed wholly and broadcast live in the Republic.

11.6.2. This means that, for example, if the lyrics were written by a foreign artist and the music (melody) was co-written by a foreigner and a local artist but performed by the local artist, such musical works would, for ICASA's requirements, qualify as local content. However, from a performing rights point of view, a large portion of royalties would go to the foreign artists, since they would have been the author and co-composer of the work.

11.6.3. The definition of South African music as contained in the EC Act compromises the income of South African composers and, particularly as applied to classical music is too narrow.

11.7 CONCLUSIONS

11.7.1. Despite the recommendations of the MITT in 2000, local content targets are still too low (25% for commercial radio stations, 40% for public radio stations and community radio stations) and will negatively affect the economic benefits arising from the introduction of needletime.

11.7.2. ICASA could not provide the assessment files for 11 radio stations for 2010 and, therefore, the CRC could not ascertain whether monitoring activities were performed for the radio stations in question. The CRC believes there is room for improvement on the monitoring activities.

11.7.3. There are gaps in the definition of South African music and the CRC believes such gaps should be rectified.

11.8 RECOMMENDATIONS

Table 26: Recommendations for Local Music Content

	Recommendations	Timelines for Recommendations Implementation
a.	The local music target for public radio stations to be increased from 40% to 80%.	Within one year after the effective date of implementation.
b.	The target for private radio stations to be increased from 25% to 50%.	The new target to be phased in over a five-year period (to be increased by 5% per annum for a period of five years).
c.	Community radio stations' target to be increased from 40% to 80%.	Within one year after the effective date of implementation.
d.	Local music content to be incorporated into TV and to be in line with local content for other programmes.	Within three years after the effective date of implementation.
e.	ICASA should include as a condition in broadcasters' licences that compliance with needletime and copyright obligations is compulsory and that repeated failure by broadcasters to comply should lead to the cancellation of their licences.	Within three years after the effective date of implementation.

	Recommendations	Timelines for Recommendations Implementation
f.	ICASA to implement appropriate processes and systems to ensure that the monitoring process is improved and effective.	Immediate
g.	The definition of South African music to be amended to include the following: a) A song must have been written or composed by a South African resident. b) In the case of classical music, to include such music performed by South African musicians and recorded in the Republic even if the performance is not 'live'. c)	Immediate

12 DEVELOPMENTAL ASPECTS AND EDUCATION

12.1 CURRENT ENVIRONMENT

12.1.1. The universal purpose of copyright is to reward and incentivise creators of knowledge and art. Various sectors within the South African Copyright regime are dissatisfied. Ranking highest are local performers and composers, who have not benefitted due to a lack of access to the copyright system. Their complaints at public hearings included:

- They had registered their intellectual property and applied for membership, but had not had any response;
- Prior airplay was a prerequisite for membership of SAMRO, which excluded emerging musicians, who work mostly on live performances;
- The venues where they work and the community radio stations where they play did not come into consideration for royalties;
- Offices of copyright societies were centralised in one province and thus inaccessible; and
- Musicians and the general public did not know enough about copyright and contractual law, which made it easy to exploit aspirant musicians.

Most of these complaints have been aired since the days of CIGS and the MITT and it is evident that if the recommendations were implemented then the effects were not felt on the ground.

12.1.2. These problems could be a result of a copyright system designed to serve developed not developing countries. The hierarchy of royalty payments in SAMRO (where the bulk of creators earn less than the state grant on royalty payments, while a few earn millions of rand) and the fact that many non-members never get paid for the use of their works attest to the limitations of the traditional copyright system, particularly in a developmental context. SAMRO fails to serve the majority of creators because it does not practise as a creative business model expanding its operations to include venues and broadcasters where ordinary musicians work. Brazil has shown that it is possible to collect a larger share of revenue for royalties from live concerts and venues where live music is played.

12.1.3. SAMRO's differential system of membership is a further indication of an exclusivism that does not fit a developmental context. Membership is determined by Board votes rather than objective criteria. A developmental approach to membership of a collecting society may require that the society goes all out to recruit every active creator and performer in a country, since copyright would not only be seen as an individual right, but as a national resource empowered by national legislation.

12.1.4. Ahmed Abdel Latif ("Global Copyright Reform: A View from the South in Response to Lessig", *Intellectual Property Watch*, 22 November, 2010) has argued that WIPO has continuously failed to transform itself into an organisation that reflects its UN status. He argued that the dismal record of WIPO was due to its history of only strengthening copyright rules to the benefit of rights holders and at the cost of consumers and developing countries. As far back as 1971, the Berne Appendix was an attempt to make provisions for developing countries. The WIPO Development Agenda was launched in 2004, aimed at developing and promoting a public policy-oriented and balanced view of IP in accordance with WIPO's UN Status. The Declaration, signed by Prof. Lessig and many prominent civil society figures and academics, invited WIPO to take "a more balanced and realistic view of the societal benefits and costs of intellectual property rights as a tool, but not the only tool, for supporting creative intellectual activity".

12.1.5. After three years of discussions, in 2007, 45 recommendations were accepted for the Development Agenda. In 2008, under the leadership of a new Director General, WIPO started to show a willingness to address many of the issues previously considered taboo. However, the implementation of the WIPO Development Agenda is an on-going process and much remains to be translated into tangible and concrete changes in WIPO's activities and institutional culture. A Development Agenda Group (DAG) was established as an implementing mechanism. The DAG called for an enduring pro-development cultural transformation within the WIPO Secretariat based on arguments that include:

- A one-size-fits-all model does not gel with developmental imperatives;
- War on piracy is denounced as a failure that is criminalising an entire generation; and
- Global reform should not be confined to the digital environment and should include limitations and exceptions for the visually impaired and disabled, educational and research institutions and libraries.

Generally, developing countries view copyright reform through the lens of the broader 'access to knowledge' framework, which is an important component of the Development Agenda. South Africa is part of the DAG in WIPO and serious effort should be made by the government to shift the copyright regime in this country in the direction of 'access to knowledge'.

12.1.6. Professor Lawrence Lessig, speaking in Geneva at WIPO in November 2010, called for the creation of a 'blue sky' commission, led by WIPO, to consider a new international copyright architecture for the digital age. Central in fixing the copyright system, he argued, was for WIPO to lead this debate.

12.1.7. The WIPO Development Agenda fell outside of the terms of reference of the CRC. However, it may be short-sighted to attempt to correct some of the shortcomings within the copyright regime without acknowledging the South African developmental context. Such attempts must include developing the productive base of the music industry, strengthening the domestic economy and market share, and increasing the export of music products. The DAC and **the dti** have embarked on some efforts to grow the music, film and cultural industries. However, the focus here may have been more on the macro-, medium and small enterprises, with the exclusion of micro-

enterprises. There was a suggestion at the public hearings that some regulation was required to ensure good business practices from small, independent producers.

12.1.8. The lack of definition of what constitutes the labour force in the creative industry and what their rights are within the Labour Relations Act create difficulties for the role of a creative workers' union.

12.1.9. The system of licensing that continues to reproduce a colonial system, which plays more foreign than local music on the airwaves, should be reviewed. The aim should be to saturate the domestic market with local and African music and turn South Africa into a music exporting rather than a music importing country.

12.2 DEVELOPING EXPERTISE ON THE INTERPLAY OF LAW, TECHNOLOGY AND SOCIETY

12.2.1. To keep track of the changes within the music industry, expertise needs to be developed to inform policy on the interplay of IP law, technology and society. Along similar lines as the CTI in Brazil, **the dti** or the Department of Science and Technology should consider partnering with one or more tertiary institutions to work with or establish an institute to champion IP in the developmental context by focusing on the reform of law, technology and society in the interest of sustainable development and democracy. The challenge here is for government and civil society, particularly the IP legal and academic fraternity, to develop critical notions of IP that promote sustainable development and democracy, rather than uncritically applying traditional models that serve an elite and do not lead to economic development.

12.2.2. Such an institute should promote the Creative Commons project as a way of promoting access.

12.2.3. It should also include the Culture Livre (Free Culture), a joint project between the Centre for Technology and Society (CTS) in Brazil and the University of the Witwatersrand's Learning Information Networking and Knowledge Centre in South Africa. The project has managed to bring Brazilian and South African artists together to promote the exchange of content.

12.2.4. Such an institute should examine the research on open business practices emerging from technology and culture in the peripheral areas of Brazil in the Amazon and North Eastern regions of Brazil. Tecno-brega and funk music have developed from these open business practices, showing how creativity occurs in these areas in an innovative way. There are parallels in China and Egypt. The research suggests that these new cultural business models are specifically southern business models, based on the sharing and free dissemination of information, and different from the traditional ideas connected to IP in developed countries. While the traditional music industry launches only a few major international albums with a paucity of Brazilian artists, the open-business scenario in northern Brazil launches hundreds more albums from an array of artists, making the system more democratic. The first phase includes research projects from Colombia, Mexico, Argentina and Nigeria.

12.2.5. The institute should engage in action research, developing a means of monitoring and evaluation, and building grassroots organisations focusing on IP.

12.3 COPYRIGHT IN MUSIC EDUCATION AND GENERAL PUBLIC AWARENESS

During the course of public hearings and interaction with stakeholders, the CRC became aware of a general lack of knowledge of copyright and its use in the music industry. Capacity building and the development of a knowledge base would be a positive contributor to the growth of the industry.

12.4 RECOMMENDATIONS

The dti should lead an intergovernmental committee in a renewed effort to consolidate past attempts to integrate government interventions in the music industry. A new Music Industry Task Team should be established to facilitate growth and economic development. In this regard, players within the copyright regime should not be let off the hook. All government-sponsored efforts should be specified in terms of measureable outcomes and subject to monitoring and evaluation. Beneficiaries of sponsorship should be held accountable.

12.4.1. At the level of WIPO, **the dti** has to ensure that its officials are informed of the developmental imperatives that face the music industry and are able to represent the country effectively.

12.4.2. All the recommendations of the MITT should be implemented with renewed vigour.

12.4.3. Incentives by the South African Government for the production, marketing and export of South African music need to be intensified and expanded beyond the music industry hub of Johannesburg. This should be done by sponsoring, skilling and educating local independent producers in partnership with local government.

12.4.4. The Department of Communications should be brought on board to take into account the effect of the new technologies on the music industry and play an effective part in the transition, and the promotion of access to knowledge and art.

12.4.5. Collecting societies, particularly SAMRO, should adopt a developmental approach to membership recruitment, which may require that the society goes all out to recruit every active creator and performer in the country, viewing copyright not only as an individual right, but as a national resource empowered by national legislation.

12.4.6. Collecting societies should adopt creative business practices by monitoring and adopting new local trends in music, and including these for membership recruitment and collection. For example, ABRAMUS in Brazil focused on live concerts, gospel and country music as growth niches, while continuing the long-term battle of getting on board broadcasters and other infringers of copyrights. They have been able to show growth and provide monthly payments to members.

12.4.7. The CRC recommends that schools and tertiary institutions involved with music education in particular and arts in general should be encouraged to develop unit standards and/or modules that deal with copyright issues in their programmes. This should be done in collaboration with the South African Qualifications Authority. **the dti** should engage the national Department of Education in this regard. Emphasis should be placed on developing a knowledge base in the following areas:

- Copyright as it relates to copyrighted music material, in tuition and in practice;

- Copyright as it relates to copyrighted music books and out-of-print music – in tuition and in practice;
- Copyright exemptions in reproducing, recording, reparations and arrangements, derivative works, performance, display;
- Nature of copyright and the rights of copyright owners;
- The economic, financial and social benefits of copyright; and
- The foundations of South African Copyright Law and regulations.

12.4.8. Copyright informal education should be disseminated through:

- Workshops with industry role players;
- Public awareness campaigns;
- Media awareness; and
- Public prosecution of infringements.

12.4.9. Copyright education should be carried out through formal and informal means. It is appropriate that **the dti** forms partnerships with such government departments as Education (Basic and Higher), Arts and Culture, Communication and Economic Development, as well as with music industry role players and stakeholders.

13 IMPLEMENTATION AND MONITORING PROCESSES

13.1 CURRENT MONITORING PROCESSES

13.1.1. More than 80% of SAMRO's members (largely songwriters and composers) receive less than R5 000 a year in royalty fees arising from public performance rights. With regard to needletime rights, performers have not received royalties since the legislation was passed in 2002. This is due to disputes between the various parties and defects in the legislation. This situation is unsustainable and unacceptable.

13.1.2. A variety of actions need to be taken by different parties at various levels. However, it does not help to have a project plan with no project managers or to implement a project without the appropriate monitoring systems.

13.1.3. It is important to consider that the MITT was established in 2000 to review and make recommendations as to how to improve the lives of the musicians. Ten years later, a significant percentage of the MITT recommendations have not been implemented and most are being recommended again by the CRC. It looks like the problem could rest with the implementation and monitoring processes rather than with the lack of awareness of solutions.

13.1.4. In Table 27, the CRC lists key government role players capable of leading the transformation of the local music industry.

Table 27: Key Government Role Players in the Copyright Environment

Ref.	Key Role Player	Roles and Responsibilities within Copyright Environment
a.	Department of Trade and Industry	'Owner' of the Copyright Act: Responsible for drafting and maintenance of the Act and responsible for making sure that it is applied and implemented accordingly.
b.	CIPRO / CIPC (Registrar)	Supervisory of the accredited collecting societies is responsible for ensuring that there is an effective collective management system in place that is in compliance with the legislation.
c.	Department of Arts and Culture	'Owner' of the MITT project: Responsible for driving the implementation of the MITT's recommendations.
d.	Department of Communication	Plays an oversight role over ICASA.
e.	ICASA	'Owner' of the Electronic Communications Act: Responsible for drafting the relevant legislation for the local music content targets and monitoring and enforcement of the licence conditions.

13.1.5. To assess the effectiveness of the monitoring activities associated with the improvements of the livelihoods of local artists (performers, songwriters, performers, publishers, record companies and other stakeholders), the CRC reviewed recent strategic plans and annual reports of the above-mentioned key stakeholders.

13.2 the dti

13.2.1. **the dti** initiated the amendments to the Copyright Act in 2002 and the Performers' Protection Act of 2002, and introduced the Regulations in 2006 to provide for needletime. The CRC was not able to locate targets relating to the implementation of the Collecting Society Regulations in the Strategic Plans for **the dti** for the subsequent years (after 2006). It was also unable to verify that progress was reviewed, since annual reports for the subsequent years did not disclose anything about the Regulations and the amendments to the Act. The CRC is, therefore, not able to satisfy itself that there was adequate oversight on the implementation of the amendments to the Act and the Regulations.

13.3 CIPRO (REGISTRAR)

13.3.1. CIPRO's strategic plans for the previous periods could not be located and, therefore, the CRC was unable to ascertain whether there were appropriate plans and targets for the Registrar's functions. The performance information (as per published annual reports) for the years ended 31 March 2010, 31 March 2009 and 31 March 2008 did not disclose anything associated with a supervisory function for the collecting societies, progress made with regard to the collections of needletime royalties, and progress with regard to the implementation of the Regulations.

13.4 DEPARTMENT OF ARTS AND CULTURE (DAC)

13.4.1. Despite the fact that large parts of the MITT recommendations are not implemented, the strategic plans for the DAC for the last three years made no reference to it. The annual reports for the respective periods were also silent on the matter. It is doubtful that implementation will be a priority for junior managers if it is not a priority for the organisation.

13.5 ICASA

13.5.1. The plans and targets associated with the enforcement and monitoring of compliance with the licence conditions by the broadcasters are well documented on the strategic plans, and the annual reports disclose the results of actual performance against the plans.

13.5.2. The issue of higher local content targets does not seem to be part of ICASA's mandate and, accordingly, setting higher targets is not part of ICASA's monitoring mechanisms. ICASA is only concerned with the achievements of the legislated targets, but it does not help anyone if the unrealistic low targets are achieved. For example, the local content for public radio stations is currently at 40%. It is a known fact that most achieve between 75% and 90% (as per Table 23) and, accordingly, a target of 40% cannot assist in maintaining or improving the current situation.

13.5.3. ICASA's mandate is not about economic growth and, accordingly, it is not ICASA's priority to have higher local content targets. It was incorrect to assign ICASA the responsibility for setting these targets or driving the process of setting local content targets. The CRC believes that the natural home for this responsibility is **the dti**, while ICASA is geared to play a significant role in monitoring the pre-agreed targets.

13.6 CONCLUSIONS AND RECOMMENDATIONS

13.6.1. There is no evidence that monitoring at strategic level with regard to increasing the disposable royalty income for local artists has been effective.

13.6.2. There is a risk that the recommendations for the CRC may not be implemented due to inadequate monitoring or a lack of collaboration among key stakeholders. The CRC recommends:

- A joint steering committee (interdepartmental steering committee) with ministerial representatives from the three departments (**the dti**, DOC and DAC) should be established to oversee the implementation of the recommendations. The joint steering committee should meet at least twice a year and there should be a standing invitation to include the Registrar for collecting societies (CIPC), the CEOs for the respective collecting societies (SAMRO, SAMPRA and NORM) and the CEO of ICASA;
- The strategic plans for CIPC should include targets for the tangible deliverables arising from the supervisory function of the collecting societies; and
- **the dti** strategic plans should incorporate the high-level plans and targets for the implementation of the CRC's recommendations.

14 COMPARATIVE STUDIES

14.1 KEY FINDINGS

14.1.1. The purpose of conducting this comparative study, which included both developed and developing countries, was to enable the CRC to identify opportunities and threats that could assist in enhancing the effectiveness of the royalty collections and distributions processes.

14.1.2. Brazil, France, India, Norway, Senegal, Switzerland and the UK were selected for the comparative study.

14.1.3. As part of data-gathering process, the following activities were carried out:

- Interviews with key role players (relevant government officials, members of the senior management of the collecting societies or agencies, representatives of the recording entities, trade union officials and other interested parties);
- Review of the copyright legislation for the respective countries;
- Review of the recent annual reports and annual financial statements (for 2010 and 2009) for the relevant collecting societies;
- Review the tariffs; and
- Review the relevant publications in this area.

14.1.4. Key findings are listed in Table 28 and individual countries are listed in Appendix 2.

Table 28: Comparative Study's Key Findings

	KEY ITEMS	BRAZIL	FRANCE	INDIA	NORWAY	SOUTH AFRICA	SENEGAL	SWITZERLAND	UK
a.	Total music royalty fees collected in 2010 as % of GDP	0,0118%	0,0468%	Collection figures for PPL India could not be sourced	0,0228%	0,0128%	0,0015%	0,0285%	0,0417%
b.	Most recent annual increase / (decreases) in total royalty revenues	16%	7%	Collection figures for PPL India could not be sourced	(1%)	11%	4%	(4%)	7%
c.	Broadcasting collections as % of total domestic royalty revenue	39%	52%	34% (Based on IPRS's collections)	50%	48%	Details not available	44%	44%
d.	Average collections per employee	ECAD = R2 132 k	SACEM = R5 975 k	IPRS = R724 k	TONO =R7 493 k	SAMRO = R1 620 k	SBDA = Details not available	SUISA = R5 283 k	PRS = R6 093 k
			SPRE = Details not available	PPL = Details not available	GRAMO = R7 083 k	SAMPRA = R4 116 k		SWISSPERFORM = R28 443 k	PPL = R6 935 k
e.	Average distribution per member	ECAD = R4 k	SACEM = R33 k	IPRS = R20 k	TONO = Details not available	SAMRO = R25 k	SBDA = Details not available	SUISA = R22 k	PRS = R40 k
			SPRE = Details not available	PPL = Details not available	GRAMO = R5 k	SAMPRA = Distributions are still outstanding		SWISSPERFORM = R20 k	PPL = R19 k

	KEY ITEMS	BRAZIL	FRANCE	INDIA	NORWAY	SOUTH AFRICA	SENEGAL	SWITZERLAND	UK
f.	Average pay per employee	ECAD = Payroll details not available	SACEM = R912 k	IPRS = R39 k	TONO = R625 k	SAMRO = R298 k	SBDA = Payroll Details not available	SUISA = R739 k	PRS =R327 k
			SPRE= Details not available	PPL= Details not available	GRAMO = R841 k	SAMPRA = R494 k		SWISSPERFORM = R1 340 k	PPL = R642 k
g.	Licence revenue generated for every rand spent on labour costs	ECAD = Payroll details not available	SACEM = R6,55	IPRS = R18,38	TONO = R11,97	SAMRO = R5,42	SBDA = Payroll Details not available	SUISA = R7,14	PRS = R18,63
			SPRE = Details not available	PPL = Details not available	GRAMO = R8,42	SAMPRA = R8,33		SWISSPERFORM = R21,23	PPL = R10,79
h.	Maximum allowable ratio of cost-to- royalty income ratio	The current limit is 24,5% (17% for ECAD and 7,5% for the collecting societies)	Limited to 20% in terms of Articles of Association for SACEM	15% for all collecting societies	Limited to 15%	Limited 20% for regulated collecting societies and no limits for unregulated collecting societies	Details not available	Limited to 20%	No limit
i.	Copyright duration based on authors' deaths	Life plus 70 years	Life plus 70 years	Life plus 60 years	Life plus 70 years	Life plus 50 years	Life plus 50 years	Life plus 70 years	Life plus 70 years
j.	Copyright duration based on publication and creation dates	70 years from fixation of phonograms or transmission of broadcasts	70 years from publication	60 years from publication	50 years from performance	50 years from publication	50 years from creation / publication	50 years from performance	70 years after release / making

	KEY ITEMS	BRAZIL	FRANCE	INDIA	NORWAY	SOUTH AFRICA	SENEGAL	SWITZERLAND	UK
k.	Retention period for unclaimed royalties	5 years	10 years	3 years	3 years	3 years for SAMRO	Details not available	5 years	3 years for PRS and 6 years for PPL
l.	Utilisation of unclaimed royalties at the end of the retention period	Distributed to known members on the pro-rata basis	Utilised for social needs for the benefit of the members	Distributed to known members on the pro-rata basis	Distributed to known members on the pro-rata basis	Distributed to known members on the pro-rata bases by SAMRO and not applicable for SAMPRA	Details not available	Distributed to known members on the pro-rata basis	Distributed to known members on the pro-rata basis
m.	Who determines the tariffs?	Collecting associations	Group of collecting societies and group of users and endorsed by Minister of Arts and Culture	Respective collecting societies	Respective collecting societies within the competition law	Respective collecting societies	BSDA (Collecting Agency)	Collecting societies and associations of users approved by the Arbitration Commission	Respective collecting societies and Copyright Tribunal
n.	Structure of music collecting societies								
	Performance Rights	Multiple associations	SACEM	IPRS	TONO	SAMRO	BSDA	SUISA	PRS
	Sound Recording / Neighbouring Rights	Multiple associations	ADAMi, SPEDIDAM, SCPP and SPPF	PPL	GRAMO	SAMRO and SAMPRA	BSDA	SWISSPERFORM	PPL
	Mechanical Rights	Multiple associations	SACEM	IPRS	NCB	NORM and SAMRO	BSDA	SUISA	MCPS

	KEY ITEMS	BRAZIL	FRANCE	INDIA	NORWAY	SOUTH AFRICA	SENEGAL	SWITZERLAND	UK
o.	Membership competition by collecting societies for performance and sound recording rights	Approximately 10 associations compete for membership market	Competition is in place for producers (between SCPP and SPPF) and performers (ADAMI and SPEDIDAM)	None	None	None	None	None	None
p.	Competition for music users by the collecting societies for performance and sound recording rights	None	None	None	None	None	None	None	None
q.	Local music content (based on the monetary values)	77%	Details not available	95% (for IPRS)	51% (for TONO)	24% for local artists & 32% for publishers (including foreign component)	Details not available	62% (for SUISA)	74% (for PRS)
r.	Local music content obligation	None	None	None	None	Commercial radio station is 25% and public radio stations 40%	None	None	Local content varies based on the licence conditions.
s.	Sharing split for sound recordings royalty fees	Record companies = 41,7%, featured artist = 41,7% and non-featured artist = 16,6%	50% split between performers and recording entities	100% for recording entities	50% split between performers and recording entities	The Act and the Regulations are vague on this matter	50% split between performers and recording entities	50% split between performers and recording entities	50% split between performers and recording entities

	KEY ITEMS	BRAZIL	FRANCE	INDIA	NORWAY	SOUTH AFRICA	SENEGAL	SWITZERLAND	UK
t.	Automatic reversion of copyright to the original owner	Not in place	Not in place	Not in place	Not in place	Not in place	Not in place	Not in place	Not in place
u.	Frequencies of royalty distributions by collecting societies	ECAD = 12 times per annum	SACEM = four times per annum	IPRS = twice per annum	TONO = four times per annum for broadcasting and once a year for others GRAMO = once a year	SAMRO = twice per annum (main distributions) SAMPRA = None as yet	BSDA = twice per annum	SUISA = 25 times per annum	PRS = four times per annum PPL = one payment per annum
v.	Royalties on ringtones and digital downloads	Not regulated and, accordingly, no payments for performance rights	Performance rights are payable on ringtones and digital downloads	Performance rights are payable on ringtones and digital downloads	Performance rights are payable on ringtones and digital downloads	Not regulated and, accordingly, no payments for performance rights	Not regulated and, accordingly, no payments for performance rights	Performance rights are payable on ringtones and digital downloads	Performance rights are payable on ringtones and digital downloads
w.	Accessions to WIPO Copyright Treaty,WPPT	No	Yes	No	No	No	Yes	Yes	Yes

14.1.5. The total music royalty collections as a percentage of the GDP (in Table 28 (a)) amounted to 0,0128% in 2010 for South Africa and is the third-lowest ratio among the countries selected for benchmarking. France and the UK have the highest ratios at 0,0468% and 0,0417% respectively. The higher ratios for the developed countries (mainly France and the UK) are largely because:

- Higher tariffs are in place;
- Major problems around the royalty collections of the digital downloads and ringtones have been resolved;
- There is a lower proportion of unlicensed users; and
- Turnaround times for tariff disputes are shorter, and the industry is more mature.

Brazil's ratio is the second lowest among the selected countries, largely because of lower tariffs. Only 50% of the radio broadcasters pay for the usage of music and a significant number of commercial music users are not required to take licences.

14.1.6. A higher growth rate in collections (of 16%) in Brazil (in Table 28 (b)) is largely because of the low base (growth in the market and awareness of the users about the need to get the appropriate licences). An 11% growth for South Africa is mainly due to the growth phase of SAMPRA.

14.1.7. Despite the fact that collections are not generated for needletime rights from local broadcasters, South Africa's ratio of broadcasting collections to total collections stands at 48% (in Table 28 (c)), which is the third-highest among the selected countries. This is a clear indication of the fact that the collection problems are not limited to broadcasting. As indicated above, there are other problems with local collections.

14.1.8. The average collections per employee (in Table 28 (d)) for Brazil of R2 132 632 (for 2010) is based on the employees numbers for ECAD (Central Collection and Distribution Agency) and does not include the employees numbers for the 10 collecting societies. The average for SAMRO is R1 620 806 (which is second-lowest among the parties selected for benchmarking). The unfavourable ratio for SAMRO is due to:

- Some of the human resources are assigned to the management of the investment portfolios,
- Tariffs are relatively lower, and
- The staff numbers are relatively higher.

SAMPRA's average is R4 116 111 per employee. This was achieved without the broadcasting and some retail collections and, therefore, SAMPRA's ratio can be expected to improve once the disputes are resolved.

14.1.9. In computing the average distributions per member (in Table 28 (e)), the foreign distributions have been excluded since they are not payable to members but rather to sister societies.

14.1.10. The average pay per employee per annum for IPRS amounted to R39 447 (in Table 28 (f)) compared to SAMRO and SAMPRA at R298 893 and R494 423 respectively. The annual pay for IPRS is almost equal to the monthly average pay for SAMPRA.

14.1.11. With regard to collections (licence revenues) generated for every rand spent on labour cost (in Table 28 (g)), SAMRO has the lowest ratio of R5,42. This is in line with the ratio of administration cost-to-royalty revenue of

about 30%, which is the highest among the selected collecting societies. Based on the analysis, it is clear that the biggest problem is the labour cost, which is not generating competitive revenues. IPRS has the second highest ratio of R18,38 (behind SWISSPERFORM).

14.1.12. South Africa's copyright duration (in Table 28 (i)) for authors is the lowest at 'life plus 50 years' compared to 'life plus 70 years' for the developed countries. Most of the music played locally is imported and more than 95% of the old music (30 years and older) played by the local radio station is foreign as discussed in paragraph 11.4.6. Any change to the copyright duration is, therefore, likely to be substantially more beneficial to foreign artists as opposed to local artists and, as a result, the CRC does not believe amendments to the duration should be made this stage. A review may be required in the future, once local content has improved on a sustainable basis.

14.1.13. South Africa has the lowest local music content of 24% for artists, excluding payments made to music publishers, compared to 77% for Brazil and 95% for India. Both Brazil and India do not have targets for local music content, but are passionate about their cultures and local music. Brazil has been independent from Portugal for about 200 years and has created its own identity. The impact of colonisation on Indian local cultural activities was minimal. Even after the sixth generation of descendants of Indian emigrants, Indian cultural activities are still practised in different countries outside India. In 2010, India exported about 25% of the local music. The situation is different in South Africa because the country is still struggling to recover from the repercussions of apartheid, which portrayed local cultural and tribal activities, including local African languages, as primitive and inferior to the Western languages. Unfortunately, this belief was entrenched in the education system and it will take decades to eradicate it.

14.1.14. The revenue-sharing split on sound recordings (in Table 28 (s)) between record producers and artists is 50% for the UK, France, Norway and Switzerland. In India, only record producers are entitled to the sound recording royalty income, and the performers are paid by the record producers in accordance with the contracts between the parties. In South Africa, the Regulations are vague and appropriate changes have been recommended.

14.1.15. Automatic reversal of copyright ownership (in Table 28 (t)) is not in place in all countries selected for comparative studies. In South Africa, there is a high proportion of musicians and authors who are ignorant about copyright issues and, as a result, there are several cases where the rights are assigned to third parties without a full understanding of the implications. In order to minimise the impact of these transactions, the CRC has recommended an automatic reversion of copyright to the original owner after 25 years, regardless of the terms of the original transactions.

14.1.16. The challenges around the royalties payable on ringtones and digital downloads have been resolved in all developed countries selected for benchmarking (in Table 28 (v)), including India. Brazil, Senegal and South Africa have not yet managed to resolve these challenges.

14.2 CONCLUSIONS

14.2.1. With regard to collection activities and the state of the relevant legislation, South Africa lags behind the developed world. There is, however, room for improvement and the right levels can be achieved. Areas that need to be improved include:

- Intensification of collections (users' awareness of their responsibilities);
- Digital downloads and ringtones;
- Growth of sound recording components; and
- Ineffectiveness of the Copyright Tribunal and the competitiveness of the tariffs.

14.2.2. With regard to efficiency, a significant improvement is required in this area.

14.2.3. One of the biggest problems for the industry is the high level of foreign music consumption and the current local quotas have done little to improve the situation. While there is a recommendation to improve the current quotas, the solution is not sustainable on a longer term if the local cultural problems are not addressed appropriately.

14.2.4. The issue of copyright duration will have to be reviewed once the problem around local content has been resolved on a sustainable basis.

15 KEY RECOMMENDATIONS

Many of the points set out below became apparent during the work of the CRC.

15.1 DEFECTS IN LEGAL PROVISIONS RELATING TO COPYRIGHT AND THE PERFORMERS RIGHT TO NEEDLETIME

15.1.1. The provisions in the Copyright Act and the Performers' Protection Act that create a statutory licence in respect of needletime do not adequately protect the rights owners and can be (and have been) exploited to create unnecessary delays. The CRC's recommendations to address this problem are set out in paragraph 3.3.6 of Chapter 3.

15.1.2. The provisions in the Collecting Society Regulations for payment into an 'escrow' account are unsatisfactory because:

(1) Even that portion of the amount deposited into such an account, which represents the amount the user agrees it is liable to pay, cannot be distributed until the dispute as to the appropriate tariff is resolved; and

(2) If the user must pay the amount demanded before being permitted to broadcast or otherwise communicate the recordings in question to the public (an issue which is sub-judice), it may be obliged to pay an unreasonably large sum of money into the account.

Both these problems are addressed in the CRC's recommendations set out in paragraph 3.3.6 of Chapter 3.

15.1.3. The Copyright Tribunal's procedures are cumbersome and its structure ill-suited to deal with the cases likely to come before it. Detailed recommendations are set out in paragraph 3.3.11 of Chapter 3.

15.1.4. The Copyright Act must be amended to allow rights holders (as well as users) to engage the Copyright Tribunal in disputes about the appropriate tariffs to be applied. At present it is only in respect of needletime that the rights owners (as opposed to the users) are able to do this. This encourages delays. See paragraph 3.3.10 of Chapter 3.

15.1.5. The Acts should require certain users to provide full information (to be defined in the Regulations) to collecting organisations so that rights owners entitled to payment can be readily identified. See paragraph 3.3.13 of Chapter 3.

15.1.6. The Acts should be amended to provide that needletime be divided equally between the owner(s) of the copyright in the sound recordings and the owner(s) of the neighbouring right to needletime. See paragraph 3.3.8 of Chapter 3.

15.1.7. The CRC believes that an overall impact study should be conducted to assess whether it is appropriate for South Africa to ratify and implement the WIPO Internet treaties. See paragraph 4.2.9 of Chapter 4.

15.1.8. The 'private use' exceptions must be expanded and adapted for the digital era to include, for example, format shifting and ensure that the law is in accordance with the expectations of reasonable persons. This is important in order to persuade members of the public to respect copyright law.

15.1.9. The Copyright Act must be amended to include a section modelled on that in the US Copyright Act providing for the reversion of assigned rights 25 years after the copyright came into existence. (The drafters of the section must have regard for proposals currently under discussion in the US for an amendment of the section to overcome difficulties encountered in practice.) Such an amendment will go far to relieve the plight of composers whose works still earn large sums of money that are going to the assignees of the composers' rights long after the assignees (or their predecessors) have recouped their initial investment and made substantial profits, in excess of those anticipated when the original assignment was taken. The period proposed is shorter, based on the fact that the local copyright duration is shorter than the American one. See paragraph 10.12.10 of Chapter 10.

15.1.10. The Copyright Act must be amended so as to provide for the office of an ombud for the industry, whose functions and operational rules should be spelt out in regulations. In this regard, the recommendations made by the MITT should be implemented.

15.1.11. The definitions of local music contained in the EC Act should be enlarged. See Table 26 (g) of Chapter11.

15.1.12. The Copyright Act should be amended to adopt the right 'to communicate the work to the public' and the 'making available' right as two new exclusive rights of copyright owners. The Performers' Protection Act should also be amended to provide the performers with the right to make their performances available to the public and to create moral right for performers. See paragraph 4.8.2 of Chapter 4.

15.1.13. The ECT Act should be amended to require ISPs to adopt a graduated response for repeat infringers, culminating in the suspension of access services to an individual. See paragraph 4.8.4 of Chapter 4.

15.1.14. The CRC recommends amendment of the provisions relating to the Copyright Tribunal. In its opinion, the Tribunal should consist of:

1) a President and a Deputy President, both of whom should be High Court judges appointed by the President of the Republic on the recommendation of the JSC; and
2) three other members appointed by the President of the Republic on the recommendation of the JSC, each of whom has at least five years' experience at a high level in industry, commerce, business, public administration education or the practice of a profession.

The sittings of the Tribunal should be held at such places and times as the President of the Tribunal determines. See paragraph 3.3.11 of Chapter 3.

15.1.15. The Copyright Act should be amended to provide for one collecting society for performance rights, one collecting society for sound recording rights, and one collecting society for mechanical rights. All music rights collecting societies (SAMRO, NORM and SAMPRA) should fall within the ambit of the Regulations issued under the Act, and the Registrar should be empowered to supervise all collecting societies. See paragraph 7.4.2.1 of Chapter 7 and paragraph 6.3.4 of Chapter 6.

15.1.16. The Copyright Act should be amended to allow the Registrar to take over the administration of any of the collecting societies (SAMPRA, NORM or SAMRO) if he or she has reason to believe that there has been a material breach of the Copyright Act or the Regulations. Currently, the law makes provision for accreditation withdrawal. This is, however, inappropriate because there will be only one collecting society per right and, if accreditation were withdrawn for a collecting society, there would be no back-up for that right. It is, therefore, recommended that the Registrar's power to withdraw an accreditation of a collecting society be repealed and that he or she be empowered to take over the administration of such society. See paragraph 6.3.2 of Chapter 6.

15.1.17. The Registrar should be empowered to take the administration of any collecting society under his supervision should he or she be satisfied that such society is run in a manner detrimental to the respective rights holders. See paragraph 7.4.2.2 of Chapter 7.

15.1.18. The Regulations should recommend the appropriate period for retention of unclaimed royalties. It is recommended that the minimum retention period for unclaimed royalties should be five years and that any unclaimed royalties older than five years may only be used for social-related activities and cultural projects for the benefit of local artists. See paragraph 10.12.2 of Chapter 10.

15.1.19. ICASA should include as a condition in the broadcasters' licences that needletime and copyright obligations have to be complied with and that repeated failures by broadcasters to do so should lead to the cancellation of their licences. See Table 26 (e) of Chapter 11.

15.1.20. Local music content requirements should be raised for all broadcasters. See Table 26 (a), (b) and (c) of Chapter 11.

15.1.21. As part of the annual returns submitted to the Registrar, all collecting societies within the ambit of his or her jurisdiction should report the total and individual amounts paid to foreign entities via foreign collecting societies or the agencies of foreign publishing houses as well as individual amounts collected from the foreign sources. See paragraph 10.12.3 of Chapter 10.

15.1.22. The Copyright Act should be amended to provide that where the music usage information is not retained by the background music users, the collecting societies should commission an appropriate statistical sampling survey based on the relevant users' information to determine the appropriate split for the royalty distributions. See paragraph 10.12.4 of Chapter 10.

15.2 OTHER RECOMMENDATIONS AS TO HOW THE POSITION OF MUSICIANS CAN BE IMPROVED

15.2.1. There is a need for education as to the reasons for and the value of intellectual property, in particular copyright and the performers' neighbouring right. This is necessary to persuade members of the public as to the legitimacy of intellectual property law and to encourage them to respect it by not, for example, purchasing counterfeit CDs and DVDs or illegally downloading copyright material from the Internet. In order to do this, certain restrictions on the use of copyright must be amended to create a balance between private and public rights.

15.2.2. There is also a need for musicians to be educated as to the basic principles of copyright law so they can take steps to protect themselves from having their rights infringed. See paragraph 12.4.8 of Chapter 12.

15.2.3. Tertiary institutions that train musicians should be encouraged, or possibly even required, to introduce compulsory courses on the basic principles of copyright law. See paragraph 12.4.7 of Chapter 12.

15.2.4. Standard recording contracts that are fair to both sides should be drawn up as a matter of urgency, preferably by representatives of the music industry and musicians, and made available to musicians, who should be urged to use them. They should be made available online and be referred to in educational courses for musicians as well as information pamphlets distributed by **the dti** and the DAC. See paragraph 10.12.5 of Chapter 10.

15.2.5. SAMRO's practice of distributing unallocated revenues is unacceptable. Thorough and effective means of tracing those persons entitled to the payment of royalties should be introduced, providing inter alia, for details of missing rights owners to be published on the Internet and in newspaper advertisements and newsletters to members of SAMRO. The methods used in Australia by APRA, and summarised in the Simpson Report, should be followed. See paragraph 10.12.7 of Chapter 10.

15.2.6. SAMRO's requirement that full members (i.e. those entitled to be elected to the Board) have to be approved by the Board is inappropriate. The objective criteria applied in practice should be incorporated in its constitutive documents.

15.2.7. SAMRO should take active steps to identify those persons entitled to the reversion of copyright under Section 5 of the Third Schedule to the 1916 Act (i.e. in respect of works composed before 11 September 1965 by composers who died less than 50 years ago and more than 25 years ago) and see to it that any royalties due to them are paid. During the hearings it was ascertained that no attempts are made to collect royalties falling in this category, despite the success enjoyed by Prof. Owen Dean in collecting royalties for the heirs of Solomon Linda. See paragraph 3.1.7 of Chapter 3.

15.2.8. SAMRO's decision not to collect royalties for copyright music used in sectors such as church services is unacceptable because it deprives composers of royalties to which they are entitled and is not provided for in the Act. See paragraph 8.1.6.3 of Chapter 8.

15.2.9. The constitutive documents for SAMRO are not aligned to the Companies Act of 2008 and good corporate governance standards and should be revised to fairly protect the members. See paragraph 7.4.2.4 of Chapter 7.

15.2.10. SAMRO should seek the mandate from its members (via a Special Resolution) for the utilisation of cash resources for investment purposes. See paragraph 10.12.8 of Chapter 10.

15.2.11. SAMPRA should rectify the areas of non-compliance with the Regulations (e.g. failure to submit the audited annual financial statements within the prescribed period) within one year. See paragraph 6.3.3 of Chapter 6.

15.2.12. Collecting societies should intensify their licensing and collecting activities. There is a high rate of general music users who are not licensed and no action has been taken against them. Legal action should be taken against all major music users who are infringing the rights of musicians. See paragraphs 8.1.8.2 and 8.1.8.3 of Chapter 8.

15.2.13. It is recommended that the collecting societies should comply with the appropriate standards of corporate governance. See paragraph 7.4.2.3 of Chapter 7.

15.2.14. A joint steering committee (interdepartmental steering committee) with ministerial representatives from **the dti**, DOC and DAC should be established to oversee the implementation of the recommendations. The joint steering committee should meet at least twice a year and there should be a standing invitation to include the Registrar for collecting societies (CIPC), the CEOs for the respective collecting societies (SAMRO, SAMPRA and NORM), and the CEO of ICASA. See paragraph 13.6.2 of Chapter 13.

15.2.15. ICASA should improve the monitoring processes. (The CRC could not be provided with assessment files for 12 radio stations.) See paragraph 11.4.5 and Table 24 of Chapter 11.

15.2.16. **the dti** should every year, for at least five consecutive periods, initiate and fund an audit on behalf of at least 10 randomly selected artists. This audit should examine all financial transactions processed via the recording entities

for the selected artists. The outcome of such audits should be reviewed by both **the dti** and the respective artists to determine the trends and the level of integrity of the recording entities. See paragraph 10.12.6 of Chapter 10.

15.2.17. Multichoice should discontinue its practice of providing broadcasting platforms to content service providers who are unlicensed music users. See paragraph 8.1.2.6 of Chapter 8.

15.2.18. The existence of independent qualified directors within the collecting societies is encouraged and recommended. See paragraph 7.4.2.5 of Chapter 7.

15.2.19. The collecting societies should review and benchmark their tariffs at least once every five years. See paragraph 8.2.12 of Chapter 8.

15.2.20. The liquidators of SARRAL should consider initiating a civil case against the former directors of SARRAL for breaching members' contracts. See paragraph 7.4.1.2 of Chapter 7.

15.2.21. The CRC strongly recommends that DALRO take urgent steps to satisfy itself that the local publishers that mandate it to license articles are entitled to give it such mandates, not only in respect of Section 11A rights, but also in respect of rights arising under Section 6 (a), and furthermore where articles have been copied under licences issued, that the persons who hold the Section 6 (a) rights receive the royalties to which they are entitled. See paragraph 9.3.1 of Chapter 9.

15.2.22. WASPA should amend its Code of Conduct to provide for the right to suspend members that fail to conclude a licence with the collecting societies and/or pay the necessary royalties. See paragraph 4.8.3 of Chapter 4.

15.2.23. Currently, there are countries such as the US that do not recognise sound recording rights for broadcasting. Performers and recording entities are, therefore, not compensated for the use of their works by radio stations. In line with international trends, the CRC recommends that payments should not be made in respect of sound recordings for artists and recording companies from countries that do not recognise these rights. See paragraph 10.12.9 of Chapter 10.

15.2.24. SARRAL's liquidators should consider and assess the appropriateness of the mechanical rights monies payable to SARRAL by some of the broadcasters and mobile telephone operators as a result of the use of these rights between 2000 and 2007. See paragraph 8.1.8.4 of Chapter 8.

16 LIST OF SOURCES

16.1 OFFICIAL REPORTS

ABRAMUS Annual Report, 2009

Advisory Committee on the Copyright Act, *Report on 'Needle Time' and 'Blank Tape Levy*' (1993)

Contract between SARRAL and one of its members (1996)

Contracts between SAMRO and the commercial broadcasters (1980 to 2006)

Countries Indicators: GDP (World Bank) 2011

Foreign Currency Exchange Rates used to convert amounts denominated in foreign currencies into Rands as at the end of August 2011:

- Canadian Dollars to One South African Rand = $0,1147
- Indian Rupees to One South African Rand = Rs6,45
- Norwegian Krones to One South African Rand = 0,4505NOK
- South African Rands to One British Pound = R11,64
- South African Rands to One Euro = R10,20
- South African Rands to One US Dollar = R7,60
- Brazilian Real to One South African Rand = 0,2278 BRL
- Communaute Financiere Africaine Franc to One Rand = 63,6128 XAF
- Swiss Franc to One South African Rand = 0,11464 CHF

Franki Committee (Copyright Law Committee) (Australia) 1974

Gowers *Review of Intellectual Property* (2006)

Gramo's audited financial statements for the year ended 31 December 2010

Hargreaves *Digital Opportunity, a Review of Intellectual Property and Growth* (2011)

IPRS's published music royalty tariffs (2007)

IPRS's audited financial statements for 2010 and 2009 financial years

King II Report by Institute of Directors Southern Africa (2002)

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NORM's financial statements for 2009 and 2010

PPL's audited financial statements for the financial periods ending 31 December 2010 and 31 December 2009

PPL's published music royalty tariffs (2011)

PRS's audited financial statements for 2010 and 2009 financial years

PRS's published music royalty tariffs (2011)

SACEM's audited financial statements for the year ended 31 December 2010

SAMPRA's published music royalty tariffs (2011)

SAMPRA's unaudited financial statements for 2008, 2009 and 2010

SAMRO's annual reports for 2008, 2009 and 2010

SAMRO's constitutive documents (1960)

SARRAL'S audited financial statements for 2002, 2003, 2004, 2005, 2006 and 2007

SARRAL's constitutive documents

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Simpson *Review of Australian Copyright Collecting Societies* (1995)

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Submission to the Copyright Review Commission by ICASA (2011)

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Submission to the Copyright Review Commission by NORM (2011)

Submission to the Copyright Review Commission by PRIMEDIA (2011)

Submission to the Copyright Review Commission by the SABC (2011)

Submission to the Copyright Review Commission by SAMPRA (2011)

Submission to the Copyright Review Commission by SAMRO (2011)

SUISA's annual reports for 2009 and 2010 financial years

SUISA's published music royalty tariffs (2011)

SWISSPERFORM audited financial statements for the year ended 31 December 2010.

the dti *Government Involvement in the Music Industry* (2011)

16.2 BOOKS AND ARTICLES

Arnold *Performers' Rights* (4 ed 2004)

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Gramophone Co v Cawardine [1934] Ch 450

In re Application of Cellco Partnership D/B/A Verizon Wireless (case 1:09-cv-0774-DCL filed 10/14/2009)

16.4 STATUTES

16.4.1 Australia

Copyright Act of 1968

16.4.2 Brazil

Brazilian Copyright Act (Law No. 9 610 / 98)

16.4.3 France

Loi 2009-669 *du 12 juin* 2009 *favorisant la diffusion et la protection de la création sur internet [Law* 2009-669 of June 12, 2009 on Promoting the Distribution and Protection of Creation on the Internet], *Journal Officiel de la République Française* [J.O.] [Official Journal of France], June 13, 2009, p. 9666 9 (*Haute Autorite pour la Diffusion des Oeuvres et la Protection des Droits sur Internet* 2009)

16.4.4 India

Indian Copyright Act of 1999

16.4.5 New Zealand

Copyright Act 1994

Copyright (Infringing File Sharing) Amendment Act 2011 Copyright Act 1994

16.4.6 Norway

Copyright Act (Act No. 2 of 12 May, 1961 relating to Copyright in Literary, Scientific Artistic Works, as amended by Law No. 27 of June 2, 1995)

16.4.7 Senegal

Senegal Copyright Act 1973 (as amended up to January 24, 1986)

16.4.8 South Africa

Arbitration Act, Act No. 42 of 1965

Broadcasting Act, No. 4 of 1999

Companies Act 1926

Companies Act 1973

Companies Act 2008

Patents, Designs, Trade Marks and Copyright Act 1916

Copyright Act 1965

Copyright Act 1978

Copyright Amendment Act 2002

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Copyright Amendment Act of 1992

Copyright Regulations

Electronic Communication and Transactions Act, 2002 (ECT Act)

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Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers (Government Notice 1283 in *Government Gazette* 29474 of 14 December 2006)

Independent Communications Authority of South Africa Act of 2000

Labour Relations Act

National Credit Act

Patents Act 57 of 1978

Performers Protection Act 1967

Performers' Protection Amendment Act 2002

16.4.9 United Kingdom

Statute of Anne 1710 (8 Ann., c. 21)

Copyright Act of 1886 (49 & 50 Vict. c. 33)

Copyright Act 1838 (1 & 2 Vict. c. 59))

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Copyright Act of 1911

Copyright Act of 1956 (4 & 5 Eliz. 2, c.74)

Copyright, Designs and Patents Act, 1988

Digital Economy Act 2010

APPENDIX 1 (A): LIST OF PEOPLE WHO SENT WRITTEN REPRESENTATIONS TO THE CRC

Submission 1: South African Music Rights Organisation (SAMRO)
Submission 2: National Association of Broadcasters (NAB)
Submission 3: DMX Music (Africa) Limited
Submission 4: The Association of Independent Record Companies
Submission 5: University of Free State
Submission 6: South African Music Promoters Association (SAMPRA)
Submission 7: Writers Guild Association of South Africa
Submission 8: Colin Shapiro
Submission 9: Louis Putter
Submission 10: Chris Ntuli
Submission 11: Pierre Lombard
Submission 12: Denise Nicholson
Submission 13: Aubrey Diphoko
Submission 14: Ayanda Roda
Submission 15: Nkululeko Suping
Submission 16: JJ Diedericks – Radio Pretoria
Submission 17: South African Music Promoters Association and Recording Industry of South Africa (RiSA)
Submission 18: South African Broadcasting Corporation (SABC)
Submission 19: Peter Klatzow
Submission 20: CWUSA
Submission 21: Show Business Foundation
Submission 22: National Organisation for Reproduction Rights in Music (NORM)
Submission 23: Department of Labour
Submission 24: Minister of Science and Technology
Submission 25: SR Willemse
Submission 26: Dramatic, Artistic and Literary Rights Organisation (DALRO)
Submission 27: University of Cape Town

APPENDIX 1(B): SUMMARY OF ORAL REPRESENTATIONS TO THE COMMISSION HELD

CAPE TOWN: CAPE TOWN LODGE HOTEL: 10 MAY 2011

Mr Lombard

Proposed a collecting society for films made in South Africa.

Mr Gonyi

The fact that there are no theatres in townships makes it very difficult to promote local movies. It will be better if the culture of watching movies is brought back. Community halls and multipurpose centres should be built to help establish an audience from the townships.

Mr Heydenrych

Submitted that the CRC must look at how to bring emerging artists into the system in a structured manner that can be managed. It should be beneficial to both artists and producers.

Ms Fairweather

The relevant legislations should be broadened in order to sufficiently protect artists and formalize their work. She highlighted the importance of local production to the economy of the country.

Mr Lacey

One collecting society should be responsible for collecting royalties on behalf of all artists in the country.

Mr Nyawala

Education is a challenge that is faced by artists in South Africa. Therefore, education is needed because artists are occasionally exploited due to lack of necessary knowledge. Artists should have better knowledge of the industry and must be empowered to understand their rights. Artists are also told to pay income taxes despite the fact that they are not permanently employed and as a result have no fixed income.

Mr Daniels

The creative industry suffered a set-back by the abolishment of the Consultative Standing Committee that was used as a communication vehicle with the government on various issues.

SAMPRA should comply with CIPRO's request before approving the needletime royalty distribution, in terms of Clause 4.1 of the Collecting Society Regulations.

We need one collecting society to administer one right, in line with Clause 5.2 of the Collecting Society Regulations.

No monies should be defrayed for legal costs, and there should be a vigorous campaign to mobilize performers through workshops that will empower members.

PORT ELIZABETH: PINE LODGE RESORT: 11 MAY 2011

Mr Sibande

A free legal advice facility should be set-up by the government or on behalf of the government in order to advise poor artists on complex recording / publishing agreements with big recording / publishing companies.

ICASA should open its offices in all provinces.

Mr Motswana

The law should force local radio stations to play local content and there should be a standard selling price for all CDs.

Mr Mzalazala

The usage of jukeboxes should be monitored. SAMRO should enquire with the international collecting societies about the direct translation of local content by foreign artists.

Municipalities have to play a significant role in setting up offices that will enforce the events' policies. Thereafter, collect and distribute the monies to the relevant collecting societies, with regard to the songs that were played by the artists at the organized event.

Ms Mbiyo - South African National Library for the Blind

There are copyright exemptions in European countries, unlike in South Africa. Other countries understand that a sighted person has easy access to music or works of art, whereas for a blind person that information must be converted.

Mr Sibande

Community radio stations should be made profitable because they are the key in generating income for local artists who are unable to travel to big cities. They can be a key source of income for the broad masses of artists.

BLOEMFONTEIN: KOPANO NOKENG CONFERENCE CENTRE: 11 MAY 2011

Mr Roda

the dti must ensure that the artists have better understanding and knowledge of the Copyright Act.

The law must introduce a Social Security Plan.

Mr Moikangoa

The Performers Protection Act must be revisited.

Due to the fact that the existing collecting societies do not put the interests of artists and the owners of intellectual properties ahead of everyone else, one collecting society will be better suited.

Community radio stations should be used as an intervention mechanism for providing sustainable livelihood to local artists because our national radio stations are still dominated by international artists' works. Only music from Gauteng gets to be exported outside the country and it is exhibited or exposed to the world.

Mr Jansen
The CRC should look into the aspects of foreign creativities as to why they are more advantaged than our own local work.

Workshops should be held in order to educate artists about their rights.

KIMBERLEY: KIMBERLEY CLUB HOTEL: 12 MAY 2011

Mr Nyongane
The criminality of copying artists' CDs within the taxi industry is a worrying factor and accordingly the CRC should look into creating ways in which the municipalities can be forced to create by-laws which combat the above-mentioned criminal cases.

The taxi industry should also contribute to artists on an annual basis when they renew their licences or permits because they play music in their taxis. This suggestion is based on the fact that commuters usually prefer a taxi that plays music. This can be a motivating factor on why the taxi industry should pay royalties to the relevant artists.

Unregistered choral music should be regulated so that the owners, authors, composers or performers can be easily identified to ensure the royalties be paid to the rightful beneficiaries.

The CRC must look into brand values, because artists are not aware of the implications these brand values have on them.

Mr Mayesa
The Legal Aid Board must assist artists so that they can benefit from Constitutional protection. **the dti** must open provincial offices to serve artists provincially to avoid them travelling to Gauteng.

There should be a national and provincial commission in all provinces within South Africa.

There should be enforcement that will ensure that all taverns that are registered with the Liquor Board are licensed with the collecting societies. The CRC should be part of the development of an arts policy at the provincial level that will assist with guidance, with regards to copyright.

Mr Taiwo
Independent DJs who buy CDs and DVDs of artists, should be asked to register with SAMRO. Alternatively, there should be a union that will control the CDs which they play in order to control piracy.

Mr Botha

The CRC must draft a standard revenue split share for artists (as a percentage of income generated) for every recording company that has contracts with artists. In order for the artists to get sufficient money from the signed contract, every recording company will have to pay in accordance with this predetermined sharing split to the relevant artists.

POTCHEFSTROOM: ELGRO HOTEL: 13 MAY 2011

Mr Seleki

the dti should employ someone with the appropriate and necessary administration skill to help artists with the administration of their work and so forth.

Artists also need to be educated about their rights.

JOHANNESBURG: PYRAMID CONFERENCE CENTRE: DAY ONE: 16 MAY 2011

Mr Mthelebofu

The issue of accessibility to the National Archives was raised. There should be a standard price for accessing files in the National Archives, particularly in the SABC archives (currently, it is a bit expensive). In foreign countries people can access files, even South African information can be accessed for free, but it is really difficult and expensive to access information at the SABC archives.

Mr Schwinges

The Copyright Act must protect all people particularly the original owners of the works. Issues of piracy are still considered to be a big problem within the country, because artists do not benefit anything from their work.

Mr Putter

The CRC will have to look at accessibility and the costs of music to the jukebox industry. The price of music should be acceptable, affordable and music must also be easily accessible by the public.

JOHANNESBURG: PYRAMID CONFERENCE CENTRE: DAY TWO: 17 MAY 2011

Mr Sithole - CWUSA

Artists must be licensed to avoid the 'fly-by night artists'. There is a need for a social security plan for all entities or businesses that benefit from using arts or artists' work. Those entities or businesses should pay a levy to the social security plan for the benefit of the artists. There is also a need for the enforcement of law to fight piracy. The issue of education, in the form of workshops to teach artists about their intellectual property and related rights, was raised.

Mr Brottel

Protection of copyright must be extended from 50 years to 70 years in terms of Section 3 (2) of the Copyright Act.

It will be better if one music licence management system can be formulated.

Guidelines must be formulated on who qualify as musicians/artists.

Entertainment Law should be taken into consideration as it will minimize some problems in terms of copyright royalties. By so saying, entertainment lawyers must also play a role to assist artists.

DURBAN: PROTEA HOTEL EDWARD: 19 MAY 2011

Mr Dimba

Artists are not recognized as employees in South Africa, because they are not employed permanently and work independently. Therefore, it becomes a problem for them to take their grievances to the CCMA and the Labour Court to be resolved. **the dti** must come up with a solution to accommodate artist with regard to the above.

Music should not only be there for heritage or for economic development, but also for empowerment. Therefore, education should be provided for artists as well. The collecting societies should come up with hefty measures (licensing fees) for DJs as they mostly play some artists' music for their own benefits.

APPENDIX 2: INTERNATIONAL BENCHMARKING REPORTS

1. BRAZIL

1.1. INTRODUCTION

1.1.1. REASON FOR SELECTING THE COUNTRY

Brazil was chosen as a country for benchmarking because its structure for the collective management of copyright is unique in that it has a two-tier system with a central office that manages collections on behalf of, and distributions to, all copyright associations. The different associations manage copyright of authors and composers, as well as neighbouring or related rights of recording companies and performers (in one society).

Copyright legislation in Brazil makes provision for the protection of related or neighbouring rights, including:

- Interpretation and artistic performance (as well as musical);
- Radio broadcasts;
- Phonographic rights i.e. the fixation of sounds of a performance or interpretation; and
- The representation of sounds, which is not a fixation, included in an audio-visual work.

South Africa is part of an economic forum with Brazil, Russia, India and China, known as BRICS. South Africa shares with Brazil certain perspectives, policies and practices pertinent to emerging economies. One such development imperative is the WIPO Development Agenda.

1.1.2. SOUTH AFRICA, BRAZIL AND THE WIPO DEVELOPMENT AGENDA

Brazil hosts the only academic institution that has status at WIPO sittings. This institution, headed by Professor Pedro Paranagua, has implemented some of the recommendations of the WIPO Development Agenda through a number of donor-supported programmes in the IT as well as culture development fields. The IT programme is done in partnership with the University of the Witwatersrand's Learning Information Networking and Knowledge Centre in South Africa. The project has managed to bring Brazilian and South African artists together to promote exchanges of content. Due to the limited time, it was not possible to visit the institution or interview Prof. Paranagua. However, reports of the debates concerning copyright reform, as well as reports on the programmes implementing some of the recommendations of the WIPO Development Agenda were obtained from the Internet. The programmes are discussed in more detail in the section dealing with development aspects of copyright.

Even though the terms of reference of the CRC do not explicitly include the developmental aspects of copyright, it is obvious that any consideration of copyright reform or review cannot ignore the developmental context of South Africa's economy and culture. It is within this context that Brazil may offer best practice models on how to become a music exporting rather than a music importing country, and for copyright and Intellectual Property (IP) in general to make an impact on democracy and sustainable development.

1.1.3. LIST OF ENTITIES VISITED AND THEIR RELEVANCE TO THE PROJECT INTERVIEWS

Three entities were selected for benchmarking in May 2011:

1. The Intellectual Property Office in the Ministry of Culture (ECAD);
2. The Central Office for Collections and Distributions; and
3. A director of one of the Collective Management Associations.

The interview on ECAD was conducted at the offices of this organisation in Rio de Janeiro with the Superintendent, Ms Gloria Braga. The second interview was conducted with Mr Gustav Gonsalez from ABRAMUS at its premises in Rio de Janeiro. A third interview was done with the Director of Intellectual Property at her office located in the Ministry of Culture, in Brasilia. Further details were acquired from the Internet and other relevant sources. Due to lack of sufficient time, interviews with a record company, Prof. Paranagua and two artists had to be cancelled.

1.2. SUMMARIES OF KEY LEGISLATION FOR COPYRIGHT AND COLLECTING SOCIETIES

According to Brazil's Copyright Law 9610, the protection of an intellectual work includes its title, if original and unmistakable, in the same genre, from that of another author. Exceptions are the following:

(i) The ideas, normative procedures, systems, methods, project or mathematics;
(ii) Schemes or rules for carrying out mental acts, games or business;
(iii) Blank forms to be filled out with any type of information, scientific or not and their instructions;
(iv) Texts of agreements or treaties, laws, decrees, regulations, legal decisions and other official acts;
(v) Information of everyday use such as calendars, diaries, reference files or sub-titles;
(vi) Names and titles; and
(vii) Industrial or commercial utilisation of ideas contained in the works.

The legislation makes provision for the protection of related or neighbouring rights, including interpretation and artistic performance (including musical); radio broadcasts; phonographic rights (i.e. the fixation of sounds of a performance or interpretation); or the representation of sounds, which is not a fixation, included in an audio-visual work.

The author is regarded as the individual who creates literary, artistic or scientific work, but the protection given to the author may be given to legal entities in the cases foreseen in Law 9610. The patrimonial rights can be owned by companies, but the moral rights of the author are inalienable. Record producers and radio stations can be the original copyright owners. With regard to music, the owners of the author's rights and related rights are:

(i) The composer and the lyricist, who usually pass the administration of their rights to a music publisher;
(ii) The arranger, whose rights are usually passed to the record company; and
(iii) The interpreter, whose rights usually belong to the record company.

In terms of the use of intellectual works, Article 29 of Law 9610/98 establishes that prior authorisation of the author (or anyone controlling his rights) is needed for the usage of an intellectual work in terms of:

(i) Its partial or total reproduction;
(ii) The edition;
(iii) Adaptation, the musical arrangement and any other transformation or translation to any other language;

(iv) The inclusion in a phonogram or any audio-visual production;

(v) The distribution, when not inherent to the contract signed by the author with third parties for the use and exploration of the work;

(vi) The distribution of works or productions by means of cable, optical fibre, satellite, waves or any other system that allows the user to make the selection of the work or production to receive it at a time and place previously determined by the person who formulates the demand, and in cases where the access to the works or production is done by any system that means payment done by the user;

(vii) The direct or indirect use of the literary, artistic or scientific work, by means of:

a) representation, recitation or declamation;
b) musical execution;
c) use of loudspeakers or similar systems;
d) radio or broadcasting;
e) reception of transmission of radio broadcasting in places of collective attendance;
f) background music;
g) audio-visual, cinematographic display or by any similar process;
h) use of artificial satellites;
i) use of optical systems, telephone wires or not, cables of any kind and similar means of communication that may be adopted; and
j) exhibition of works of art;

(viii) The inclusion of the work in a database, the storage in computer, microfilming and other forms of filing; and

(ix) Any other existing forms of use or that may be invented.

The law, in Article 97, stipulates that associations should be non-profit, prohibits membership in more than one association, and allow members to change between associations, subject to prior written notification to the original association. Article 28 stipulates that members mandate the association to perform all acts (judicial or extra-judicial) in defence of their copyright and for the collection of their royalties. It further states that owners of copyright can act in their own defence and protection of copyright, subject to prior notification to the association. Rights are, therefore, not assigned and if members move to another association, their rights move with them. This provision allows for competition between associations for membership and provides an incentive for associations to improve their services.

Article 99 stipulates that the central office for collections should be non-profit and directed and managed by the associations. At present, government has no power to intervene in cases where an association functions ineffectively or engages in fraudulent activities.

1.3. THE EFFECTIVENESS OF THE RELEVANT LEGISLATION

The proponents of copyright, including ECAD and all the associations, believe that the law is effective, particularly the lack of government regulation and intervention, thereby optimising free enterprise and good, efficient organisational practice.

The revenue of ECAD of $374 255 579,82 in 2008, despite the world economic crises, reflected an increase of 12,63%, showing that the implementation of the copyright law has contributed to economic growth and the individual income of artists.

In the 2009 Annual Report of ABRAMUS, Ms Gloria Braga, Superintendent of ECAD, attributes this progress to creative business practices in relation to recovering debts, new contracts signed with music stores and movie theatre chains, as well as the payment of monthly fees by users. The number of shows and events collected surpassed those of the previous year by almost 10%, and new strategies were developed for the collection of sports events and users of new media. By improving on the above strategies, ECAD successfully overcame the effects stemming from the default of the television broadcasters, making ECAD less dependent on them.

The establishment of organisational units throughout Brazilian territory, led to record growth both in terms of collection units and new registrations of members. South African collecting associations should note that both new registration of membership and the establishment of collection units at local levels are signs of growth in Brazil. The lesson learned from the Brazilian approach is that decentralisation and inclusion of those on the periphery, both in terms of collections and membership recruitment, are regarded as growth factors.
Very important is the capacity-building in the form of optimising operational procedures of all units, resulting in the simplification and standardisation of operations.

The high cost of collections and the double administration charges resulting from the unusual two-tier system has been mentioned on the down side of the copyright system resulting from the implementation of the legislation.

Several significant music users do not yet pay for the use of music. This is exacerbated by the country's lengthy legal processes. In 1996, 35% of the 4 000 radio stations did not pay. Also, the television stations Manchete, CNT, Record and the public education channel owed ECAD R$50 million.

Critics of the associations have said that ECAD's workings are not transparent, resulting in a number of legal disputes involving ECAD, the individual societies and the government. In its defence, ECAD has argued on its website that:

> The management system of ECAD and associations that comprise it cannot be considered a cartel. There is no cartel created by law and ECAD was created by Law no. 5.988/73, having been held by the Law 9.610/98, precisely in order to centralise the collection and distribution rights, uniting the amounts to be charged and the rules of distribution. Moreover, the activities of collecting and distributing royalties are not economic in nature, since the music cannot be characterised as a commodity to be dictated by competition rules … (CNDA determined the unified price fixing - No cartel, 11/08/2011, http://www.ecad.org.br. 16/08/2011).

In the past, some of ECAD's members have also disputed the system of voting rights of the organisation.

Brazil is in the midst of a copyright reform process. The protagonists of copyright reform argue that copyright is not, and should not, be viewed only as a means for creating arts and remunerating artists. They argue that cultural diversity, education and innovation are, and should be, essential parts of a broader copyright policy. They argue further that the Executive Power, Congress and the Judiciary should play a crucial role in a long-term, countrywide intellectual property and innovation policy programme, and that cultural diversity, education, innovation and national development should be the common goal of all three tiers of government. (Paranagua, Pedro, 08/02/2011)

1.4. COLLECTING ASSOCIATIONS IN BRAZIL

1.4.1. HISTORY OF COLLECTIVE MANAGEMENT ASSOCIATIONS

Between 1942 and 1967 there was a proliferation of collective management associations in Brazil. The *Associacao Brasileira de Compositores e Editores* (ABCA), for composers, was established in 1938, and the UNIAO *Brasiliera de Compositores* (UBC) in 1942. Another association of authors, composers and music editors (SBACEM) arose from a dispute between publishers and composers in 1946. This was followed by the *Sociedade Arrecadadore de Direitos de Execucao Musical no Brasil* (SADEMBRA) in 1956, and SICAM (*Sociedade Independente Compositores e authores Masicais*) in 1966. In 1966, SBAT UBC, SADEMBRA and SBACEM created the SERCICO *de Defesa do Direito Autoral* (SDDA), a central body to control distribution for these four associations. SICAM refused to participate. In 1967, the *Sociedada de Interpretes e Produtores de Fonograma* (SOCINPRO) was set up to include the rights of the record companies and producers. It is assumed that it was this proliferation of collecting associations that the legislation was meant to address in 1973.

1.4.2. TWO-TIER COLLECTING AND DISTRIBUTION SYSTEM

ECAD was created in 1973 by Law 5988 as an 'association of associations' that united all of the associations under this private enterprise to collect and distribute public performance royalties. It began its activities in 1977 with the following associations:

1. ABRAC,
2. ABRAMUS,
3. ACIMBRA,
4. AMAR,
5. ANACIM,
6. ASSIM,
7. ATIDA SABEM,
8. SABEMBRA,
9. SBACEM,
10. SICAM,
11. SOCINPRO, and
12. UBC.

The top six were UBC, ABRAMUS, AMAR, SOCINPRO, SICAM and SBACEM. All associations distribute to their members (and to foreign associations) the amounts gathered for them by ECAD – or sent to them by foreign associations.

At present, ECAD has its existence guaranteed according to Article 99 of Law 9610, which states:

> The associations shall keep a single central office for collection and distribution, in common, of rights related to the public performance of musical works and phonograms, even by means of broadcast in any modality, and from the exhibition of audio visual works (Annual Report, 2009/ABRAMUS p.15).

The implementation of this law led to the present two-tier system existing in Brazil. ECAD shall be referred to, in this document, as a collecting society, while the copyright societies shall be called Collective Management Associations (CMA).

1.4.3. STRUCTURE OF ECAD

ECAD is a non-profit civil institution created exclusively to meet the needs of the associations. ECAD is run by a General Assembly, which consists of managing directors of the different associations responsible for the public performance of music. ECAD, with its headquarters in Rio de Janeiro, has 25 collecting units, 780 employees, 45 lawyers, 130 service providers and 130 autonomous agencies as service providers located in all Brazilian states. It has a fully centralised computerised system, which has 342 000 owners of works registered with 2,4 million works and 862 000 phonograms, which account for all registered versions of each song. The music users of copyright works total 418 000 in the register of ECAD (Annual Report, ABRAMUS, 2009).

The General Assembly meets every month. Its decisions are taken through voting, which are weighted according to the market share of each society. However, most decisions are taken by consensus (Gloria Braga, interview, May 2011).

The ECAD collects, whereas the association acts as a bridge, supplying information to ECAD (Gustav Gonsales interview, ABRAMUS, May 2011). The associations are responsible for documenting the repertoire of their represented rights holders in the database of ECAD, centralising information of the rights holders from all associations.

The amounts fixed on ECAD's price list correspond to different types of user and usage. The user is any individual or company who uses music through public broadcast. The amount of money collected by ECAD (minus 25% administrative costs) is passed on to the copyright owners.

Brazil does not have one society per right, but rather there is one bureau that collects for all 10 associations and distributes to all the constituent associations on the basis of their repertoires.

According to Ms Barbosa, Director of Intellectual Property Office in the Ministry of Culture, CMAs in Brazil are different from those in other countries, because they have composers, record companies, performers and authors all in one association (Ms Barbosa, Director of Intellectual Property, Ministry of Culture, interview, June 2011).

There is no limit to the number of CMAs that can exist simultaneously. The minimum requirements for setting up a collecting society are determined by Civil Law and the only other requirement is that they must have rights holders as members.

1.5. EFFECTIVENESS OF THE STRUCTURE OF THE ASSOCIATIONS CONCERNING DISTRIBUTION OF AUTHORS' RIGHTS

In terms of effectiveness, the existence of a central structure for collections allows for the associations to act consensually in terms of setting tariffs and distribution. This rules out competition among the different associations on the basis of tariffs charged to users. With the collection function off their hands, CMAs have greater capacity to improve their data-capturing systems (developing their own software) and training their staff to provide good service to their members.

There is healthy competition among associations as members are free to join any society or to move from one association to another as long as they inform the society they are leaving. This competition provides incentives for associations to provide a better service. Newly developed software gives instant and consistent feedback to ECAD as well as to member associations and members. Although there are no limits on the establishments of new associations, small associations are not sustainable due to the technological infrastructure required to run an association successfully (Gustav Gonsalez, interview, ABRAMUS, May, 2011).

The lack of competition among associations on tariff setting has led some critics to accuse ECAD of abusing its monopoly.

On the matter of fraud, there have been allegations, defences and counter allegations. Recently, allegations of fraud within ECAD have led to a parliamentary enquiry. In its defence, ECAD responded by putting out a public statement on its website that ECAD is no different from any other organisation where individuals sometimes transgress. However, it is claimed that whenever a single act of fraud is detected, it is politically exploited by ECAD's critics and large user corporations, such as cable television. (http://respostadoecad.ecad.org.br 2011/06/11)

1.6. COLLECTION OF ROYALTIES

Types of agreements between collecting societies and users: There are no blanket licences given and royalties are only collected for the works of members according to information given by users. There are no differences between the private and public broadcasters' obligation to pay royalties, rather different tariffs are charged. Collection from all the users is done centrally by ECAD. ECAD collects on the behalf of the associations and provides the mechanism for representatives of different associations to reach consensus and make collective decisions. ECAD collects only for members of Collective Management Societies and for members of foreign societies with whom local associations have agreements. There is thus no issue of non-members' royalties.

The amount collected has increased on an annual basis by more than 10% since the 1990s. In 1996, the collections of ECAD rose by 14% to $68 million. Payments from television stations accounted for 21% of the total, and radio stations for 14%. General use payments represented 24% of the total. Payments from the cinema sector was only 0,3%. Over the years, ECAD has become more efficient, increasing rates of collection from users and distribution to associations, directly benefiting composers, performers, musicians, record labels and music publishers. Collections in 2006 of R$268 368 828,00 increased in 2007 to R$302 206 444, which increased in 2008 to R$332 298 825,06, which, in turn increased to R$374 255 580 in 2009 and R$432 953 853 in 2010. In four years, the revenue of ECAD increased 38%.

Royalties are collected at different times from different users and distributed to the associations on a monthly basis to ensure a regular income for rights owners.

Use of cue sheets by some or all users and the alternatives: Where manual cue sheets are used, the data is processed electronically by the associations. This applies to domestic as well as international data. Associations maintain a good electronic database. The accuracy of music usage information is ensured through an auditing process. ECAD and the associations are in an ongoing process of developing better software to measure usage directly. Composers, publishers, performers and recording companies are beneficiaries of royalties collected for the performance and reproduction of sound

recordings. In respect of audio-visual work, only the music is collected for and the money distributed to the same sectors of beneficiaries (Gloria Braga, interview, ECAD Offices, May 2011).

1.7. TARIFFS FOR ALL MUSIC-RELATED ROYALTIES

Tariffs follow general guidelines determined by CISAC, but also add criteria within the local context. ECAD charges the following tariffs for the following categories:

- Radio broadcasts: 2,5% of revenue for radio broadcasts and depending on the size of the antennae, the socioeconomic conditions of the target audience, mobile ringtones and Internet broadcast (non-interactive and interactive). R$287 minimum is charged for community radio stations.
- Airlines: A small amount is paid by airlines, for example, R$18 000 is paid by TAM, Brazil's national airways.
- Airports, hospitals and clinics are charged by the size of the area in which music can be heard. Brazil has no satellite broadcast. 2,5% of the revenue of cable television is charged, although the amount is under dispute.
- Mobile DJs, karaoke players and use of jukeboxes are not charged. Rather, the venue in which the music is played is charged according to the size of the area in which the music is played. Hotels are obliged to pay even if they don't play music according to an agreement with owner groups. They are charged according to area.
- Restaurants, cafes, bars coffee shops and office canteens are charged per month and live events are charged according to live fees. Pubs are charged according to area and usage of music.
- Buses, trains and taxis are not yet charged; buses don't use music, only television.

With regard to the calculation and charge of fees to mobile operators, there is an ongoing discussion with all those involved with new technologies, including the Internet. ECAD is investigating ways of obtaining royalties from the archiving of works in deposits and music libraries. ECAD has made attempts to collect from mobile service providers, but has had difficulties. Mobile service providers prefer to pay directly to publishers. Their service is regarded as having reproduction rather than performing rights (Gloria Braga, ECAD offices, May, 2011).

1.8. DISTRIBUTION OF ROYALTIES

In terms of the nature of the agreements between collecting societies and members, the contractual relationship between CMOs and authors and performers are non-exclusive licences with no duration stipulated. There is no assignment of rights. ECAD collects on behalf of the associations, which receive a mandate from members to collect on their behalf. This happens through affiliation. A major difference between the UK and Brazilian law is that in the UK the right is transferred to the collecting society, whereas in Brazil the collecting society does not have propriety of the right. If members are unhappy with a society, they can change to another, subject to prior notification to the society they intend to leave (Gustav Gonsales, interview, ABRAMUS Offices, May 2011)

With regard to the royalty distribution ratio among various parties, of the total 100% collected, 17% goes to ECAD and 7,5% to the associations for administrative costs, while 75,5% goes to the rights owners. Of the amount that goes to the rights holders, two-thirds go towards copyright (the authors, composers and publishers) and one-third goes towards neighbouring rights (41,7% for recording companies, 41,7% for featured performers, and 16,6% for non-featured performers).

Unclaimed royalties are held for five years, then returned to the revenue pool and distributed according to the distribution schedule of radio broadcasters. This is a guideline provided by CISAC.

Investments by collecting societies: In its Annual Report of 2009, ABRAMUS, in its audited statement reported short-term investments in the Money Market of BRL 10.042.517. Such investment only exists between receiving and paying out royalties. All property owned is used for the purpose of accommodating staff and operations.

Associations distribute international royalties according to the reciprocal agreements they have with foreign societies and the repertoire information given to them by radio broadcasters. ABRAMUS, one of 10 societies, claims to run a sophisticated system that enables it to represent Brazilian creators abroad as well as international authors, publishers, performers and producers in Brazil.

In 2008, ABRAMUS signed representation agreements with 28 foreign societies (51 signed agreements, 39 unilateral and 12 bilateral). In the *ABRAMUS Magazine*, 2nd Edition, 2009, ABRAMUS claimed to have the only system in Brazil that could speed up payments to members. The organisation has connected with the databases of international services such as IPI (the most important of the authors' rights sector). ABRAMUS was developing a program to enable them to use SDEG (for neighbouring rights) and CRD (author rights) formats. This would make their access to CIS-NET and Grix quicker. Such an integrated system would speed up payments to members. Currently, 62 international associations have agreements with ABRAMUS, which will become more effective in identifying Brazilian artists and their works. They would be enabled to collect sums owed for public performance of artistic work and pass them on to ABRAMUS for payment in Brazil.

With regard to the flow of royalties to foreign countries, ABRAMUS represents 26 foreign societies and various international artists including Paul McCartney, Britney Spears, Madonna and Robbie Williams. ABRAMUS acquired its positive image by attending events bringing together the world's main author and neighbouring rights societies.
Work with foreign societies on neighbouring rights in ABRAMUS began in 2006. This work required of them to separate authors and neighbouring rights, since no other country had a joint collective management system of author and neighbouring rights. They adopted a new format in mid-2007. Since then they have been learning how the exchange between societies of neighbouring rights functions. They worked closely with partner societies, PPL (UK) and SENA (the Netherlands).

In 2009, ABRAMUS received a total of BRL111 880,44 from abroad, made up of amounts from (Annual Report, ABRAMUS, 2009):

- AIE (BRL52 041,39),
- GRAMEX (BRL2 053,71),
- PPL (BRL2 921,40),
- SAMI (BRL509,40),
- SENA (BRL38 094,18), and
- The Sound Exchange (BRL16 260,36).

Other international projects identified by ABRAMUS were to improve contact with Latin American societies and to integrate with the International Performers Database (IPD), a worldwide database of artists and their membership agreements.

In 1995, ECAD distributed 72% of its revenue nationally and 28% abroad. ECAD distributed $50 million to the 10 associations it represented:

1. ABRAMUS,
2. AMAR,
3. ANACIM,
4. ASSIM,
5. SABEM,
6. SADEMBRA,
7. SBACEM,
8. SICAM,
9. SOCINPRO, and
10. UBC.

The amount paid was a 34% increase from the previous year. This amount has steadily increased over the years to:

- R$80,1 million (1997),
- R$89,9 million (1998),
- R$91,47 million (1999),
- R$112,5 million, (2000)
- R$156,8 million (2001),
- R$176,5 million (2002), and
- R$200 million (2003).

For the associations, this growth is something to be proud of as it happened at a time when the music industry was shrinking due to a drop in CD sales and a rise in piracy (www.ecad.org.br).

According to information from the Internet, ECAD's biggest member society in the 1990s has been the Brazilian Composers' Union (UBC), which with 3 800 members had the largest revenues of ECAD's members. Its administration costs were only 5%. However, because such revenue was channelled through ECAD, it cost authors 30% for the collective management of their rights. In 1996, the collections of UBC rose 10% to $22,03 million. Of this, 97% was from domestic collections. UBC also collected $1,7 million in neighbouring rights (www.ecad.org.br).

In 2008, ABRAMUS earned the distinction of being the largest CMO for authors and composers. By the end of 2009, there were 22,782 members. This association distributes the most rights in Brazil. In 2008, R$104 231 242,62 was passed on to the domestic members of ABRAMUS (Annual Report, 2009). An amount of R$5 713 385,76 was passed on to the international associations it represents (Annual Report, ABRAMUS, 2009).

In the 2009 Annual Report of ABRAMUS, the President, Roberto Correa de Mello, indicated the intention of the association to establish more dynamic work parameters for rights owners, working towards planning and developing tools to improve their clients' productivity. He mentioned their investment in programmes, enabling them to offer online services and work more closely with rights owners. They were focusing on electronic and innovative means to better meet current demands for swift, simple solutions.

From a management point of view, the focus of ABRAMUS is on forging close relationships with rights owners and, after consultation, tailoring their services to meet the needs of rights owners. Taking into account the downturn on CD sales and lack of investment of major record companies in new artists and new releases, ABRAMUS identified new growth areas such as country and gospel music. In addition, live music shows have provided a viable alternative. A number of control mechanisms have been adopted to allow ECAD to accurately measure the music that has been performed, to enable fair and more correct distribution. ABRAMUS has further created a space on its website for the author or performer to inform them of the performance of a concert, enabling ECAD to collect and distribute that part to which they are entitled. They have also identified television within an author's rights public performance structure. Authors of theme music for television shows rank the highest in remuneration, particularly in shows played daily (ABRAMUS Annual Report 2009).

Members can move between societies. Small societies are not sustainable because a good infrastructure is required. Associations deal with complaints from members. Offices are there to serve members. Distributions are made every month to ensure a monthly income for members.

The association offers training, on its own and in partnership with ECAD. ABRAMUS established a web portal for members. They also have a 'relationship portal' aimed at building a good relationship with members. A special section of their office space is dedicated to members, who visit the offices of ABRAMUS (Gustav Gonsales, interview, ABRAMUS Offices, May 2011).

Due to lack of time, no information was gathered in Brazil regarding the relationship between recording companies and artists.

1.9. PROTECTION OF INDUSTRY AGAINST MUSIC IMPORTS

Incentives are in place to promote local music. At the national level, Brazil has within the last three decades successfully developed a national music repertoire, which currently allows for about 80% of local music to be played on the airwaves in that country. This high level of local music played in Brazil was due to government initiatives to develop the national cultural repertoire. One such initiative was an incentive offered to recording companies to record Brazilian music. Another initiative by the previous Minister of Culture, Gilberto Gil, was the provision of funding at local government level to promote local culture and establish independent recording studios, enabling the production of CDs in small quantities and the diffusion of music through the Internet, the training of sound technicians, and professional music training in communities (Gloria Braga, ECAD Offices, interview, May 2011).

There has not been a need for legislation to protect local music or discourage foreign music. Rather over a period of 30 years government had put programmes in place to build a national culture. Record companies were given an incentive to record Brazilian music. This was during a great time of selling CDs, and radio stations began to play Brazilian music. After the incentive was discontinued, the Brazilian people continued to buy Brazilian music. Currently there are 45 000 radio stations that play an average of 79% Brazilian music. Radio licences do not carry an obligation of having to play Brazilian music (Gloria Braga, ECAD Offices, interview, May 2011).

In line with government cultural policy, and responding to a market where CDs and DVDs were being replaced with digital music as well as a slump in sales of CDs and DVDs as a result of piracy, associations such as ABRAMUS searched for new

niches in the market to ensure fair and correct distribution of royalties. Reinterpretations of the work of older and more established musicians, and new emerging trends in music coming from the peripheral areas as well as gospel music offered growth points in a creative business strategy for ABRAMUS. Live concerts and shows, and the composition of music for daily television programmes have been focus points for ABRAMUS (Annual Report 2009).

1.10. CORPORATE GOVERNANCE

According to the current laws, the associations are not regulated and operate squarely on a non-governmental basis, within the ambit of civil society and free enterprise. Disputes are settled through the justice system (interview with Barbosa, MR, *Diretoria de Direitos Intelectuais*, Ministry of Culture, 7 May 2011). Users challenge prices through the courts. The courts are the only mechanism that handles disputes and the process takes a long time. At present, Brazil is in the process of reforming its copyright law. The reform proposals include more interventions from government, and strive to achieve a balance between protecting copyright and access to culture and knowledge.

1.11. DEVELOPMENTAL ASPECTS OF COPYRIGHT AND INTELLECTUAL PROPERTY

South Africa and Brazil cooperate on developmental programmes concerning the role of IP in achieving sustainable livelihoods. For IP to facilitate development, emphasis has been placed on the role of grassroots national projects and the work of NGOs.

The Centre for Technology and Society (CTS), which is part of the Rio de Janeiro School of Law at *Fundacao Getuilio Bargas* (FGV), is such a national grassroots project. The schools of law based in Rio de Janeiro and Sao Paolo promote law reform in Brazil for sustainable development and democracy. One of its foci, the reform of the traditional IP institution, deals with the interplay of law, technology and society. With a team of interdisciplinary staff, the school coordinates graduate and post-graduate programmes, including IP courses.

Prof. Paranagua has argued that the CTS has demonstrated, in practice, in the context of sustainable development, that open models can work better than traditional IP-based ones. The centre has been active in shaping the Access to Knowledge (A2K) movement in Brazil and beyond, and is able to share best practice. It has further been chosen to be part of the launching of the A2K Global Academy, together with other members from China, Egypt, India, South Africa and the US.

The Academy aims to explore new lines of research, including a comprehensive study on the potential liability of Internet service providers. Brazil and most countries of the A2K Global Academy have not yet resolved the issue of shutting off the Internet for users involved in file sharing versus the liability of Internet service providers. The A2K Global Academy aims to develop comparative models and a new draft Bill that will regulate the liability of Internet providers.

The Brazilian Ministry of Culture has further commissioned CTS to do a study on copyright and access to knowledge, which was presented to officials from the Ministry in 2006. The CTS Website became a national reference for access to knowledge issues in the country and is utilised by government and civil society. The website covers issues ranging from technological protection measures, digital locks, exceptions and limitations to copyrights, access to educational materials, and cultural diversity. Under this programme, numerous presentations have been made at conferences and lectures.

The CTS director, Prof. Paranagua, has served as the chairperson of iCommons International, giving the work of the CTS international exposure. The CTS further created a group to provide legal support for free and open-source software research. The centre further organised a national contest for research projects dealing with practical problems connected to free software businesses. The winners were sponsored to write papers dealing with these practical issues. The contest attracted impressive candidates from all over the country.

Another programme (*Culture Livre* or Free Culture), funded by the Ford Foundation, aims to build a 'Southern' dialogue and perspectives on culture, media and IP. One of its objectives is to monitor the WIPO Development Agenda and to put into practice alternative IP licensing models. It is a joint project between CTS in Brazil and the University of the Witwatersrand's Learning Information Networking and Knowledge Centre in South Africa. The project has managed to bring Brazilian and South African artists together to promote the exchange of content.

The FGV/CTS became the first academic institution from the global south to have permanent accreditation before WIPO since 2005, participating regularly in WIPO meetings, with Prof. Pedro Paranagua as Brazil's representative at WIPO.

Other activities of the CTS include:

- Publishing academic books;
- Doing applied research;
- Teaching graduate and post-graduate level courses;
- Delivering training to patent and trademark examiners;
- Writing accessible articles for magazines, newspapers, and Internet blogs;
- Giving interviews to radio and television channels;
- Training judges and military officials; and
- Delivering lecturers to a variety of stakeholders, including the Supreme Court of Brazil.

The CTS works on the basis of the principle that informing all walks of Brazilian society is necessary to ensure effective debate on IP issues (Pedro Paranagua, *Strategies to Implement Wipo's Development Agenda: A Brazilian Perspective and Beyond*). The Internet has been used effectively to provide ordinary citizens with access to knowledge about IP.

2. FRANCE

2.1. INTRODUCTION

France was selected because French copyright law was developed in the 18th century, at the same time as copyright was developed in the UK. Based on the 'right of the author' instead of 'copyright', the philosophy and terminology of French copyright law is different from that in common law jurisdictions.

The French law defines two distinct sets of rights:

- Proprietary rights, and
- Moral rights.

Proprietary rights allow authors to exploit their works for financial gain. Authors have the right to authorise reproduction of works or public performances, and may also prevent the reproduction of works.

The French copyright law treats a protected work as an extension of the personality of the author which is protected by certain moral rights. The Author has the right to "respect of his name, of his status as author, and of his work" (Article L121-1).

Contrary to the position in most common law jurisdiction, the breach of propriety right is a criminal offence in France. This attracts a fine of up to €300 000 (about US$375 150 or £247 100 as of July 2010).

List of entities visited:

- CISAC (Representative of Authors Worldwide);
- SNAM (Musicians Union of France);
- Ministry of Arts and Culture (Secretary General);
- SCAM (Audio Visual);
- ADAMI (Featured Artists);
- SPEDIDAM (Non-Featured Artists);
- SPRE (Collecting Agency for Performers/Producers);
- SPPF (Small Recording Labels);
- SORECOP (Collecting for Private Copying); and
- SCPP (Record Companies Majors).

SPRE collects 'equitable compensation' (the equivalence of our needletime royalties), which are then distributed by member companies (SCPP, SPPF, ADAMI and SPEDIDAM) to producers and performers. SPRE is also co-managed by these four member companies.

The above mentioned four companies distribute the royalties directly to performers and producers on the basis of statements provided by television and radio stations or to other surveyed distributors of music.

In accordance with the Act, a portion of the total royalties collected by SPRE is intended to be used for general activities, for example:

- Aid for creation,
- Dissemination of the performing arts, and
- Training of artists; and
- The financing of numerous actions and events.

2.2. ASSESS THE EFFICIENCY OF THE RELEVANT LEGISLATIONS

The French Intellectual Property Code regulates the formation of a collecting society, Article L321-1 to L321-13. A standing committee is established to oversee royalty collection and distribution.

The societies are obliged to report to the Minister in charge of Arts and Culture at the end of every financial year. The information contained in these report is verified by the auditor for honesty and consistency with the accounting documents of the society.

2.3. ASSESS THE EFFECTIVENESS OF THE STRUCTURE OF COLLECTING SOCIETIES

Most societies operate on the basis of one society per right, though there is some duplication, particularly as regards to audio-visual works.

The level of the competition is not that high among the collecting societies in France, however, there is competition between ADAMI and SPEDIDAM. ADAMI represents featured artists and SPEDIDAM non-featured artists.

Ownership structures are determined by the members during their General Assembly. Members have all necessary rights, voting rights and full participation within societies.

2.4. COLLECTION OF ROYALTIES

There are simple agreements between societies and the users since they all account to the Ministry of Arts and Culture. In the case of sound recording rights, SPRE collects on behalf of ADAMI, SPEDIDAM, SPPF (small record companies) and SCPP (major record companies). SACEM collects on behalf of authors, composers and publishers. SORECOP collects for everybody.

Tariffs are determined by all stakeholders, with the endorsement of Ministry of Arts and Culture**.**

France has developed a data-sharing mechanism to track the usage of music in radio and television, mobile phones and other mediums. Societies or agents invoice broadcasters. SORECOP, a collecting society for private copying, has an agreement with SACEM to collect royalties for authors only, while SPRE collects on behalf of Adami and SPEDIDAM.

Most users keep automated cue sheets, which societies or agents monitor to enforce compliance.

Non-members are traced and their royalties protected. If notification for royalty distribution happens before a non-member is accepted then his or her royalties will be released in the next distribution period.

2.5. DISTRIBUTION OF ROYALTIES

Royalty distribution is done twice a year, with support programmes in place that compel all collecting societies to support the social needs of authors, performers, publishers, etc.

The Article of Association (Article 9) stipulates a 20% ceiling in terms of administration.
As determined by the Act, unclaimed royalties are held for 10 years, after which they are administered by the society for the social needs of members and their heirs.

International royalty distribution is applied to all members of CISAC without discrimination. In France, SPRE (Equitable Remunerations Society) only distributes to countries that recognise the right. The money that is not distributed becomes the property of the society, which should report to the Minister in charge of Arts and Culture**.**

2.6. RELATIONSHIPS BETWEEN THE RECORDING ENTITIES AND THE ARTISTS

The nature of the agreement between recording entities and artists ensures that the validity of exclusive rights afforded by the author may not exceed five years; the interruption of performance for two consecutive years shall automatically terminate the contract (Article L132-18).

SACEM in terms of its statutes provides advances to members without any interest, and not against royalties.

Since collecting societies are regulated by the government, the relationships between collecting societies and artists are sound.

2.7. TRAINING OF PROSPECTIVE ARTISTS

According to SACEM statutes, 10% is made available for the training and social needs of members (Article 33).

The French Intellectual Property Code, Article L321-9, compels collecting societies to provide action training programmes for artists.

2.8. COPYRIGHT INFRINGEMENTS

Collecting societies for recording companies SPPF/SCPP play a pivotal role in educating the community, and they also played a significant role during the establishment of HADOPI (which deals mainly with digital illegal downloading systems).

Heavy penalties are imposed, up to €15 000 or five years' imprisonment. The breach of proprietary rights is a crime.

2.9. OTHERS

In France, the Copyright Law is under the Minister in charge of Arts and Culture. All issues that are IP related are controlled and implemented by Arts and Culture.

2.10. CONCLUSION

HADOPI (High Authority for the Transmission of Creative Works and Copyright Protection on the Internet) is a government agency headed by a Board of nine members, three of which are appointed by the government, two by the legislative bodies, three by judicial bodies and one by the Superior Council of Artistic and Literary Property. The agency is vested with the power to police Internet users.

HADOPI's mandate is to ensure that Internet subscribers "screen their Internet connections in order to prevent the exchange of copyrighted material without prior agreement from the copyright holders" (Article L336-3 of the Bill).

SPRE is a good method of collection for equitable compensation (known as needletime in South Africa). SPRE collects, whereas the co-owners distribute to rights owners.

The Audio-Visual Collecting Society for Actors, which collects on behalf of right owners, is another example of good legislation in France.

3. INDIA

3.1. INTRODUCTION

The purpose of the benchmarking exercise was to ascertain the level of key activities of the music copyright environment in other countries in relation to the South African environment. This exercise included the following activities:

- Comparing the legislations;
- Assessing the effectiveness of the collecting societies;
- Distributions and collections of the royalties; and
- The relationships between the parties with the entire value chain.

India was one of the seven countries selected for benchmarking. India was chosen based on:

- It is still a developing country with challenges that are not very different from those in South Africa;
- India's music industry is successful and local music is exported globally;
- India has been successful in preserving its culture in a number of different areas;
- It is a former British colony like South Africa and, accordingly, the earlier legislations were inherited from the UK; and
- It is a big country (with a population in excess of one billion) and, as such, any potential challenge that may exist within the music copyright environment is expected to be found in India.

The following institutions were visited in India at the beginning of June 2011:

Institution's Name	Purpose of the Visit
Registrar of Copyrights	To obtain an understanding of the role of the Copyright Registrar and the challenges faced by him with regard to the regulation of the collecting societies.
Research and Information for Developing Countries	To obtain an understanding of copyright legal framework and the structures in place to support the Act.
RKD (Recording entity)	To obtain an understanding of the functioning of the Indian music industry.
Copyright Board (Ministry of Law and Justice)	To obtain understanding of the effectiveness of the copyright dispute resolutions.
The Indian Performance Right Society Limited	To obtain understanding about the functioning of the collecting societies for authors and composers.
PPL (Due to logistics problems, the meeting was cancelled)	To obtain understanding about the functioning of the collecting societies for sound recording.

3.2. Relevant Legislations

The present copyright law in India is Copyright Act of 1957, which was preceded by the 1914 Copyright Act that incorporated most of the provisions of the British copyright law. The current Act has been amended three times (1992, 1994 and 1999) and a new set of amendments is under consideration.

Copyright, as provided by the Indian Copyright Act, is valid only within the borders of India. To secure protection to Indian works in foreign countries, India is a member of the following international conventions on copyrights:

- Berne Convention for the Protection of Literary and Artistic works;
- Universal Copyright Convention;
- Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms;
- Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties; and
- Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS).

The duration of copyright is as follows:

- Literary, dramatic, musical and artistic works published during the life time of author = life + 60 years; and
- All other works: 60 years from the date of publication.

The Indian Copyright Act, 1957 provides for recourse to the following judicial/quasi-judicial organs to administer the provisions of the Act:

- Registrar of Copyright;
- Copyright Board;
- Civil courts;
- Criminal courts; and
- High courts.

3.3. STRUCTURE OF COLLECTING SOCIETIES

The collecting societies are registered under Section 33 of the Indian Copyright Act, 1957 as registered Collective Administration Societies. Such societies are formed by the copyright owners. The minimum membership required for registration of a society is seven years. Only one society is registered to do business in respect of the same class of work (one society one right). A collecting society can issue or grant licences in respect of any work in respect of any other right given by the Copyright Act.

The registered collecting societies in India are:

- For cinematograph and television films: Society for Copyright Regulation of Indian Producers for Film and Television (SCRIPT);
- For musical works: The Indian Performing Right Society Limited (IPRS);
- For sound recording: Phonographic Performance Limited (PPL); and
- For reprographic (photocopying) works: Indian Reproductive Rights Organisation (IRRO).

The licences governed by the Copyright Act may only be granted by the registered copyright societies (except by the owners in their individual capacities). The registration of a collecting society may be suspended pending inquiry and an administrator may be appointed as a caretaker of such society. The registration may be cancelled by the Registrar if a society is being managed in a manner detrimental to the interests of the owners of the rights concerned.

In terms of the Act, the Indian collecting societies are required to:

- Accept exclusive authorisation to administer rights by issue of licences or collection of licence fees or both;
- Conclude agreements with foreign collecting societies;
- May not discriminate between Indian and foreign works;
- Administrative expenses may not exceed 15% of the total fees collected;
- Must be under collective control of the members;
- Frame a tariff scheme;
- Distribution schemes to be approved by the members; and
- Obtain audited accounts annually.

The registers maintained by the collecting societies are as follows:

- Register of members;
- Register of agreements;
- Register of fees; and
- Disbursement registers.

The details of the annual returns to be filed with the Registrar of Copyrights are:

- The minutes of the members of the Annual General Meeting;
- The up-to-date list of members;
- The tariff scheme;
- The distribution scheme; and
- A statement approved by its Board of Directors setting out a full and detailed account of all its activities during the year in relation to the rights of members.

3.4. COLLECTION OF MUSIC ROYALTIES

Only 30% of the collectible royalties are being collected. This is due to the following:

- The industry is still immature;
- The level of awareness among users is too low;
- There is a high level of resistance to payments among the users;
- There is a significant number of disputed pending cases with the Copyright Board and the courts; and
- The collecting societies are not yet geared to pursue the small informal businesses.

IPRS has reciprocal agreements with 94 different collecting societies around the globe. According to the annual financial statements for IRPS for the year ended 31 March 2010, approximately 25% of the total revenue collected was generated outside India. This is due to the popularity of the Indian music globally.

IPRS uses the standard tariffs in respect of public performances for all users. The tariffs are determined by IPRS based on international benchmarking and taking into account local business activities. They are adjusted each year, taking into account the CPIX for the country. Users who are unhappy with the tariffs are able to refer the matter to the Copyright Board for review.

With regard to broadcasters (communication to public), the sliding scales tariffs are based on the music usage by the respective broadcasters – for example, a broadcaster that dedicates 90% of the available time to music pays 9% of the total advertising revenue; for 80% usage, 8% is payable; and for 70% usage, 7% is payable; and the ratio is the same for the other utilisation levels (60%, 50%, 40%, 30%, 20%, 10%). With regard to the sound recordings, the Copyright Board recently completed a case where it was decided that the broadcasters should pay a flat rate of 2% (of the total advertising revenue) for sound recording. The maximum fees payable by the Indian radio broadcasters (excluding mechanical rights) is 12% (10% + 2%) and the minimum fees amount to 2% (0% + 2%), assuming that the radio station does not play music.

All broadcasters are required to keep cue sheets, which are submitted to the relevant collecting societies on a monthly basis. The non-broadcasting users do not use the cue sheets and most pay their annual royalty fees in advance.

The collecting societies do not collect royalties on behalf of non-members. With regard to non-broadcasters, it is not possible to distinguish between the members and non-members because there are no cue sheets and, by default, the money for the non-members is collected and distributed to the members.

3.5. DISTRIBUTION OF ROYALTIES

Royalties are distributed to members twice a year, in September and February. The money collected may not be used for anything other than royalty distribution and administration, without the approval of the members. This can be evidenced through the audited financial statements of IPRS. There are no investments, other than the cash on hand (waiting for distribution) and fixed assets (for operational requirements).

The royalty distributions (from broadcasting and non-broadcasting users) are based on the broadcasting usage information.

Any unclaimed royalties are retained by the collecting societies and written back after three years. The beneficiaries of unclaimed royalties are not traced by the collecting societies.

The administration cost (IPRS) as a percentage of the collections was 15,4% for 2009 and 13,3% for 2010.

IPRS was not able to provide a split between local and foreign distributions because of the fact that most foreign artists have representations in India.

Interest earned from the cash on hand is distributed with royalties on the same ratio.

For public performances (including mechanical rights), the distribution ratio is as follows:

- Authors = 20%,
- Composers = 30%, and

- Publishers = 50%.

For sound recording, the recording labels get 100% of the distributions and they, in turn, distribute the performers' share based on the agreement between the parties.

3.6. RELATIONSHIP BETWEEN RECORDING ENTITIES AND PERFORMERS

Due to the lack of strong unions for the artists, in most cases the partnership relationship between the recording entities and their respective artists is not place.

In most cases, the performers have session agreements with recording artists whereby they are paid once-off and upfront and in return relinquish all their rights. The basis for determining the upfront payments are ad-hoc and unscientific.

The industry is entirely dominated by the recording entities.

3.7. PROTECTION OF MUSIC INDUSTRY AGAINST MUSIC IMPORTS

There are no legislations (or practices) in place to protect the local artists.

3.8. CORPORATE GOVERNANCE

There are no recognised practices in place to guide organisations with regard to acceptable corporate governance practices, and the corporate governance is weaker than the international standards.

With regard to corporate governance, the following matters were noted with regard to the IPRS:

- The directors are voted by the members during the Annual General Meeting (AGM);
- All members are invited to the AGM;
- The approval of the members is sought if the society wants to use the cash for anything other than the distributions;
- The annual report is limited to the abbreviated income statement, balance sheet and the directors' report. The Chairman's report is not part of the annual report;
- The published annual financial statements do not comply with the International Financial Reporting Standards (IFRS) and, accordingly, the level of disclosure is limited;
- The directors' pay is not disclosed by the published accounts;
- The qualifications, skills and experience for the senior management and directors are not disclosed to the members; and
- There is no evidence that the Board sub-committees such as audit and risk committees are in place.

3.9. TRAINING OF PROSPECTIVE PERFORMERS

The school and college training is limited to the technical aspects of music and, accordingly, most prospective musicians are ignorant about their rights with regard to copyright issues.

Ad-hoc workshops on copyright are conducted, but their results are not yet visible.

3.10. COPYRIGHT INFRINGEMENTS

Other than the ad-hoc police investigations, a structured and effective approach to the copyright infringements could not be identified.

The following acts are not considered to be infringement:

- Performance in an educational institution;
- Performance by an amateur club;
- Making three copies of a book, not available for private use;
- Reproduction of public material;
- Use in religious or official ceremonies, including marriage processions;
- Importing one infringing copy for private and domestic use; and
- Others.

Penalties and punishments available for the copyright infringement offenders are as follows:

- First offence – six months' imprisonment and Rs50 000 fine;
- Second offence – one year imprisonment and Rs100 000 fine; and
- Maximum three years' imprisonment and Rs200 000 fine.

3.11. CONCLUSION

The good elements of the Indian copyright system include:

- All copyright collecting societies are legislated and regulated by the Copyright Registrar;
- The number of collecting societies is limited. Only one collecting society is allowed to service one set of rights. The level of confusion among the members and the users is limited. There is only one set of tariffs per right;
- The regulations stipulate the maximum amounts (15% of the total collection) that may be retained by the collection societies to compensate for the administration expenses;
- The Copyright Board (Tribunal) is efficient. The members of the Copyright Board meet weekly to resolve disputes between the parties;
- The users are forced to continue to pay for the use of rights at the rate of tariffs prescribed by the collecting societies, even if there is a dispute about the tariffs being charged and the matter has been referred to the Copyright Board or to the courts. If the outcome of the tariffs dispute is in favour of the user, the collecting society is instructed to refund the differences between the approved tariffs and the requested tariffs; and
- The copyright is governed by the Copyright Act of 1957, which has been amended several times. The Act is simple and it has no ambiguity and it is understood by most of the relevant people.

Areas that require improvements include:

- Although there is one collecting society per right (for example, IPRS is the collecting society for musical works and PPL is the collecting society for sound recording) in most cases, the users who are obliged to pay for the sound recording are also obliged to pay for the public performance rights. The fact that they have to deal with both PPL and IPRS is irritating and inefficient;
- The levels of synergies arising from the existence of two music collecting societies are minimised (no sharing of users databases, collection efforts are duplicated, negotiation efforts are also duplicated);
- A high rate of tariffs disputes are referred to the Copyright Board. This is due to the fact that the collecting societies are responsible for setting up the tariffs and the users generally believe that, due to the monopolistic environment, the process of setting up the tariff is always in favour of the collecting societies;
- Only 30% of the current users of music rights pay for the utilisation of rights. This is because there is a significant number of informal businesses; some of the users are unaware of the fact that they need licences; and the inspections cost is too high to justify the tracking of all users;
- The local industry is not protected against music import. This, however, is not a problem for the country because the exports exceed import;
- The country has not yet adopted the International Financial Reporting Standards (IFRS) and as such the level of accounting disclosure (transparency with regard to the financial status of the collecting societies) is limited;
- No corporate governance practices are in place to guide the entities; and
- For sound recording, the tariffs are not published and there is high level of inconsistency between users within the same industry.

4. NORWAY

4.1. MEETING WITH KOPINOR – the dti

On Monday, 6 June 2011, I met with KOPINOR at their offices in the city centre of Oslo, Norway. I had travelled to the meeting venue via the bus shuttle from my out-of-town hotel. The bus took me to the Oslo Airport, where I boarded the local train to National Theatre Station in the city centre. I was to repeat the journey for the next few days, sometimes alighting at OSLO Central Station.

At the KOPINOR offices I was met by Heidi Wollo, before meeting with Helge and the Deputy Executive Director, Mr Hans-Petter Fugland. The title of our topic was: “Collective Management of Reprographic and Similar Rights”. It relates to the terms of reference that states:

> Assess licensing agreements that universities, other institutions of higher learning and training institutions have with collecting societies regarding royalties for copyright work or literary work; and how these royalties are distributed to collecting societies and from there on to artists, composers, authors and/or publishers. The CRC should assess, advise and make recommendations.

KOPINOR came into being in 1980. During the 1970s, the Norwegian government took an interest in the publishing of local books in order to promote the creative economy through writing. The government wanted creative people to make a

meaningful living out of their creative works. KOPINOR represents 22 of the 38 organisations functioning in the copyright domain within Norway.

KOPINOR also signs international reciprocal agreements with other similar bodies. Through its development fund, it is currently helping Malawi to draft a model law for the harmonisation of the collection and management of all rights related to copyright.

Collective rights management organisations in Norway include:

- BONO;
- FONO;
- GRAMO;
- KOPINOR (the Reproduction Rights Organisation of Norway);
- NORWACO; and
- TONO.

Their role in the copyright regime is to accommodate the users' need to use works (in a convenient and lawful manner) wherein KOPINOR acts as a facilitating agent. They also manage the rights of the creators, producers and publishers. Their focus is on growing the industry through effective use and management of the copyright regime, as do all other similar collective rights organisations.

KOPINOR is a member of IFPRO – the International Federation of Reproduction Rights Organisations. Its objectives are to secure the economic and moral rights for authors and other right holders on a non-exclusive basis where the rights holders find it appropriate.

KOPINOR concludes licences between users and author societies.

In Norway, about 650 million copy pages are made from copyright works each year for internal institutional use. KOPINOR licenses and collects fees for about 90% of this volume. There is also a notable increase in digital use, around which strategies are currently being formed.

KOPINOR'S member organisations are listed in the table below.

FOCUS AREA	MEMBER ORGANISATIONS
AUTHORS LITERATURE	1. The Non-Fiction Writers' and Translators' Association 2. Norwegian Authors' Union 3. Norwegian Association of Literary Translators 4. Norwegian Writers for Children 5. Norwegian Playwrights' Association 6. Norwegian Comedy Writers' Association
MUSIC	7. Norwegian Society of Composers 8. NOPA – Norwegian Society of Composers and Lyricists 9. New Music Composers Group

FOCUS AREA	MEMBER ORGANISATIONS
PRESS	10. Norwegian Union of Journalists 11. The Association of Norwegian Editors 12. Norwegian Critics Association
VISUAL ARTS AND PHOTOGRAPHY	13. GRAFILL – Norwegian Organisation for Visual Communication 14. The Association of Norwegian Visual Artists 15. The Norwegian Association of Professional Photographers 16. The Norwegian Association of Arts and Crafts 17. The Norwegian Association of Fine Arts Photographers
PUBLISHERS	18. The Norwegian Publishers' Association 19. The Norwegian Music Publishers' Association 20. Norwegian Media Business Association 21. The Norwegian Specialised Press Association 22. Norwegian Association of the Periodical Press

KOPINOR Organisational Structure:

- Council of Representative;
- Executive Board;
- Executive Boards Working Committee;
- Distribution Committee;
- Nominating Committee;
- Arbitration Tribunal; and
- International Affairs Committee.

4.1.1. ESTABLISHING A RIGHTS PORTFOLIO

According to KOPINOR, one of three options can be followed:

1. Option 1: Written power of attorneys from the individual authors to its rights holders' organisations or directly to the Reproductive Rights Organisation;
2. Option 2: Mandate through the statutes of the organisations and membership. KOPINOR is mandated by member organisations and their members via the bye-laws and through representation in decision-making bodies; and
3. Option 3: Mandate by foreign rights holders via bilateral agreements with foreign RROs.

4.1.2. KOPINOR OPERATION

All relevant categories of rights holders, authors and publishers to text, visual material and printed music are represented

KOPINOR encourages building and involvement of strong and representative rights holder organisations.

Cooperation and consensus-building is the guiding principle of engagement. IFFRA has model contracts for bilateral agreements.

4.1.3. LICENSING AND LEGAL REGIMES

In Central Europe, the practice is for any legal entity that owns a photocopying machine to pay a levy on the cost of that machine.

Legal Licence can be done in a non-voluntary compulsory licensing system, such as the above. Voluntary licence with legislative support can happen where extended collective licensing is the norm, such as in NORDIC countries. There must be a legal presumption.

Voluntary licensing is based on sole mandate. Contracts with indemnity clauses are signed.

4.1.4. EXTENDED COLLECTIVE LICENCE

KOPINOR negotiates licences equally for members and non-members.

The Nordic solution for extended collective licensing is:

> If an organization has been mandated by a substantial part of authors in the field to license, it must cover also non-members. Treat members and non-members equally.

In the case of Norway, the collecting organisation must be approved by the Ministry of Culture.

KOPINOR has licensing agreements with;

- Education: primary and secondary schools, universities and colleges; and
- Public Administration: municipalities and countries, state departments:
    - The Norwegian Church;
    - Private Business and Industry ;
    - The Norwegian Band Federation; and
    - The National Library.

4.1.5. LICENCES

Licences are issued for:

- All published material, including Internet;
- Blanket licensing, which is not title specific;
- Photocopying, printouts, scanning and storage;
- Downloading from Internet or the sources; and
- Use in Learning Management System, such as virtual learning environments, interactive white breads, projection, etc.

4.1.6. SCOPE

- 15 % or one chapter of a book;
- Two articles from one scientific journal;
- No limitations on periodicals;
- No limitations on websites; and
- Strict limitations for sheet music.

4.1.7. COLLECTION ESTIMATE

This is done through statistical surveys from a sample of users

4.1.8. DEVELOPMENT ACTIVITIES

When foreign works are copied, it is sometimes impossible to identify their country of origin. The remuneration claimed is deposited with KOPINOR'S Development Fund. From 2008, some of the funds were transferred to NORCODE (The Norwegian Copyright Development Association).

KOPINOR does statutory licences on title-specific examination as well as the licensing of audio books for visually impaired people. It also does clearance services, which go beyond the blanket licensing limitations:

1. Purely voluntary;
2. Work through a reporting system; and
3. Most money collected goes to Britain.

4.2. MEETING WITH THE NORWEGIAN MUSICIANS' UNION (MFO) ON 7 JUNE 2011

4.2.1. HISTORY

The Norwegian Musicians' Union came about as a result of the merger of three unions in 2001. These included:

- The Norwegian Church Musicians' Union (established in 1906);
- The Norwegian Musicians' Union (established in 1911); and
- The Norwegian National Opera and Ballet.

4.2.2. MEMBERSHIP

The union currently has 7 000 members drawn mainly from:

- Performing musicians or artists working in the fields of culture;
- Music producers;
- Music educators (self-employed);
- Heads of music schools;
- Music therapists;

- Ballet teachers;
- Teachers in the fields of drama and theatre;
- Employees in the fields of visual arts;
- Higher education staffers;
- Musicians, singers and dancers, members of theatre orchestras;
- Church organists;
- Stage managers;
- Administrative staff in the field of music and culture;
- University students; and
- Choir conductors.

The union was formed to get a better professional life and better working conditions for the musicians and to advance their careers. It works through collective agreements with employers. It also advises those who are self-employed and acts as partner with lawyers standing for musicians in disputes.

The union does political work in the form of lobbying for proper legislation and the whole policy for musicians to do their work properly. It works well with the Ministry of Culture.

Its source of income is from members contributions. The union is a member of the 800 000 strong Norwegian Confederation of Trade Unions.

It has 14 employees and grapples with current issues in the music sector such as:
- The role of the Internet;
- Keeping IPR at the centre of the legislative processes;
- Piracy; and
- The falling levels of consumption of recorded (CD) music.

The union facilitates good working relations between collecting societies and producers. Its strong affiliate collecting societies are:
- NORWACO,
- GRAMO, and
- TONO.

The union is interested in helping other countries to build strong collecting societies.

4.2.3. BENEFITS

Services to its members include:
- Advice and support in tax and welfare;
- Help with application for financial support for recording CDs, tours, and projects;
- Help with other types of contracts such as recording, publishing and management contracts;

- Debt collections service – on behalf of its members where there are delayed payments due; and
- Various types of insurance policies.

4.3. MEETING WITH NORWACO – 9 JUNE, 2011

4.3.1. BACKGROUND

NORWACO represents the members of 34 Norwegian rights holder organisations for authors, performing artists and producers. It safeguards the interests of the rights holders in the form of collective administration.

4.3.2. MEMBERSHIP

The member organisation represents 37 000 individual rights holders. Through their organisations, the right holders give NORWACO mandates in areas where a united effect of several organisations is the best way to go.

4.3.3. COLLECTIVE AGREEMENTS

NORWACO has agreements and responsibility for the collection and distribution of remuneration funds in the following areas:

- TV distribution (retransmission of TV and radio channels);
- Recording of TV and radio channels for educational use and media monitoring;
- Video and satellite distribution of Norwegian feature films; and
- Individual distribution of the state-funded compensation for lawful private copying (not piracy).

The agreements entered into by NORWACO are supplemented by extended collective licence provision in the Norwegian Copyright Act.

Extended collective licences are used where it is impossible for users to enter into agreements with all rights holders, for example with regard to the transmission of TV and radio channels.

The rules relating to extended collective licences supplement the agreements between the users and the rights holder organisations, and give the agreements between the users and the rights holders binding effect. This also applies to non-organised rights holders. NORWACO enters into exchange agreements with foreign rights holders. It enters into exchange agreements with organisations in other countries to ensure that remuneration funds reach foreign rights holders.

Distribution of remuneration usually takes place the year after NORWACO has collected the remuneration.

4.4. MEETING WITH TONO

TONO manages rights on behalf of Norwegian and foreign music publishers and enters into agreements concerning the right to perform and record music and lyrics.

It was founded in 1928 by the Norwegian Composers' Union.

4.5. MEETING WITH GRAMO

4.5.1. GRAMO

GRAMO is the Norwegian joint collecting society for performing artists and producers. The main objective is to negotiate, collect, administer and distribute remuneration to performers and producers when their recordings are used for broadcast or public performance. Martin Grondahl is the Managing Director. In 2010, Gramo had 26 employees, a total of 11 195 performers and 2 720 producer members.

4.5.2. COLLECTION OF REMUNERATION FOR BROADCASTING AND PUBLIC PERFORMANCE

Section 45b of the Norwegian Copyright Act establishes a right of performers and producers to remuneration when their recordings are used for broadcasting (from 1990); and for public performance (i.e. music in shops, restaurants, cafes and hotels etc.) from 2001.

Broadcasting and dubbing revenues combined remained GRAMO's largest source of income. Public performance licensing grew by 12,45% to a total of NOK50,5 million in 2010, reflecting an increase of music users. The main administrative task has been to conclude more new agreements and collect more remuneration from businesses that play recorded music.

4.5.3. COLLECTION OF A LEVY FOR THE FOUNDATION FOR PERFORMING ARTISTS (*FOND FOR UTOVENDE KUNSTERE*)

A levy for the foundation for performing artists has been established under Norwegian law for the broadcasting and public performance of non-protected repertoire. The levy has come into force both for broadcasting and public performance. GRAMO collects the levy on behalf of the foundation. The total amount collected in 2010 on behalf of the Foundation for Performing Artists was NOK40,1 million.

4.5.4. DISTRIBUTION OF REMUNERATION

In 2010, GRAMO distributed the main remuneration from broadcasting and public performance for 2009. Gramo distributed a total of NOK98,9 million in the main settlement for 2009.

4.5.5. SUMMARY

KOPINOR takes responsibility for the collective management and distribution of reproductive rights. It enters into agreements with schools, universities, government and other users of reproductive materials.

TONO has exclusive rights for composers and lyricists in relation to the performance of their entire works at public spaces such as hotels, shops etc.

GRAMO manages rights in relation to neighbouring rights as far as performing artists are concerned. It collects from restaurants, bars and night clubs on behalf of performing artists, not composers.

NORWACO collects and manages from cable owners.

5. SENEGAL

Meetings were held with the following parties:

- Association of Phonographic Producers;
- Association of Senegalese Comedians;
- Association of Senegalese Writers;
- Association of Musicians in Senegal; and
- *Bureau Senegalais Du Droit D' Auteur* (BSDA), a collecting society controlled by the government.

BSDA is responsible for the collection and distribution of all forms of royalties in Senegal. It is administered by the Board of Directors consisting of a Chairperson, two representatives of the composers and two writers.

It issues blanket licences covering the complete repertoire of Senegal and the rights of foreign owners.

Senegal has drafted amendments to the existing Copyright Act and these have been forwarded to the government for legislation.

Senegal has ratified international treaties, which have not yet been implemented within the country.

There is a lack of transparency with regard to the computation of royalties distributable.

Most of the agreements between the sound producers and artists allow for the sale of all rights upfront by the artists to the sound producers.

There are no big international sound producers in the country.

Sound recordings known as neighbouring rights are recognised and the law requires a 50/50 split between the recording entities and performers.

6. SWITZERLAND

6.1. INTRODUCTION

A benchmark study was conducted of the collective management of copyright in Switzerland. A range of stakeholders were consulted, including: SUISA, SWISSIMAGE and a representative of the IIP. SWISSPERFORM was not able to consult in person but filled in a questionnaire.

6.2. STRUCTURE OF COLLECTING SOCIETIES

In Switzerland, there are five collecting societies. These societies were established as additional repertoires. ProLitteris and SUISSIMAGE were first authorised to administer rights in 1982. In 1992, SSA (Swiss Society of Authors) were authorised to manage the rights pertaining to, inter alia, dramatic and choreographic works. SWISSPERFORM was established in 1993.

There is one society per repertoire according to the artistic field (literary, music, etc.), with the exception of neighbouring rights (where there is one collecting society). SUISA is the collecting society for authors' rights and SWISSPERFORM is the collecting society for neighbouring rights. If more than one collecting society manages the invoicing under a tariff for all, the user will only have to deal with one collecting society. Collecting societies may consist of cooperatives (SUISA) or an association (SWISSPERFORM). Swiss collecting societies have reciprocal agreements with collecting societies from other jurisdictions, for example, SWISSIMAGE has entered into 65 reciprocal agreements with producers and authors of audio-visual works from other jurisdictions, with the notable exception of South Africa.

The Federal Act on Copyright and Related Rights of 9 October 1992 (the Copyright Act) provides for the compulsory collective management of various rights, including the retransmission rights, remuneration for private copying ('blank tape' levy) and business photocopying.

6.3. THE TARIFFS

6.3.1. THE PROCESS

Tariffs are approved through negotiations between groups of users and the collecting societies. Article 55 of the Federal Act on Copyright and Related Rights of 9 October 1992 (the Copyright Act) provides that the tariffs must be approved by the Federal Board of Arbitration for the Exploitation of Copyright and Related Rights (the Arbitration Commission) (http://www.eschk.admin.ch/eschk/de/home.html). The Arbitration Commission fulfils its functions in accordance with the procedures prescribed in the Administrative Procedure Act of 20 December 1968. The collecting societies and the relevant associations of users nominate members to the Federal Arbitration Board, and the members of the Board are appointed by the Federal Council.

Article 60 of the Copyright Act provides for principles of equitableness to be taken into account in approving the tariffs. In general, the licensing fee shall normally amount to a maximum of 10% of the proceeds from or cost of utilisation for authors' rights and a maximum of 3% for related rights; however, it shall be determined in such a way that the entitled persons receive equitable remuneration for administration carried out efficiently. Preferential tariffs are prescribed for the use of a work by a teacher for teaching in class.

Article 59(2) provides that the Arbitration Council may modify the proposed tariff after hearing the collecting society and the associations of users (such as DUN, SWICO, Swissstream, swisscable, Gastrosuisse and Hotelleriesuisse) involved in the procedure. The Federal Arbitration Board investigates the fairness of the tariffs and obtains the opinion of the Office of Price Control for this purpose. Federal Arbitration Board decisions on the approval of tariffs may be appealed to the Federal

Administrative Court and thereafter to the Federal Supreme Court. The final approved tariffs shall be binding on the courts (Article 59(3)).

6.3.2. THE TARIFFS

The approved tariffs are available online. The tariffs include SWISSPERFORM's radio broadcast tariff (which also caters for interactive Internet broadcasts) and is published at http://www.swissperform.ch/fileadmin/user_upload/documents/Tarife/2010_A_Radio_d.pdf.

Article 47 of the Copyright Act provides that where more than one collecting society collects royalties in the same field of utilisation, they shall draw up a joint tariff applying uniform principles and shall designate one collecting society as the joint office for payment. A common tariff has been established for background music. Common tariff 3A covers all repertoires (not only music but also neighbouring rights, audio-visual works, literary works, such as features on radio) that are broadcast as background music in public places. One society has been designated as the common office for payment (see (SUISA) Common Tariff 3a (Gemeinsamer Tarif 3a: Tariftext)) for domestic music on hold (see http://www.suisa.ch/de/services/download-center/). Similarly, SUISSIMAGE manages the common tariff for satellite broadcasting: http://www.suissimage.ch/fileadmin/content/pdf/3_Nutzer_Tarife/gt1-de.pdf (Common Tariff 1/ SUISSIMAGE).

The Swiss collecting societies are responsive to new technological developments and rapidly adapt their business operations to new modes of exploitation. For example, since 2005 Swiss collecting societies have been licensing users for mobile phone reception of television broadcasts and for the use of virtual Personal Video Recorders (vPVRs) for digital television.

Anomalies exist. It is, for example, surprising that SWISSPERFORM has no tariff for mobile ringtones. This collecting society advised that it is currently (July 2011) in negotiations with the mobile providers. SUISA also reported that it does not have strong licensing contracts with the mobile providers, but that it has contracts with the record labels, such as Sony. There seems to be fragmentation as far as digital rights are concerned and the expansion of the range of storage media on which remuneration is due.

6.4. THE 'BLANK TAPE LEVY'

The Swiss Copyright Law provides for the payment of a levy to collective rights management organisations on the importation and sale of media suitable for the recording of works, such as CDs and DVDs ('blank tape levy'). The amount payable is 19 cents for each DVD-RW and 7 cents for each DVD-R. In 2006, the Federal Arbitration Board approved the new joint tariff 4d, which expanded the tariff to MP3 recording devices. With the advent of 'music phones' such as the Apple iPhone, the collective rights management organisations submitted a joint tariff 4e, arguing that such devices should be treated on the same basis as the MP3 players. In March 2010, a reduced joint tariff 4e was approved in principle by the Federal Arbitration Board. This decision is being appealed by the manufacturers and importers of these devices.

6.5. COLLECTION OF MUSIC ROYALTIES

The collection of royalties in Switzerland is very effective. In 2009, the average amount of royalties collected per SWISSPERFORM employee (in monetary terms) was 3,8 million CHF. In 2010, the amount of royalties collected per employee was 3,15 million CHF.

Reception of broadcasts is regulated under media law – all users pay a licence fee for the reception of the broadcasts. Collection of radio and television licence fees has been entrusted to the private company Billag SA, which is the official Swiss body for the collection of licence fees for radio and television reception. Billag SA, which is based in Fribourg, is supervised by the Federal Office for Communications (OFCOM) in Bienne.

Users such as café and restaurant owners pay their broadcast licence together with their copyright licence. Where retailers do play radio broadcasts to their customers, they pay directly to Billag SA. Currently 65 000 pay Billag SA (broadcasting). Retail stores often pay directly to SUISSE because they only use CDs and do not play radio broadcasts to their customers. Currently 3 000 clients pay directly to SUISSE.

The collecting societies make use of inspectors to enforce payment. Billag SA has its own inspectors and SUISSE has three inspectors who regularly go to theatres to monitor that the repertoire used is reported for all performances.

Year	ProLitteris	SSA	SUISA	SUISSIMAGE	SWISSPERFORM
2007	28'723'000	17'986'000	132'276'000	46'390'000	35'559'000
2008	29'885'000	18'301'000	141'270'000	52'445'000	42'402'000
2009	29'330'000	19'816'000	136'859'000	49'409'000	43'031'000

Source: http://www.swisscopyright.ch/en/income-and-distribution/money-flows/market-development.html

6.6. DISTRIBUTION OF ROYALTIES

Article 48 of the Copyright Act regulates the distribution of royalties. Collecting societies must draw up distribution regulations and submit them to the supervisory authority for approval (see Article 52(1)). Section 49(4) provides that where contractual agreements exist between the original owners and third parties, such contractual provisions shall take precedence over the rules of distribution.

Users must provide the collecting societies with all the information they require to devise and apply the tariffs and to distribute the proceeds. Suissa noted that users must provide it with list of works played in terms of Article 51 of the Copyright Act. Broadcasters and concert organisers provide SUISA online with a list of the works used. Swiss musicians provide the data on handwritten forms.

Before the royalties can be distributed among the members, the royalties received from the joint tariffs are apportioned among the societies involved. Each society then distributes its share to its members. Detailed examples can be found on the page money flows (at http://www.swisscopyright.ch/en/income-and-distribution/money-flows/key-figures.html).

Article 49 of the Copyright Act provides that the collecting societies must distribute the royalties in proportion to the revenue it received from the individual exploitation of works and performances. They must take reasonable steps and appropriate steps to identify the copyright owners who should be remunerated. SWISSPERFORM has a division of 50% / 50% between performing artists and producers (see overview on distribution on page 18 of the 2010 Annual Report: http://www.swisscopyright.ch/fileadmin/user_upload/news/Publikationen/2010_SWISSPERFORM_Jahresbericht.pdf

SUISA distribution is done through the use of data from several sources, such as works played on radio stations (80%), CD sales, and cinema and television performances. SUISA does 25 distributions per year. SWISSIMAGE's distribution of royalties is complicated as there are various different factors to weigh. SWISSIMAGE strives to be as precise as possible, but it must also take efficiency requirements into consideration and thus has to make certain assumptions. It makes use of market research to determine which cable operator offers which channels and viewing patterns of users. Market researchers regularly contact 2 000 households.

SWISSPERFORM has developed weight factors to determine the type of programmes that users tape on DVDs etc. Experience has shown that these are not the same in the areas of distribution. Unclaimed royalties are reserved for five years. If they are not claimed, the money goes into another distribution,

The administrative costs are kept below 20% and some collecting societies' costs are below 10%.

16.4.10 Administrative costs 2010

Society	Receipts (CHF million)	No. of members	Administrative costs	Full-time staff
ProLitteris	34,9	10'116	19,80%	24
SSA	19,3	2'231	16,58%	17
SUISA	142	28'793	11,95%	164
SUISSIMAGE	50	2'582	6,20%	27
SWISSPERFORM	40,6	9'134	9,18%	13

Source: www.swisscopyright.ch, 2011

6.7. PROTECTION OF INDUSTRY AGAINST MUSIC IMPORTS

The performance of music is decidedly local in Switzerland. SWISSPERFORM has noted that the average ratio between local and foreign distributions of royalties is as follows (percentages exclude record producers and broadcasters):

- Local (Switzerland / Liechtenstein): 9,2 million CHF (71%); and
- Foreign: 3,8 million CHF (29%).

Article 48(2) of the Swiss Copyright Act provides that a portion of the proceeds may be used for social welfare purposes and for appropriate furtherance of culture, subject to approval by members. The roots of this provision can be traced back to

1957, when the Managing Director of PRS (UK), and CISAC introduced a provision in the standard reciprocity contracts allowing 10% of the income to be allotted to cultural and social projects. The need for provident funds and social care were first addressed and, thereafter, the focus shifted to the local music industry.

Copyright owners are largely responsible for the promotion of culture in Switzerland. Swiss music export, Music Charta and Pro Helvetia, to mention just a few, are all non-governmental initiatives to enhance the local cultural industries (refer to 'Benefits' in the annexure to this document for an exposition of the contribution made by the collecting societies).

The government has also launched various initiatives to boost local culture: SUISA Foundation of Music.
http://www.bak.admin.ch/themen/kulturfoerderung/00456/index.html?lang=de
http://www.bak.admin.ch/themen/kulturfoerderung/00482/00485/index.html?lang=de
http://www.bak.admin.ch/themen/kulturfoerderung/00486/01382/index.html?lang=de#sprungmarke0_12
http://www.bak.admin.ch/themen/kulturfoerderung/00497/index.html?lang=de

6.8. CORPORATE GOVERNANCE

The Swiss Federal Institute of Intellectual Property is the controlling authority of SUISA. It controls the administration of the collecting societies and examines and approves the annual report. It also has the power to issue directives concerning the obligation to provide information (see Article 50 and https://www.ipi.ch/en/copyright/collective-rights-management.html).

The Copyright Act also specifically provides that collecting societies may not aim to make a profit.

SUISA has reported that its management Board of Directors consists of 15 directors, comprised of five publishers, eight authors and two external members (of which one must be a law professor or a representative of the Swiss Parliament). SUISA has sub-committees, e.g. committees for finance; public relations; tariffs and distribution.

SWISSIMAGE subscribes to the 'four eyes principle' – anything of importance is always checked by someone else. Its board consists of 11 directors, comprised of five authors and scriptwriters and five distributors or right holders. The chairperson is usually a lawyer or a former Member of Parliament.

In 2009, the collective rights management organisations allocated more than CHF17,7 million for cultural and social purposes.

6.9. CONCLUSION

It would seem that Swiss authors' rights are managed well by the collecting societies. SUISA's members' content is evident from the number of complaints it handles annually. SUISA representatives reported that they only receive about four complaints from its members in a year. The representative from SWISSIMAGE noted that she annually receives from none to one complaint. Lastly, both societies receive lots of compliments from their members.

6.10. ANNEXURE

Benefits: (extract from http://www.swisscopyright.ch/en/cultural-and-social-affairs/support.html)

> In 2009, the collective rights management organisations allocated more than CHF17,7 million for cultural and social purposes. The following examples of subsidies and benefit payments by the collective rights management organisations illustrate the entire scope. Prolitteris: CHF1,6 million

In 2009, the Cultural Fund decided to provide special support for the Solothurn Literary Festival and other cultural events in the area of literature and visual arts.

Its Social Foundation paid out almost CHF1,3 million for pensions and CHF240 000 in aid and support payments.

16.4.11 SSA: CHF1.4 million

Among other things, the cultural fund awarded four grants each of CHF25,000 for the preparation of feature film screenplays (cinema) during the Locarno Film Festival. It also paid CHF80 000 to the Teleproduction fund established by SUISSIMAGE, SWISSPERFORM and SSA.

In 2009, the SSA Aid Fund (provident care foundation) was subsidised with a payment of almost CHF600 000 and the solidarity funds provided urgently needed financial aid.

16.4.12 SUISA: CHF6,4 million

In 2009, the SUISA Foundation for Music (cultural foundation), which disburses more than CHF2 million a year, supported the celebrations to mark the centenary of film music in conjunction with the UFMC (Union of Film Music Composers).

The Foundation for the Benefit of Authors and Publishers (provident care foundation) paid out pensions amounting to CHF3,4 million to authors and disbursements amounting to CHF1 million to publishers' provident care foundations.

16.4.13 SUISSIMAGE: CHF4,3 million

Among the projects supported by the cultural foundation in 2009 were 17 feature film productions and the development of 12 treatments. It provided significant sums to support the Teleproduction fund and the FilmPlus foundation in Italian-speaking Switzerland. Prizes were also awarded at festivals and other selective support measures rendered.

In 2009, the solidarity foundation paid out CHF440 000 in the form of pensions and CHF360 000 to the provident care institutions for employees of production companies. Financial support to individual needy persons amounted to more than CHF110 000.

16.4.14 SWISSPERFORM: CHF4 million

In 2008, the 10% allocated to cultural and social purposes was paid to the following institutions:

- Phono area: CHF2,2 million, of which:
  - 35% = CHF765 000 to the *Schweizerische Interpretenstiftung SIS* (Swiss Performing Artists' Foundation);
  - 35% = CHF765 000 to the *Phonoproduzentenfonds* (Phonographic Producers' Fund Foundation); and
  - 30% = CHF670 000 to the *Stiftung für Radio und Kultur Schweiz* (Swiss Foundation for Radio and Culture).
- Audiovisual area: CHF1,8 million, of which:
  - 80% = CHF1,45 million to the *Schweizerische Kulturstiftung für Audiovision* (Swiss Cultural Foundation for Audiovision); and
  - 20% = CHF350 000 for provident care and aid purposes was distributed to *Schweizerische Interpretengesellschaft* (Swiss Performing Artists Society, SIG), *Suisseculture Sociale, Artes et Comoedia Foundation*, CAST Provident Care Foundation, Film and Audio vision Provident Care Foundation (VFA). See http://www.swisscopyright.ch/

7. UNITED KINGDOM

7.1. INTRODUCTION

A benchmark study was conducted of the collective management of copyright in the United Kingdom. A range of stakeholders were consulted, including: the British Musicians' Union; the Intellectual Property Office (Copyright and IP Enforcement Directorate); the Phonographic Performance Ltd (PPL); the Copyright Licensing Agency (CLA); the Performance Rights Society (PRS); and UK Music. These entities not only made time available to conduct the interviews, but also made numerous valuable documents available to Professor Pistorius to inform the South African process.

7.2. STRUCTURE OF THE COLLECTING SOCIETIES

Music (public performance) has two collecting societies: PPL collects on behalf of performers and record labels and the PRS Alliance collects on behalf of composers and lyricists. PRS collects and distributes royalties for musical works that have been performed or played. MCPS collects and distributes royalties for musical works that have been reproduced or copied. PRS and MCPS are two separate collection societies joined together in an alliance – the MCPS-PRS Alliance – to deliver better value for their members. *PRS for Music* is the public brand name for this alliance.

The PRS was incorporated in 1914 as a non-profit company limited by guarantee. The PPL was formed by EMI and Decca in May 1934. PRS administers the rights of public performance, broadcasting and diffusion by cable on behalf of their members consisting of:

a) composers of music;
b) authors of lyrics;
c) publishers of such music and lyrics, and
d) successors in title of deceased composers and authors.

There are no formal legal requirements that collecting societies must meet under UK law. Section 116 of the Copyright Design and Patents Act of 1988 (CDPA) describes rather than prescribes a 'licensing body' as follows:

> a society or other organisation which has as its main object, or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent for him, of copyright licences, and whose objects include the granting of licences covering works of more than one author.

7.3. THE TARIFFS

7.3.1. THE TARIFFS

PRS has more than 40 public performance tariffs. A full list of PRS's charging policies are available online at: http://www.prsformusic.com/users/businessesandliveevents/musicforbusinesses/Pages/doineedalicence.aspx

The tariffs of PRS are set based on analysis of the sector and, where possible, discussion with customer or representatives groups (or by the Copyright Tribunal). Existing tariffs may be used as a guideline for new tariffs.

PRS has tariffs for educational establishments, amusement parks or arcades, bowling concourses, commercial bingo halls, holiday centres and more. The PRS tariffs contain some interesting features. For example, the tariff for music-on-hold is payable for commercial and non-commercial users.

PPL has also published a host of tariffs. The PPL tariffs are published on PPL's website and include: Background music (see Bars, restaurants and cafés) (this tariff has been set by the Copyright Tribunal); Background music members clubs; Discos/DJ presentations; Pop quizzes; Telephone music-on-hold; Offices (this tariff has been set by the Copyright Tribunal); Jukeboxes – Jukebox rates (jukeboxes with BGM facility); Bingo; Folk/Scottish/Country and Western dancing (Scottish/highland country dancing; Folk club dances; Country and Western dances); Amateur dramatics; Fashion shows and music videos – Background; Foreground; Jukebox; Concerts.

7.3.2. EXCEPTIONS

PRS does not charge for use of its members' music in certain healthcare circumstances, such as background music use in treatment and therapy areas within hospitals and clinics (including patient wards, patient day rooms, patient dining rooms, treatment rooms and operating theatres). This exception is not applicable if a specific charge is made to the patient for the use of music. A licence fee is, however, payable for other areas, such as foyers and waiting rooms, cafés, restaurants, music at events, staff-only areas and staff clubs.

PRS also does not charge for use of its members' music in a hospice, refuge or similar premises, where the music use is consistent with the activity of the centre. Educational establishments benefit from a number of exemptions (see www.mpaonline.co.uk).

Cross-border licensing of digital rights is a reality and a necessity. The MCPS (Mechanical-Copyright Protection Society) and PRS (coined the PRS Alliance) has already agreed with EMI Music Publishing and the German collecting society GEMA to clear the rights of EMI's Anglo-American songs for online and mobile usage across Europe.

Mobile service providers make extensive use of sound recordings in their offerings to consumers. PRS and MCPS collect royalties for the mobile exploitation of music works, namely for the exploitation of performing rights (communication to the public) and mechanical reproduction rights. All rates for digital use are informed by the Joint Online Licence (JOL) confirmed by the Copyright Tribunal (CT84-90/05 of 19/07/2007). The rates were amended in 2009 to reflect market conditions. The rates for ringtones include 12% of gross revenue for real tone services or 15% for monopoly ringtone services or minima rates. This is a joint rate and it is based on the historical MCPS rate of 10%/10p minima and PRS rate of 5%/5p minima. The reduction in rates for real tone services (i.e. those using actual sound recordings) was negotiated with major players in the industry. For music services (i.e. full track music or music videos) the rates vary dependent on exploitation:

- On-Demand (10,5% GR or minima);
- On-Demand Subscription (8% GR or minima);
- Webcast (6,5% or minima);
- Webcast Subscription (5,75% or minima);
- Single Artist Webcast (10,5% GR or minima);
- Single Artist Webcast Subscription (8% GR or minima);
- Interactive Webcast (8,0% GR or minima) or Interactive Webcast Subscription (5,75% GR or minima);
- Interactive Webcast (8,0% GR or minima); and
- Interactive Webcast Subscription (5,75% GR or minima).

Non-music or general entertainment services (i.e. Internet TV or VOD) are licensed by PRS under non-precedential trial licences prior to a substantive scheme being launched. These are negotiated with licensees under a Board-approved trial approach. Simulcast of linear TV i-For music services (i.e. full track music or music videos), the rates once again vary dependent on exploitation.

PRS makes provision for annual increases of its tariffs. The inflation adjustment criteria are detailed in each tariff. The most common method to calculate the annual increase is to use the mean (to the nearest whole percentage point) of the percentages by which the Retail Prices Index and Average Weekly Earnings index (unadjusted) change in the year.

7.3.3. CONSULTATION AND DISPUTES

PRS has a voluntary consultation process detailed on its website.
http://www.prsformusic.com/users/businessesandliveevents/musicforbusinesses/customerconsultation/Pages/Abouttariffconsultations.aspx.

The tariffs are regulated by the Copyright Tribunal, which has the power to decide whether the terms and conditions of a licence are reasonable and whether someone has unreasonably been refused a licence. Users or their representative bodies, depending on the circumstances, can refer the terms and conditions of a licence to the Copyright Tribunal, which will adjudicate on the reasonableness thereof. Collecting societies have no corresponding right to make referrals to the Tribunal.

This provision is intended to rectify the imbalance in power that can often be the case in the negotiations between powerful monopoly players and significantly smaller players.

7.4. COLLECTION OF MUSIC ROYALTIES

Collecting societies in the UK collect large sums every year. The Hargreaves Review (*Independent Review of IP and Growth* available at http://www.ipo.gov.uk/ipreview.htm) estimated that close to £1 billion is collected annually. A report by PricewaterhouseCoopers (*Music Collecting Societies. Evolution or Regulation? Assessment of Recent Proposals on the Reform and Regulation of Collective Rights Management in the Music Industry,* June 2005 page 11) notes that:

> Revenues collected in the UK are high relative to income per capita and are also reflective of the relative size of the overall music market in the United Kingdom. The high level of revenue collected in the UK is indicative of significant 'depth' of collection.

Royalties are typically collected by PRS from users annually. However, where appropriate, PRS collects royalties on a more frequent basis (biannually, quarterly or monthly or per event). Collection by PRS for UK Broadcast and Online is dependent on the online licensing scheme in question and it could be monthly or quarterly depending on revenues generated.

PPL works closely with The Trading Standards Office to ensure licences are taken. Each provider of an Internet music service that falls within PPL's remit, such as online radio, has a licence that covers the provision of the service to any receiving device, with no distinction drawn between desktop and mobile devices.

Collection by PRS for UK Public Performance: UK collecting societies have a monitoring team who check both the completeness and accuracy of reporting. PRS only collects on behalf of its members. Virtually all composers, lyricists and music publishers in the UK have assigned their relevant public performance copyrights to the PRS, which thus has an effective *de facto* monopoly on the grant of licences for copyright music in the UK. PRS derives its income principally from its licensing activities. It deducts administration costs and then passes on royalties to its members in accordance with its own rules of distribution. PRS has reciprocal arrangements with similar collecting societies in most countries.

7.5. DISTRIBUTION OF ROYALTIES

PRS derives its income principally from its licensing activities. It deducts administration costs. Article 48 of the PRS founding documents permits certain deductions from the amount collected for distribution for pension and benevolent fund purposes. These amounts are set out in the PRS Report and Accounts made available to Professor Pistorius. The remainder of the funds is then distributed to its members in accordance with its own rules of distribution. PRS has reciprocal arrangements with similar collecting societies in most countries.

In the 1995 MMC Report (*Monopolies and Mergers Report*) it was noted that the distribution to members should be improved. The Report noted that the collecting society must be clear about the distribution to members and the system must be constantly benchmarked. It is important to note that Professor Frank Kelly of Cambridge University developed a complex set of algorithms for the determination of music use within an industry and an area. For example, the Cambridge University

algorithm could be used to determine the music played in a pub in the South West of London or the music played in a hairdressing salon in Hull.

PPL always attempts to obtain actual usage data. If this is not possible, then PPL will use a 'surrogate' usage profile. These are created based on information from similar or associated users who have reported usage. Performers have a statutory right to equitable remuneration from the owner of the rights in the sound recording embodying their performance under Section 182D of the Act. The obligation to pay equitable remuneration is discharged by way of payments made by PPL to the performer members.

In a report by PricewaterhouseCoopers (*Music Collecting Societies. Evolution or Regulation? Assessment of Recent Proposals on the Reform and Regulation of Collective Rights Management in the Music Industry* (June 2005 page 11)), it is noted that, in terms of distribution, PPL commits to distributing to the record company, featured and non-featured artists, and endeavours to do this on the basis of actual play (obtaining playlists from all possible parties). The report concludes that PPL incurs costs to ensure that collected revenues are distributed on the most accurate basis. PwC noted:

> We understand that this approach is not followed Europe-wide, with many societies basing distribution on the playlists of popular radio stations, which results in a less accurate distribution method and lower distribution costs.

7.5.1. FREQUENCY OF ROYALTY DISTRIBUTIONS BY THE COLLECTING SOCIETIES

PRS distributes its royalties four times a year (in April, July, October and December). The distribution of royalties is done very professionally by UK collecting societies. PRS's distribution of royalties for public performances is based on the actual data collected from key users, for example concert halls. PRS enters into agreements with market researchers to establish a base to determine the use of music where cue sheets are not made available.

7.5.1.1. Unclaimed Money

PPL deploys various research methods to locate members who have relocated without updating their contact details, including Musicians' Union membership, Internet research, performer representatives and, occasionally, record company contacts. We also conduct information and advertising campaigns to make performers aware of the fact that we might have money for them. We then have an online claiming system where a performer can claim against any sound recording they performed upon (supported by evidence).

7.5.1.2. Surplus Funds

Any surplus funds (being payments due to performers who have not made a claim) that PPL has when distributions are closed at the end of the statutory six-year period are distributed on a pro-rata basis across the relevant performer and record companies from that period pro-rata to their earnings for that period.

7.6. PROTECTION OF INDUSTRY AGAINST MUSIC IMPORTS

Today, only BBC and ITV for the ITV1 channel have local content for obligations. ITV have been fighting a long campaign for reductions in the statutory requirements on regional content, which are costly for them to produce.

On radio, there is a more detailed regulatory regime for licensing. The regulator, OFCOM (http://www.ofcom.org.uk/) awards for such licences (in areas where there is not enough spectrum to support all applications) has taken into account the nature of the service to be provided (talk, music etc.). There is also a localness code, which includes requirements for material to be produced in the area to which it is broadcast.

7.7. CORPORATE GOVERNANCE

There are no minimum standards set by the government. Although UK collecting societies are relatively efficient with regard to collections and distributions when compared to some of their counterparts in Europe, the government has been working closely with PPL and PRS in particular to encourage them to operate with minimum standards of fairness and transparency.

The *Hargreaves Review* has recommended statutory codes of conduct for collecting societies. The Review has recommended that collecting societies should be required by law to adopt codes of practice, approved by the IPO and the UK competition authorities, to ensure that they operate in a way that is consistent with the further development of efficient, open markets.

Some collecting societies have internal complaints procedures. PRS is the only one that has an independent Ombudsman to whom complaints can be referred if they cannot be resolved internally. PPL has been working on a Code of Practice. The British Copyright Council (http://www.britishcopyright.org/) has drafted voluntary codes of conduct that covers all collecting societies in the industry.

CISAC Statues provide governance rules. Both CISAC and individual societies are able to carry out audits of societies with the potential removal from CISAC for non-compliance. Any changes to the Memorandum of Articles or Articles of the Association of Collecting Societies must be done in terms of the Companies Act 2006, but requires approval where change affects members' rights adversely.

Article 7(c)-(g) and Article 9 embodies regulatory restrictions on the duration and scope of assignment that PRS may require its members to enter into.

The UK has around 18 collecting societies, usually one per category. Virtually all composers, lyricists and music publishers in the UK have assigned their relevant public performance copyrights to the PRS, which thus has an effective *de facto* monopoly on the grant of licences for copyright music in the UK. Thus, collecting societies in the UK tend to operate as de facto monopolies or quasi monopolies, hence the two MMC Reports (see for example Monopolies and Mergers Commission ('MMC'), *Performing Rights* (1996) H.M.S.O. Cm 3147).

Collecting societies in the UK all agree that the collective management of members' rights is more effective if there is a single collecting society per repertoire. The representatives of the collecting societies were asked during the interviews to substantiate this preference. The reasons advanced were varied. It was noted that such arrangement promotes understanding, transparency and accountability. Representatives that were interviewed also stated that it is much easier for users to have one society to negotiate with – it lessens the burden. It also ensures consistency of approach and efficiency and the possibility of disputes are lessened. One representative noted that in markets where there are two societies, time and resources must be spent in addressing competitor issues.

7.8. COMMUNICATION WITH MEMBERS

Both PRS and PPL maintain a useful website for members and users alike. These websites boast informative Frequently Asked Questions (FAQs) – see, for example, the FAQs for PRS available at http://www.prsformusic.com/creators/wanttojoin/Pages/NewMemberFAQs.aspx.

PPL offers services to its members beyond the UK borders. It notes on its website:

> In excess of 47 territories around the world have an equivalent organisation to PPL, collecting broadcasting and public performance revenue and other sources of revenue which may not exist in the United Kingdom, such as private copying, rental, audio visual communication to the public and cable retransmission.
>
> As a result, during the last few years, PPL has set up a number of agreements with similar licensing organisations in other countries.
>
> We continue to develop these relationships and we are in constant talks to add to the list of territories and licensing organisations that participate in the scheme (see http://www.ppl.com).

7.9. COPYRIGHT INFRINGEMENTS

The Digital Economy Act (http://www.legislation.gov.uk/ukpga/2010/24/contents) is an important law. One of the aims of the Digital Economy Act is to curb piracy of copyright works and the illegal downloading and reproduction of works through file sharing.

7.10. OTHER ISSUES

Section 144A of the CDPA 1988 provides for compulsory collective licensing of cable re-transmission rights in, inter alia, musical works a reception of wireless broadcasts from another state in the European Economic Area.

The Committee recommends that collecting societies adopt ADR for the resolution of their disputes with copyright users and potential users, as well as disputes with members.

The IPO has noted that the history of the PRT and Copyright Tribunal is one of disputes that have spiralled out of control, which have been marked by cost and delay. The Copyright Tribunal is seen as a desperate option. It ill serves the collecting societies and the licensees. The cost and delay are not intrinsic to the nature of the Copyright Tribunal (or the PRT), but for

the most part are caused by the behaviour of the parties. Proceedings must be controlled firmly from the outset to avoid the twin scourges of cost and delay.

Both the CLA and the PPL commented on the inability of collecting societies to refer a proposed licensing scheme or licence to the Copyright Tribunal; this is covered by Sections 118 and 125 of the CDPA.

In discussions with the PPL it was argued that licensees use the threat of a reference to the Copyright Tribunal in negotiations; knowing the cost and delay that this will bring. It is the ‘nuclear option’. However, as the collecting society cannot refer a proposed scheme or licence to the Tribunal, the position is asymmetrical. In terms of equity, there is something to be said for the position advanced by the PPL and CLA.

APPENDIX 3: RECOMMENDATIONS BY MITT

Department of Arts, Culture, Science & Technology

MUSIC INDUSTRY TASK TEAM (MITT) REPORT

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1.PREAMBLE

The Music Industry Task Team (MITT) was appointed by Dr Ben Ngubane, the Minister of Arts, Culture, Science and Technology, in response to an expression of problems within the music industry by musicians and their representative organisations.

The MITT comprised the following people:[1]

1. Carol Steinberg – Advisor to the Minister (Chair)
2. Professor Komla Amoaku - Ghana National Theatre
3. Jan Lothe Eriksen – General Secretary, Norwegian Traditional Music and Dance Association
4. Keith Lister – President, ASAMI (Association of South African Music Industry)
5. Sipho Mabuse, Professional Musician and composer, Owner of, a live music venue
6. Motsumi Makhene –President, MUSA (Musicians Union of South Africa)
7. Rob Hooijer –Managing Director, SAMRO (South African Music Rights Organisation)
8. McDonald Netshitenzhe –Registrar of Patents and Copyright, DTI (Department of Trade and Industry)
9. Doreen Nteta – CEO, NAC (National Arts Council)
10. Lazarus Serobe - Sony Music
11. Bradley Silver – Weber, Wentzel & Bowens
12. Themba Wakashe – Chief Director of Culture, DACST (Department of Arts, Culture, Science and Technology)

The ***terms of reference*** of the MITT were as follows:

- ✓ To recommend to the Minister strategies to address the problems facing the South African music industry:
    - Recommendations are based on the oral and written submissions both national and provincial – and the experiences of MITT members.
    - Recommendations can be made regarding the interventions of all role-players - government, industry, unions, publishers, etc.
- ✓ To indicate priorities regarding the recommendations.
- ✓ Areas of investigation included the following:
    - The adequacy of the legislative framework governing the industry;
    - Contracts – comparison to international best practice and the education of musicians regarding their rights;
    - Human resource development – coordination of existing efforts;
    - Piracy – possible solutions;
    - Distribution and marketing – profile of South African Music, e-commerce and establishing an export council;
    - Wholesaling and retailing – concentration of ownership;
    - Local content – quota level and monitoring;
    - Music publishing – access, control, and copyright;

[1] NORRM (National Organisation of Recording Rights in Music) representing music publishers were also included on the panel, but the representative withdrew due to health reasons.

- Work permits;
- Royalty collection – transparency;
- Historical injustices – redress;
- Recognition of our musical legacy;
- Allegations of racism; and
- Recording – access to facilities, setting up of infrastructure and profit and not-for-profit partnerships.

The MITT met from 28 February to 3 March 2000 at the Johannesburg International Holiday Inn. Two days were dedicated to public hearings. Individuals and industry organisations from across the country made oral and written submissions to the MITT. The remaining three days were dedicated to the deliberations of the MITT.[2]

In addition, the MITT held five regional hearings in Pietersburg, Bloemfontein, Durban, Cape Town and Port Elizabeth from 8 May to 2 June 2000 in order to ensure that a wide spectrum of South Africans were able to make submissions. The outcomes of these hearings have been incorporated into the report.

2.INTRODUCTION

Music is a fast-growing industry with limitless potential. As one of South Africa's most significant cultural industries, the music industry is a powerful means of enhancing the country's identity and distinctiveness, while simultaneously creating employment, developing human skills and generating social capital and cohesion.

The music industry, however, like any South African industry, is infused with the legacy of apartheid's political economy. As a cultural industry, the music industry suffered additional setbacks because indigenous culture was actively suppressed and distorted by the apartheid regime. One of the most devastating aspects of this legacy is that *local* music is not developing as fast as it should. Eighty per cent of the music sold in South Africa is international. While international music is thriving in the South African market, the development of local music is not keeping pace.[3] Likewise, live music venues and productions are not thriving in South Africa.

The MITT attempts to recommend strategies whereby both the cultural and economic potential of music can be realised within this context.

The MITT is part of a wider initiative of the Cultural Industries Growth Strategy (CIGS). The starting point of CIGS is a recognition of the global movement towards an information or knowledge economy. This change has seen a world-wide decline in the job-creating potential of the traditional sectors of the economy - both the primary industries and manufacturing - and the growth of "value-added" jobs. These "value-added" jobs are created in sectors like advertising, finance, consulting, media, tourism, fashion design, and a range of activities, traditionally classified under "services". South Africa is fortunate enough to have a strong cultural sector, rich in potential and emerging talent to feed and sustain its further growth. The MITT's recommendations attempt to harness this extaordinary talent and originality in the South African music industry.

[2] The MITT process and subsequent call for submissions was advertised extensively through the print media, electronic media and via the internet..
[3] ASAMI figures (Annexure A), illustrate the decline in local music sales.

The environment in which the music industry operates is influenced by a number of government departments in addition to DACST:

- The Department of Trade and Industry (DTI) is responsible for the copyright legislation that governs the cultural industries and for creating the conditions, including incentive packages and export support, that facilitate the growth of these industries.
- The Department of Labour (DoL) is responsible for the legislation regarding human resource development in the cultural industries, most notably the Sector Education and Training Authorities (SETAs), as well as for the legislation that governs labour relations.
- The Department of Education (DoE) is responsible for the provision of in-school music education.
- The Department of Home Affairs is responsible for the issuing of work permits in the cultural industries.
- The Department of Communications (DoC), and the Independent Broadcasting Authority [4](IBA) in particular, are responsible for local content regulations that impact on the music industry.

In addition to government, the well-being of the music industry is affected by the record companies, the collecting societies, the unions, relevent NGOs, the state of live music, and so on.

The recommendations of the MITT are made to the Minister of Arts, Culture, Science and Technology (hereafter refered to as "the Minister"), but fall within the domain of all of the above-mentioned ministries and stakeholders. The MITT recognises that the Minister therefore cannot directly implement all of its recommendations. He can play an important role in encouraging his colleagues and the stakeholders in the industry to cooperate in strategies that will enhance the development of South African music.

Based on the written and oral submissions, the MITT identified the major problems in the music industry as follows:

- Inadequate and outdated copyright legislation, particularly with regard to needletime.
- Widespread piracy and copyright infringement that disables the growth of the local music industry.
- The ineffectiveness of the IBA's local content monitoring system and the low levels of local content in the media.
- The prevalence of unfair contracts - historic and current - leading to a polarised and hostile industrial relations environment.
- A legacy of disempowerment and lack of access to education, training and information about the economics of the industry among musicians and related workers, coupled with a lack of transparency and accountability of key players within the industry.
- An imbalance in power relations in the industry that negatively impacts on its growth - in particular, the inadequate definition of musicians' status as workers in labour legislation which undermines their access to legal protection and other benefits.
- Widespread experience of ongoing racism and sexism within the industry.
- The isolation of aspirant musicians living outside of Gauteng.
- Inadequate funding for music development.

3.RECOMMENDATIONS

[4] The Independent Broadacst Association IBA has now been joined with the South Afrcan Telecommunications Authority (SATRA) to form Independent Communications Authority of South Africa (ICASA)

3.1LEGISLATION: COPYRIGHT

3.1.1NEEDLETIME[5]

Under the current legislation, performers enjoy no copyright protection – this right is confined to composers and authors. The lack of protection for performers is out of keeping with international trends in which needletime regulations are increasingly the norm. South Africa's non-accession to the Rome Convention is similarly anomalous. The absence of needletime legislation is one of the key obstacles to the development of local music and the music industry. [6]

Recommendation 1:

The draft amendment of the Standing Committee on Intellectual Property regarding needletime should be implemented without delay. The MITT has agreed that no further public consultation on the needletime issue is required.

The MITT is unanimous in its concern about the length of time that this issue has been under discussion. It recommends that time frames be incorporated into the amendment of the Act[7], providing for negotiations between the broadcasters on the one hand and the producers and performers on the other hand, regarding the establishment of the appropriate rate. Should agreement not be reached within the stipulated time period, the Minister of Trade and Industry is asked to intervene.

The Minister of Trade and Industry is asked to appoint a permanent Copyright Tribunal that would be essential to the ongoing wellbeing of the industry. The Copyright Tribunal should be asked, if necessary, to arbitrate the initial negotiations between broadcaster and producers/performers regarding the rate to ensure that agreement is reached in the stipulated period of time.

The MITT further recommends to the Minister the establishment of a joint performers and producers collecting society to administer the needletime royalty, in order to make the Act functional and in line with international norms.

3.1.2 EXTENSION OF THE TERM OF COPYRIGHT

RECOMMENDATION 2:

The speedy implementation of the recommendations of the Standing Committee on Intellectual Property regarding the extension of the term of copyright for both composers and performers to 70 and 50 years respectively, in line with international practice.

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[5] Needletime is also referred to as the broadcast right. It gives musicians (in their capacity as performers) the right to receive remuneration when their repertoire is either played on radio or performed live amounting to a Public Performance Right. This right can impact on income for musicians and expenditure for broadcasters both domestically and internationally. It was removed from South African Copyright legislation in 1965. Ammendments to relevant legislation is currently under review by the Department of Trade and Industry in Government Gazette No.21156, published on 10 May 2000 .

[6] No broadcaster made a submission to the MITT. The National Association of Broadcasters (NAB) was approached to make a written submission or to present at one of the five regional hearings. The NAB declined on the grounds that its views had been communicated through the needletime-related hearings of the DTI.

[7] There is a minority view that the time restriction should be at the discretion of the Minister rather than written into the Act.

3.1.3 IMPLEMENTATION AND ACCESSION TO THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO) TREATIES

RECOMMENDATION 3:

South Africa should implement and accede to the World Copyright Treaty (WCT) and the World Performance and Phonograms Treaty (WPPT) without delay in the interests of protecting South African content in the digital environment and bringing South African copyright legislation in line with international trends.

3.1.4 BROADENING THE DEFINITION OF "PERFORMER"

The definition of "performer" in the Performers' Protection Act (Act No.11 of 1967)excludes performances that are not performances of literary or artistic works. As a result, various other types of "un-scripted" performances, which make use of folklore, oral tradition and other forms of indigenous culture, are excluded.

RECOMMENDATION 4:

The definition of "performer" in the Performers' Protection Act should be amended to include artists who perform works of folklore. The revised definition should include not only performances in the recognised performing arts disciplines, but also the wealth of indigenous performance. The definition in the WPPT is a useful guide.

3.2. PIRACY

The revenue lost by the industry due to piracy is estimated at R1 billion per year. Tax revenue lost amounts to R140 million per year.[8] Piracy in South Africa harms the development of local music, the primary target of the pirates. International research shows that the most effective method of combating piracy is a banderole system. .

The methodology of the banderole system is to mark legitimate product with a label that is impossible to forge. This assists the consumers and the criminal justice system to identify legitimate product and provides the necessary proof of counterfeits, something that is difficult to do at present. Integral to the efficacy of the banderole system, and thus to combating piracy, is effective law enforcement.

RECOMMENDATION 5:

The MITT unanimously agrees that the implementation of the banderole system to combat piracy is critical to the growth of South African music, and to the combating of a widespread illegal activity in the country. The Minister is asked to solicit the co-operation of his colleagues responsible for amending the relevant copyright legislation and for law enforcement in this regard.

ASAMI has undertaken to:

- Finance the costs of implementing the application of the banderole to the product; and
- Ensure that the introduction of the banderole will not increase the transfer price of products.

[8]6. Refer to Annexures A and B for an extract from the ASAMI submissions indicating the impact of piracy on the recording industry and how it affects the revenue of artists

3.3 BLANK TAPE LEVY

It is estimated that at least 90% of tapes bought in SA are used for illegal purposes. Value-added Tax (VAT) lost through blank cassette piracy is conservatively estimated at R42 million per annum. Blank tape levies are imposed in many countries throughout the world and often prove to be crucial to growth of music industries.

RECOMMENDATION 6:

The MITT recommends the implementation of a blank tape levy. The first use of this levy is for law enforcement with regard to piracy[9]. The remaining revenue could be dedicated to kick-starting a social security fund for artists in the music industry[10].

RECOMMENDATION 7:

It is critical for the South African music industry to keep in touch with trends in the international trade environment. The development of the new technologies brings new challenges for combating piracy.

The MITT therefore recommends that DACST, DTI, MUSA, SAMRO & ASAMI research the issue of piracy in the digital media, making use of international best practice. [11]

3.4 LOCAL CONTENT

3.4.1 COMPLIANCE AND MONITORING

The public broadcaster is a primary custodian of South African culture. Other broadcasters also have a profound impact on the well being of local culture. Broadcasters thus have a responsibility to mirror the broad range of national and local artistic expressions. International trends indicate that exposure to local music creates a demand for local music products among consumers.

The IBA has the constitutional responsibility to enforce and monitor local content. There is, however, a widespread perception that the IBA is not executing these duties adequately. As a result, many broadcasters are not adhering to the local content quota. The impact of this non-compliance on both the economics of the local music industry and on the development of South African culture is severe.

RECOMMENDATION 8:

The Minister should meet with the Chairperson of the IBA in an attempt to ensure that the IBA monitor and enforce local content quotas.

[9] The adoption of a blank tape levy is not a prerequisite for the implementation of the banderole system. Piracy is an illegal activity and the government is therefore responsible for funding law enforcement to prevent it. The blank tape levy is a suggested additional source of revenue.
[10] See Recommendation 14.
[11] SAMRO has volunteered to convene this research group.

In this regard, the Minister should note that the following assistance is offered:

- In the absence of systematic monitoring by the IBA, SAMRO will attempt to provide some information to indicate trends of local content usage by broadcasters.
- The organisations comprising the MITT, notably SAMRO, MUSA and ASAMI, are willing to assist the IBA in researching the appropriate monitoring system for South Africa. In the interim, the MITT suggests that the IBA consider adopting the monitoring system outlined by ASAMI.

3.4.2 LEVEL OF QUOTA FOR LOCAL MUSIC CONTENT

RECOMMENDATION 9:

The MITT is of the view that the present local content quota of 20% is too low and recommends a quota of at least 50%.

3.5 STATUS OF MUSICIANS

Musicians and related workers are disadvantaged by the lack of clarity regarding their status in labour legislation. At present, they fall outside of the legal ambit of a range of rights, protections and benefits.

RECOMMENDATION 10:

Legal advice should be commissioned to find the most advantageous definition for the status of the musician in this industry[12].

3.5.1 WORK PERMITS: RECIPROCITY

Internationally cultural goods and services are considered exceptions in the trade environment given their dual character of commodity on the one hand, and embodiment of culture, identity and values on the other.
Common international practice with regard to the issuing of work permits in the cultural industries therefore tends towards a system of reciprocity. The MITT notes that the dominant sentiment in the South African industry concurs with this trend.

The MITT appreciates, however, that the government's trade and industrial policy is anti-protectionist, and that the Minister operates within this policy environment.

RECOMMENDATION 11:

In this context, the MITT recommends that the Minister explore the viability of a policy of reciprocity[13] with regard the issuing of work permits to non-South Africans. DACST should consult ASAMI and MUSA with regard to the details of a system of reciprocity. DACST should take special note of the written submission of the South African Roadies Association (SARA) in this regard.

[12] Sony volunteers to pay the expenses of this research.

[13] Broadly speaking, reciprocity refers to a system in which South Africa would determine the number of permits it grants to nationals of another country on the basis of how many permits that country grants to South Africa.

3.5.2 CONTRACTS & DEEDS OF ASSIGNMENT

This section refers to all contracts in the music industry but is especially concerned with two types of contracts:

- the agreement between the recording artist and the record company (artist's contract); and
- the agreement between the song writer and music publisher (the deed of assignment).

There is a widespread perception in the industry that the contracts in use disadvantage the artist.

3.5.3 MINIMUM STANDARDS FOR CONTRACTS

RECOMMENDATION 12:

The MITT recommends that ASAMI and MUSA develop minimum standards for contracts. It is further recommended that the possibility of enforcing the use of these minimum standards be investigated, with the assistance of DACST.

3.5.4 RENEGOTIATING OF CONTRACTS

There is general recognition in the industry that many of the contracts between record companies and artists and between music publishers and artists signed in earlier decades were unfair to the artists concerned. This is attributed to the inequitable industrial relations environment of the past. As a result, certain artists are still bound by unfair agreements that were negotiated many years ago, a major cause of the acrimony, mistrust and polarisation that plagues the industry today.

RECOMMENDATION 13:

The MITT recommends that where artists consider contracts to be unfair, record companies and music publishers should renegotiate these contracts with artists in good faith, in line with contemporary industrial relations.
The MITT further recommends that:

- If necessary, the Minister brings the influence of his office to bear on record companies in this regard.
- The cut off point for contracts open to renegotiations in this regard is contracts concluded before 1994.
- This process does not prejudice artists taking whatever action they see fit regarding contracts signed after 1994.

3.5.5 SOCIAL SECURITY

As freelance workers, the majority of musicians and related workers do not have access to rudimentary social security.

RECOMMENDATION 14:

The MITT recommends that DACST work with relevant insurance institutions to pursue the best mechanisms to fund and administer social security within the entertainment industry, in collaboration with MUSA and ASAMI.[14]

[14] Recommendation 6 suggested that part of the blank tape levy be used to fund this social security for musicians

3.5.6 OMBUDSMAN

The music industry suffers from a relatively high number of complaints and disputes. At present, largely because most musicians and related workers fall outside of the ambit of labour legislation and do not have access to legal recourse, adequate arbitration or resolution mechanisms do not exist.

RECOMMENDATION 15:

The MITT recommends the establishment of an Ombudsman for the music industry in order to resolve disputes in a manner that promotes self-regulation, entrenches minimum standards and ethical practice, and enforces a code of conduct.
The MITT further recommends that:

- Stakeholders in the music industry jointly fund the office of the Ombudsman;
- DACST drive this initiative;
- The Ombudsman pays special attention to allegations of racism and sexism in the industry;
- The Ombudsman pays special attention to the repeated allegations made at the regional hearings regarding fly-by-night producers and "independent recording studios" that exploit inexperienced musicians by promising marketing, distribution and recording deals that never materialise and producing products of a poor quality.

3.6 COLLECTION SOCIETIES

3.6.1 CRISIS OF CREDIBILITY

South Africa is in the fortunate position having three functioning collection societies, namely, SAMRO (South African Music Rights Organisation), SARRAL (South African Recording Rights Association Limited) and NORRM (National Organisation of Reproduction Rights in Music). The hearings of the MITT, however, highlighted a perceived crisis of credibility among some constituencies in the industry of the collection societies. Linked to this is a widespread lack of understanding among performers and composers about their rights, those of record companies, music publishers and collection societies.

RECOMMENDATION 16:

The MITT recommends that the Minister commission further investigation into the collection societies regarding their accountability, credibility, transparency and efficiency.

RECOMMENDATION 17:

That the record companies, music publishers and collection societies either independently or jointly initiate national information drives to promote and improve awareness and a fundamental knowledge of their businesses as well as their contracts and agreements.

3.6.2 COLLECTION SOCIETIES IN AFRICA

Most countries in Africa do not enjoy the services of functioning collection societies. This adversely affects both the development of their own music industries and the ability of South African musicians to obtain the royalties due to them when their work is used on the continent.

RECOMMENDATION 18:

The MITT recommends that DACST offer assistance to the countries of SADC and the rest of the continent with regard to the development of collecting societies and the concomitant appropriate copyright regimes.[15]

3.7 SPONSORSHIP/FUNDING OF MUSIC DEVELOPMENT

The funding demands for music development far outweigh the resources available within the music industry, government and the NAC. There is a critical need, however, to encourage music that might never generate wealth, both for its own value and because artistic experiment constitutes the research and development necessary for a thriving and competitive music industry.

The MITT is of the opinion that the only viable way of increasing sponsorship for music development is through tax incentives. The MITT notes that this is in keeping with international trends.

RECOMMENDATION 19:

The MITT recommends that the Minister continue to pursue the possibility of tax incentives for the arts.

RECOMMENDATION 20:

The MITT recommends that DACST explore the possibilities of international aid for music development.

RECOMMENDATION 21:

The MITT recommends that the NAC explore ways in which arts NGOs can make better use of existing tax laws in their attempts to secure private sector sponsorship.

3.8 INCENTIVES FOR THE MUSIC INDUSTRY

RECOMMENDATION 22:

DACST should continue to work with the DTI to ensure that appropriate incentives are made available to the music industry, particularly with regard to export and the establishment of live music venues.

[15] It is suggested that DACST solicit SAMRO's assistance in this regard.

RECOMMENDATION 23:

The MITT recommends that companies within the music industry use their social responsibility and sponsorship funds primarily to stimulate the development of musicians. To this end, they might consider setting up a foundation or trust.

3.9 HRD AND EDUCATION

There is a fundamental problem with regard to the provision of music education in schools. In most cases, no music education – appreciation or learning of instruments – is offered. Where music education is offered, African music is generally not included.

In addition, the low level of knowledge among musicians and related workers in the industry with regard to the functioning of the industry, labour relations, contracts, opportunities related to the music business, and so on, is of grave concern. There are currently some training initiatives in this area by NAC, MIDI Trust, NGOs, collection societies, record companies and private education enterprise, These are, however, uncoordinated.

The majority of musicians and related workers are not in full-time employment in the industry and therefore are not automatically the beneficiaries of the training that will be provided by the SETA.

RECOMMENDATION 24:

The MITT recommends that DACST establish a team of experts to research a feasible and low cost plan for including music in the school syllabus - on a pilot project basis, if necessary. The research should incorporate international best practice and should emphasise the teaching of African music. The research team should liase with the Departments of Education and Labour.

The MITT further recommends that DACST approach foreign governments, particularly those with which South Africa has cultural agreements, to resource the work of the team.

RECOMMENDATION 25:

The MITT recommends that ASAMI and MUSA, the key parties comprising the SETA, negotiate an agreement whereby the training programmes organised by the SETA will target musicians and related workers who are not necessarily in full time employment in the industry.

The MITT further recommends that the SETA's training programmes include a series of workshops aimed at empowering musicians with regard to their rights in the industry.[16]

RECOMMENDATION 26:

The MITT recommends that MUSA develop a funding proposal for a legal aid facility for musicians and related workers nationally. All stakeholders in the music industry and beyond are encouraged to fund the proposal.

[16] The MITT suggests that the Music Development Initiative (MIDI Trust) be requested to co-ordinate this process.

RECOMMENDATION 27:

DACST consider facilitating a meeting of above mentioned and other stakeholders, including representatives from the Department of Education to see if greater co-ordination, standardisation and accreditation could not be achieved in respect of these efforts. This should, of course, be linked to the SETA if possible.

3.10 INTERNATIONAL TRADE ENVIRONMENT

RECOMMENDATION 28:

The MITT recommends that the Minister and the Minister of Trade and Industry agree on a policy that will guide South Africa's negotiations in international trade, recognising the exceptional nature of culture, on the basis of its status as both commodity and as carrier of South African identity and social values.

3.11 RESEARCH

The lack of baseline data on the cultural industries hampers efforts to assert their importance in the South African economy.

RECOMMENDATION 29:

The MITT recommends that the Minister approach the HSRC to create a unit to establish baseline economic data on an ongoing basis in the cultural industries and to quantify their impact on the South African economy.

RECOMMENDATION 30:

The MITT recommends that the proposed Music Industry Cluster develop a longer-term industrial strategy to enhance the growth of the industry. The Cluster should also consider how enhanced growth could be used to fund music development within the non-profit sector of the industry.

3.12 RECOGNITION OF THE CONTRIBUTION OF MUSICIANS

RECOMMENDATION 31:

The MITT recommends that DACST explore the establishment of an ongoing programme that will recognise and honour significant contributions of artists. Awards should include financial rewards and the appropriate conferring of status to recipients.

RECOMMENDATION 32:

The MITT recommends that DACST encourage other government departments to recognise that musicians, like other workers, should be appropriately compensated for their labour when employed by government.

The MITT further recommends that DACST develop guidelines for the employment of musicians by government. The guidelines should include criteria for the selection of artists, including how artists from across the country can be given exposure; and what constitutes appropriate remuneration, particularly where artists are taken abroad to perform. DACST should consult the NAC and MUSA in this regard.

3.13 CONCENTRATION OF THE MUSIC INDUSTRY IN GAUTENG

One of the major themes of the provincial hearings was the concentration of the music industry in Gauteng and the concommitant lack of access to the industry by aspiring musicians resident in other parts of the country. The MITT is of the opinion that it is desirable to foster live and recorded music in all of South Africa's regions. However, the MITT is aware that the conglomoration of the music industry in South Africa is in keeping with international trends and tends to aid the growth and competetiveness of a national music industry.

RECOMMENDATION 33:

DACST explore the possibility of creating recording infrastructure in areas outside of Gauteng as part of its Cultural Industries Growth Strategy (CIGS).

RECOMMENDATION 34:

The NAC actively solicit proposals for music development outside of Gauteng in particular and the major cities in general.

RECOMMENDATION 35:

DACST discuss with SABC Radio the possibility of the SABC playing a more active role in recording and broadcasting music in the various provinces.

3.14 LIVE MUSIC

The hearings of the MITT highlighted musicians' concern about the state of live music in South Africa. Some the issues repeatedly raised include the importance of live music to the development of local music; the exploitation of artists in live performances; the lack of support for entrepreneurs who establish live music venues; the tendency of promoters to disregard "local" artists in favour of Gauteng-based artists. Live music, especially where it is accessible to the youth, is seen as the basis for building the future musicians and audiences necessary for the growth of the music industry.

RECOMMENDATION 36:

That those implementing this report are made aware that many of the central recommendations of this report are applicable to live music. These include:

- Recommendation 10: Status of musicians
- Recommendation 11: Work permits: reciprocity
- Recommendations 12 & 13: Contracts
- Recommendation 14: Social security

- Recommendation 15: Ombudsman
- Recommendations 19, 20 & 21 : Sponsorship and funding
- Recommendations 22 & 23 : Incentives
- Recommendations 24, 25, 26 & 27: HRD and education
- Recommendations 31 & 32: Recognition of the contribution of musicians
- Recommendations 34 & 35: Concentration of musicians in Gauteng

RECOMMENDATION 37:

That DACST explore partnerships with local and provincial government and the private sector to link music venues to urban regeneration programmes and tourism initiatives.

APPENDIX 4A: EXTRACTS FROM COPYRIGHT ACT OF 1978 (AMENDED)

COPYRIGHT ACT

NO. 98 OF 1978

DEFINITIONS

"cinematograph film" means any fixation or storage by any means whatsoever on film or any other material of data, signals or a sequence of images capable, when used in conjunction with any other mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a sound-track associated with the film, but shall not include a computer program; [Definition of "cinematograph film" substituted by s. 1 (f) of Act No. 125 of 1992 and by s. 50 (c) of Act No. 38 of 1997.]

"collecting society" means a collecting society established under this Act; [Definition of "collecting society" inserted by s. 1 (a) of Act 9 of 2002.]

"performance" includes any mode of visual or acoustic presentation of a work, including any such presentation by the operation of a loudspeaker, a radio, television or diffusion receiver or by the exhibition of a cinematograph film or by the use of a record or by any other means, and in relation to lectures, speeches and sermons, includes delivery thereof; and references to "perform" in relation to a work shall be construed accordingly: Provided that **"performance"** shall not include broadcasting or rebroadcasting or Transmitting a work in a diffusion service; [Definition of "performance" substituted by s. 1 (r) of Act No. 125 of 1992.]

"Published edition" means the first print by whatever process of a particular Typographical arrangement of a literary or musical work; [Definition of "published edition" inserted by s. 1 (c) of Act No. 52 of 1984.]

"sound recording" means any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with a cinematograph film; [Definition of "sound recording" substituted by s. 1 (v) of Act No. 125 of 1992 and by s. 50 (h) of Act No. 38 of 1997.]

CHAPTER 1

COPYRIGHT IN ORIGINAL WORKS

2. Works eligible for copyright.

(1) Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright:

(a) literary works;
(b) musical works;
(c) artistic works;

(d) cinematograph films;
[Para. (d) substituted by s. 2 (a) of Act No. 125 of 1992.]
(e) sound recordings;
(f) broadcasts;
[Para. (h) added by s. 2 of Act No. 52 of 1984.]
(g) programme-carrying signals;
(h) published editions;
(i) computer programs.
[Para. (i) added by s. 2 (b) of Act No. 125 of 1992.]
[Sub-s. (1) amended by s. 2 (a) of Act No. 56 of 1980]

6. Nature of copyright in literary or musical works.

Copyright in a literary or musical work vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

(a) Reproducing the work in any manner or form;
(b) publishing the work if it was hitherto unpublished;
[Para. (b) substituted by s.6 of Act No. 125 of 1992.]
(c) performing the work in public;
(d) broadcasting the work;
(e) causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;
[Para. (e) substituted by s.3 (b) of Act No. 56 of 1980.]
(f) making an adaptation of the work;
(g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) inclusive.
[S.6 amended by s.3 (a) of Act No. 56 of 1980.]

8. Nature of copyright in cinematograph films.

(1) Copyright in a cinematograph film vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

(a) Reproducing the film in any manner or form, including making a still photograph therefrom;
[Para.(a) substituted by s.8 (a) of Act No. 125 of 1992.]
(b) causing the film, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;
(c) broadcasting the film;
(d) causing the film to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the film, and is operated by the original broadcaster;
[Para.(d) substituted by s.5 (b) of Act No. 56 of 1980.]

(e) making an adaptation of the film;

(f) doing, in relation to an adaptation of the film, any of the acts specified in relation to the film in paragraphs (a) to (d) inclusive;

(g) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the film.

[Para.(g)
added by s.6 of Act No. 52 of 1984 and substituted by s.1 of Act No. 61 of 1989 and by s.8 (b) of Act No. 125 of 1992.]

(2) . . . . . .

[Sub-s. (2) deleted by s. 8 (c) of Act No. 125 of 1992.]

9. Nature of copyright in sound recordings.

Copyright in a sound recording vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

(a) Making, directly or indirectly, a record embodying the sound recording;

(b) letting, or offering or exposing for hire by way of trade, directly or indirectly, a reproduction of the sound recording;

(c) broadcasting the sound recording;

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

(e) communicating the sound recording to the public.

[S.9 amended by s.7 of Act No. 52 of 1984 and by s. 2 of Act No. 61 of 1989
and substituted by s.6 of Act No. 56 of 1980 and by s.2 of Act9 of 2002.]

9A. Royalties.

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

(b) The amount of any royalty contemplated in paragraph (a) shall be determined by an agreement between the user of the sound recording, the performer and the owner of the copyright, or between their representative collecting societies.

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

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

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

(c) In the absence of an agreement contemplated in paragraph

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

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

(3) In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.
[S. 9A inserted by s.3 of Act 9 of 2002.]

11A. Nature of copyright in published editions.

Copyright in a published edition vests the exclusive right to make or to authorize the making of a reproduction of the edition in any manner.
[S.11A inserted by s.8 of Act No. 52 of 1984.]

CHAPTER 3

COPYRIGHT TRIBUNAL

29. Establishment of Copyright Tribunal.

(1) The judge or acting judge who is from time to time designated as Commissioner of Patents in terms of section 8 of the Patents Act, 1978, shall also be the Copyright Tribunal (in this Chapter referred to as the tribunal) for the purposes of this Act.

(2) The tribunal may order that the costs or expenses of any proceeding before it incurred by any party shall be paid by any other party, and may tax or settle the amount of any costs or expenses to be paid under any such order or direct in what manner they are to be taxed.

(3) (a) Regulations may be prescribed as to the procedure in connection with the making of references and applications to the tribunal and for regulating proceedings before the tribunal and as to the fees chargeable in respect of those proceedings.

(b) Any such regulations may in relation to proceedings before the tribunal apply any of the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965), or alternatively, any of the provisions applicable in the court of the Commissioner of Patents in terms of the Patents Act, 1978.

(c) Any regulations may include provision for—

(i) requiring notice of any intended application to the court under section 36 to be given to the tribunal and to the other parties to the proceedings;

(iii) suspending or authorizing or requiring the tribunal to suspend the operation of orders of the tribunal in cases where after giving its decision an application under section 36 to any provincial division of the Supreme Court is noted;

(iii) modifying in relation to orders of the tribunal, of which the operation is suspended, the operation of any provisions of this Chapter as to the effect of orders made thereunder;

(iv) the publication of notices or the taking of any other steps for ensuring that persons affected by the suspension of an order of the tribunal will be informed of its suspension;

(v) regulating or prescribing any other matters incidental to or consequential upon any request, application, order or decision under section 36.

[Sub-para. (v) substituted by s.26 (a) of Act No. 125 of 1992.]

(4) Without prejudice to any method available by law for the proof of orders of the tribunal, a document purporting to be a copy of any such order and to be certified by the Registrar to be a true copy thereof shall in any legal proceedings be sufficient evidence of the order unless the contrary is proved.

(5) The Registrar shall act as the registrar of the tribunal.

(6) Any reference in this Chapter to the giving of an opportunity to any person of presenting his case shall be construed as a reference to the giving to that person of the opportunity of submitting representations in writing and of being heard.

[Sub-s (6) added by s.26 (b) of Act No. 125 of 1992.]

30. General provisions as to jurisdiction of tribunal.

1. Subject to the provisions of this Chapter, the function of the tribunal shall be to determine disputes arising between licensing bodies, or other persons from whom licences are required and persons requiring licences, or organizations claiming to be representatives of such persons, either—

(a) on the reference of a licence scheme to the tribunal; or

(b) on the application of a person requiring a licence either in accordance with a licence scheme or in a case not covered by a licence scheme.

[S.30 substituted by s.27 of Act No. 125 of 1992.]

31. Reference of licence schemes to tribunal.

(1) Where at any time while a licence scheme is in operation a disputearises with respect to the scheme between the licensing body operating the scheme and—

(a) an organization claiming to be representative of persons requiring licences in cases of a class to which the scheme applies; or

(b) any person claiming that he requires a licence in a case of a class to which the scheme applies, the organization or person in question may refer the scheme to the tribunal in so far as it relates to cases of that class.

(2) The parties to a reference under this section shall be—

(a) the organization or person at whose instance the reference is made;

(b) the licensing body operating the scheme to which the reference relates; and

(c) such other organizations or persons (if any) as apply to the tribunal to be made parties to the reference and are in accordance with subsection (3) made parties thereto.

(3) Where an organization (whether claiming to be representative of persons requiring licences or not) or a person (whether requiring a licence or not) applies to the tribunal to be made a party to a reference, and the tribunal is satisfied that the organization or person has a substantial interest in the matter in dispute, the tribunal may, if it thinks fit make that organization or person a party to the reference.

(4) The tribunal shall not entertain a reference under this section by an organization unless the tribunal is satisfied that the organization is reasonably representative of the class of persons which it claims to represent.

(5) Subject to the provisions of subsection (4), the tribunal shall on any reference under this section consider the matter in dispute and after giving the parties to the reference an opportunity of presenting their respective cases, make such order, either confirming or varying the scheme in so far as it relates to cases of the class to which the reference relates, as the tribunal may determine to be reasonable in the circumstances.

(6) An order of the tribunal under this section may, notwithstanding anything contained in the licence scheme to which it relates, be made so as to be in force either indefinitely or for such period as the tribunal may determine.

(7) Where the tribunal has made an order in respect of a licence scheme which has been referred to it, such scheme shall, notwithstanding anything contained therein, in so far as it relates to the class of cases in respect of which the order was made, thereafter remain in operation subject to the terms of the order: Provided that this subsection shall not apply in relation to a reference as respects any period after the reference has been withdrawn or has been discharged by virtue of subsection (4).

32. Further reference of scheme to tribunal.

(1) Where the tribunal has made an order under section 31 with respect to a licence scheme—

(a) the licensing body operating the scheme;

(b) any organization claiming to be representative of persons requiring licences in cases of the class to which the order applies; or

(c) any person claiming that he requires a licence in a case of that class, may, subject to the provisions of subsection (2), at any time while the order is in force, again refer the scheme to the tribunal in so far as it relates to cases of the class in respect of which the order applies.

(2) A licence scheme shall not, except with the special leave of the tribunal, again be referred to the tribunal under subsection (1)—

(a) where the relevant order was made so as to be in force indefinitely or for a period exceeding fifteen months, before the expiration of a period of twelve months from the date on which the order was made; or

(b) where such order was made so as to be in force for a period not exceeding fifteen months, at any time more than three months before the date of expiry of the order.

(3) The provisions of section 31 shall mutatis mutandis apply in respect of any reference under this section or any order made thereon, and the tribunal shall have power to make such order on any such reference as it deems just.

33. Applications to tribunal.

(1) For the purposes of this Chapter a case shall be taken to be covered by a licence scheme if, in accordance with a licence scheme for the time being in operation, licences would be granted in cases of the class to which that case belongs: Provided that where in accordance with the provisions of a licence scheme—

(a) the licences which would be so granted would be subject to terms and conditions whereby particular matters would be excepted from the licences; and

(b) the case in question relates to one or more matters falling within such an exception, that case shall be taken not to be covered by the scheme.

(2) Any person who claims that in a case covered by a licence scheme the licensing body operating the scheme has refused or failed to grant him a licence in accordance with the provisions of the scheme or to procure the grant to him of such a licence, may apply to the tribunal for an order under this section.

(3) An application for such an order may also be made by any person who claims that he requires a licence in a case not covered by a licence scheme, and either—

(a) that a licensing body or person has refused or failed to grant the licence or to procure the grant thereof, and that in the circumstances it is unreasonable that the licence should not be granted; or

(b) that any charges, terms or conditions subject to which a licensing body proposes that the licence should be granted are unreasonable.

(4) Where an organization (whether claiming to be representative of persons requiring licences or not) or a person (whether requiring a licence or not) applies to the tribunal to be made a party to an application under subsection (2) or (3), and the tribunal is satisfied that the organization or person has a substantial interest in the matter in dispute, the tribunal may if it thinks fit make that organization or person a party to the application.

(5) On any application under subsection (2) or (3) the tribunal shall give the applicant and the licensing body in question and every other party to the application an opportunity of presenting his case, and if the tribunal is satisfied that the claim of the applicant is well-founded, it shall make an order declaring that, in respect of the matters specified in the order, the applicant is entitled to a licence on such terms and conditions and subject to the payment of such charges (if any) as the tribunal may—

(a) in the case of an application under subsection (2), determine to be applicable in accordance with the licence scheme; or

(b) in the case of an application under subsection (3), determine to be reasonable in the circumstances.

(6) Any reference in this section to failure to grant or procure the grant of a licence shall be construed as including a reference to a failure to grant it or to procure the grant thereof within a reasonable time after being requested to do so.

36. Appeals

(1) Any party to proceedings before the tribunal may appeal against any order or decision of the tribunal pursuant to such proceedings.

(2) Every appeal shall be noted and prosecuted in the manner prescribed by law for appeals against a civil order or decision of a single judge, and sections 20 and 21 of the Supreme Court Act, 1959 (Act No. 59 of 1959), shall apply mutatis mutandis.

(3) The court may in respect of any such appeal—

(a) confirm, vary or set aside the order or decision appealed against, as the court may deem fair;

(b) if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the tribunal with instructions in regard to the taking of further evidence or the setting out of further information;

(c) take any other course which in the opinion of the court is fair and may lead to the speedy and as far as may be possible Inexpensive settlement of the case; and

(d) make such order as to costs as the court may deem fair.
[S.36 substituted by s.28 of Act No. 125 of 1992.]

PERFORMERS' PROTECTION ACT
NO. 11 OF 1967

Interpretation of terms

1. (1) In this Act, unless the context otherwise indicates:

- '**literary and artistic works**' includes musical, dramatic and dramatico-musical works and expressions of folklore;
  [Definition of 'literary and artistic works' amended by s.1*(b)* of Act no. 8 of 2002.]
- '**phonogram**' means any exclusively aural fixation of sounds of a performance or of other sounds;

Relation to copyright protection

2. The rights created by this Act shall in no way restrict or affect the rights provided for by any other law relating to copyright in literary and artistic works.

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

3. Performers shall be granted the protection provided for in section 5 of this Act in respect of their performances:

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

in the Republic.

Extension of protection of performers' rights to performances in certain countries

4. The protection granted to performers by this Act shall be extended automatically in respect of performances:

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

in a country which is a member of the World Trade Organisation: Provided that the right conferred on performers in section 5(1)(b) shall, in the case of performances in the Republic, but emanating from a country which is a member of the World Trade Organisation, only be granted to them to the extent that performances emanating from the Republic enjoy corresponding protection in that country, and such performances of foreign origin shall not enjoy any wider protection in the Republic than is enjoyed in that country by performances emanating from the Republic.

[S.4 substituted by s.20 of Act no. 38 of 1997 and by S.4 substituted by s.2 of Act no. 8 of 2002.]

Restrictions on use of performances

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

(a) without the consent of the performer-

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

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

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

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

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

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

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

(i) broadcast the performance;

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

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

(2) In the absence of an agreement to the contrary, a performer's consent to the broadcasting of his or her performance shall be deemed to include his or her consent to the rebroadcasting of his or her performance, the fixation of his or her performance for broadcasting purposes, and the reproduction for broadcasting purposes of such fixation.

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

(b) In the absence of an agreement contemplated in paragraph *(a)*, any party may refer the matter to the Copyright Tribunal established in terms of section 29(1) of the Copyright Act, 1978 (Act no. 98 of 1978), or

the parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act no. 42 of 1965).

(4) *(a)* A performer who has authorised the fixation of his or her performance shall, in the absence of any agreement to the contrary, be deemed to have granted to the person who arranges for such fixation to be made the exclusive right to receive the royalties contemplated in subsection (1)*(b)* in respect of any broadcast, transmission or communication of such fixed performance: Provided that the performer is entitled to share in any payment received by the person who arranges for the fixation, in the manner agreed upon between the performer and the person who arranges for such fixation, or between their representative collecting societies.

(b) In the absence of an agreement contemplated in the proviso to paragraph *(a)*, any party contemplated in that proviso may refer the matter to the Copyright Tribunal established in terms of section 29(1) of the Copyright Act, 1978 (Act no. 98 of 1978), or the parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act no. 42 of 1965).

(5) Any payment made in terms of subsection (4) shall be deemed to have discharged any obligation by the person who broadcasts or transmits or causes communication of the performance to pay a royalty to the owner of any copyright subsisting in that fixation in terms of section 9A of the Copyright Act, 1978 (Act no. 98 of 1978).

(6) In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.
[S.5 substituted by s.3 of Act no. 8 of 2002.]

ANNEXURE 4B: COPY OF THE COLLECTING SOCIETY REGULATIONS

Appendix 4B

GOVERNMENT NOTICE

DEPARTMENT OF TRADE AND INDUSTRY

No. 517 1 June2006

NOTICE IN TERMS OF THE COPYRIGHT ACT, 197%

(ACT NO. 98 OF 1978)

I, MANDISI MPAHLWA, Minister of Trade and Industry, hereby, in terms of section 39 of the Copyright Act, 1978 (ACT No 98 of 1978), publish Regulations on the Establishment of Collecting Societies in the Music Industry,

These Regulations will come into effect on the date of publication of this Notice.

MANDISI MPAHLWA, MP
MINISTER OF TRADE AND INDUSTRY

In the main the Regulations provide for the following:

1. Criteria to be followed by the accrediting authority (Registrar of CIPRO)
2. Powers and functions of the Registrar
3. Obligations of collecting societies
4. Administration of rights
5. Licensing
6. Distribution
7. Entry into force

The scope of the Regulations is the one described in terms of section 9A of the Copyright Act, 1978 and section 5 (3) of the Performers Protection Act, 1967. During stakeholder consultations, there was a common understanding that all rights in the copyright regime should be managed through collecting societies in future.

During stakeholder consultations there was a common understanding that the Regulations will not apply to Community Radio Sfations.

DEPARTMENT OF TRADE AND INDUSTRY

COPYRIGHT ACT NO. 98 OF 1978

Collecting Society Regulations

Interpretation

1. In these regulations, unless the context otherwise indicates -
   (i) terms and expressions defined in the Acts of Parliament or in the regulations or in the General Notice listed below shall carry the same meaning as defined therein:
      - The Copyright Act, 1978 (Act 98 of 1978), as amended;
      - The Performers' Protection Act 1967, (Act 11 of 1967), as amended;
      - The Copyright Regulations, 1978, published as GN no R 2530 GG no 6252 of 22 December 1978, as amended by GN R1211 GG no 9775 of 7 June 1985, and by GN no 1375 GG no 9807 of 28 June 2985;
      - General Notice no 136 of 1989 published in GG no 11718 of 3 March 1989
   (ii) "framework agreement" means
      (a) a licensing agreement between a collecting society and a trade association or a user group fixing the terms and conditions of use of the repertoire of public playing rights collectively held by individual members of the trade associations or user groups, or persons affiliated to them; or
      (b) an agreement setting common standards and providing a uniform basis for the conclusion of individual licensing agreements between the collecting society and potential users being members of the trade association or user group concerned, or affiliated to them;
   (iii) "public playing right" means the right of a rightholder to receive a royalty in terms of section 9A of the Copyright Act, 1978, and/or the right to receive a royalty in terms of section 5(1)(b) of the Performers' Protection Act, 1967, as the context dictates;
   (iv) 'Registrar" means the Registrar of Copyright at the Companies and Intellectual Property Registration Office (CIPRO);
   (v) "rights of members" or "members' rights" mean public playing rights of rightholders who are members of the collecting society seeking or granted accreditation;
   (vi) "rightholders" means the owners or licensees of public playing rights.

Scope

2. The Collecting Society Regulations set out the conditions under which a collecting society may be established and may operate under the Copyright Act, 1978 (Act 98 of 1978), as provided for in section 39(cA) read together with section 9A of the Copyright Act, 1978, and with section 5(3) of the Performers' Protection Act, 1967 (Act 11 of 1967).

CHAPTER 1:

Supervision

Accreditation

3.(1) Any person or licensing body intending to act as a representative collecting society and

(a) administering on behalf of 50 or more copyright owners, or on behalf of an organisation representing 50 or more copyright owners, the right to receive payment of a royalty in terms of section 9A of the Copyright Act, 1978; or

(b) administering on behalf of 50 or more performers, or on behalf of an organisation representing 50 or more performers, the right to receive payment of a royalty in terms of section 5(1)(b) of the Performers' Protection Act, 1967; or

(c) administering on behalf of 50 or more copyright owners and performers jointly, or on behalf of an organisation representing 50 or more copyright owners and performers jointly, the right to receive payment of a royalty as contemplated in paragraphs (a) and (b) above

requires an accreditation from the Registrar in order to be authorised to function as a collecting society established under the Copyright Act, 1978.

(2) Any person or licensing body claiming the right to act as a representative collecting society shall lodge a written application with the Registrar for accreditation. The Registrar shall consider the written application together with any other relevant documents. The Registrar may for the purposes of issuing an accreditation under these regulations consult with any person or institution before granting or refusing to grant accreditation.

(3) The Registrar shall not grant accreditation to an applicant unless he or she is satisfied that-

(a) it appears from the particulars supporting the application and the information considered that the applicant is able to ensure adequate, efficient and effective administration throughout the Republic of the rights to be entrusted to the collecting society for administration;

(b) membership is open to copyright owners or their licensees and/or to performers whose rights the applicant seeks to administer and/or to organisations representing such copyright owners or licensees and/or performers;

(c) the applicant affords to copyright owners or their licensees and/or to performers, or to organisations representing copyright owners or licensees and/or performers an appropriate right and opportunity to take part in decision making concerning the affairs of the applicant and the administration of the rights in question, as well as the distribution of royalties to be received;

(d) the applicant is able to comply with the obligations set out in these Regulations (chapter 2);

(e) the person or persons appointed as representatives, managers and members of the governing body of the applicant are fit or proper persons

to act as such and are in their majority South African citizens or permanent residents;

(f) the principal place of business in respect of rights administered in the Republic is situated in the Republic;

(g) the accreditation of the applicant does not conflict with, undermine or diminish the adequate, efficient and effective administration of the right to receive payment of a royalty in terms of section 9A of the Copyright Act, 1978, or section 5(1)(b) of the Performers' Protection Act, 1967, as undertaken by a collecting society already accredited and established under the Copyright Act, 1978.

(4) Within thirty days from the lodging of the application, the Registrar shall-

(a) grant accreditation authorising the applicant to act as a collecting society established under the Copyright Act, 1978, if the Registrar is satisfied that the requirements referred to in subregulation (3) are met; or

(b) provisionally refuse to grant accreditation, if the Registrar is not satisfied that the requirements referred to in subregulation (3) are met, but if, in the opinion of the Registrar, the applicant may modify and/or supplement the application in a manner that would satisfy the requirements; or

(c) refuse to grant accreditation, if the Registrar is not satisfied that the requirements referred to in subregulation (3) are met, and within thirty days of notifying the applicant of the refusal to grant accreditation, the Registrar shall furnish the applicant with the reasons for refusing in writing.

(d) In the case of a provisional refusal to grant accreditation as contemplated in paragraph (b), the Registrar shall within thirty days of notifying the applicant of the provisional refusal furnish the applicant with the reasons for the provisional refusal in writing and grant the applicant a further period of not less than thirty days to submit a modified and/or supplemented application, and/or such further particulars as may be required. Thereafter the Registrar shall grant or refuse the application as provided for in paragraph (a) or (c) of subregulation (4).

(5) An accreditation shall be granted for a term of five years and shall subsequently be renewable for further periods of five years. Six months prior to the expiry of a five-year term, a collecting society established under the Copyright Act, 1978, may apply for a renewal. The provisions of subregulations (3) and (4) shall apply *mutatis mutandis* to such a renewal application.

(6) The Registrar may withdraw an accreditation granted if-

(a) the collecting society failed to disclose material facts that, if known at the time of accreditation, would have constituted cause for a refusal of the accreditation; or

(b) the Registrar becomes aware of facts unknown at the time of accreditation or of subsequent occurrences which, if placed before him or her prior to a decision in regard to the granting of accreditation, would have constituted a ground for refusal of accreditation and cannot be remedied within a time period to be fixed by the Registrar; or

(c) in the opinion of the Registrar, the collecting society commits

(i) a material breach of its obligations; or

(ii) continues to breach the obligations set out in this regulation and ignores directions given to it by the Registrar regarding any such breaches.

The Registrar shall notify the collecting society in writing of the withdrawal and shall furnish reasons in support of his or her decision.

(7) The grant, renewal, refusal or non-renewal, and the withdrawal of an accreditation shall be published in the Government Gazette by General Notice, and may also be published in the South African Intellectual Property Journal for notification.

(8) The grant, renewal, refusal or non-renewal, and the withdrawal of an accreditation shall be subject to judicial review on application to the High Court of South Africa, Transvaal Provincial Division (TPD), brought within three months after publication,

Powers and functions of the Registrar

4.(1) The Registrar shall exercise a supervisory function in regard to collecting societies in accordance with the Copyright Act, 1978, the Performers' Protection Act, 1967, and these Regulations.

(2) The Registrar shall keep a register of all accredited collecting societies established under the Copyright Act, 1978, and these Regulations, and shall ensure that these collecting societies shall discharge their obligations under the law. The Registrar shall be invited to attend annual or special general meetings of the members of an accredited collecting society and shall receive an annual activity report from each collecting society, setting out information on its activities, financial records and such other records as may be necessary to assess the degree of compliance of the collecting society with these Regulations, and with the Copyright Act, 1978 and Performers Protection Act, 1967. Such report shall be submitted within thirty days of the end of the financial year of such collecting society.

(3) An accredited collecting society shall keep the Registrar informed at all times as to its organisational structure and operational features, and also in regard to changes concerning the persons entitled by law or in terms of their organisational structures to represent it, by way of written notification given to the Registrar, such notification to be given within thirty days of the occurrence of a change. In particular, an accredited collecting society shall furnish the Registrar with:

(a) copies of the memorandum and articles of association, trust deed, founding documents, articles of incorporation, reciprocal agreements with foreign collecting societies, or any similar document setting out the basic organisational structure of the collecting society, including the name and address of its auditors;

(b) notice of any amendments or changes to the documents referred to in paragraph 4(3)(a), together with a report setting out succinctly the reasons for the amendment or change;

(c) tariffs set by the collecting society for potential users or user groups, and any amendments thereto;

(d) annually, an up-to-date fist of members;

(e) annually, an up-to-date list of agreements with foreign collecting societies;

(f) annual audited financial statements; and
(g) any documentation or report that the Registrar may reasonably require.

(4) In the event that a collecting society does not comply with its obligations under this Regulation, the Registrar may stipulate an appropriate time period of not less than thirty days but not more than ninety days for the collecting society to remedy the situation. Should the collecting society fail to comply within such time period, the Registrar may do one or both of the following:
(a) withdraw the collecting society's accreditation; and/or
(b) apply to court for any appropriate relief, including relief in terms of the common law or the law governing the entity acting as collecting society, and including but not limited to relief by placing the collecting society under judicial management, or by seeking the winding-up or dissolution of the collecting society.

CHAPTER 2

Obligations of collecting societies

Membership structure

5.(1) A representative collecting society shall be open to all persons either directly or through the membership of a collective organisation representing a particular group of rightholders having a similar interest.

(2) Where a representative collecting society has as members both owners of copyright in sound recordings and performing artists, whether directly or through one or several of its members as a collective organisation of performers or of copyright owners, the governing structure of the collecting society shall provide for equal representation of both owners of copyright in sound recordings and performers to take part in the decision-making process of the highest executive organ of the collecting society and the general assembly of members.

(3) Each member of a collecting society must have at least one vote.

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

(5) Nothing in these Regulations shall reduce, detract or affect in any way the rights or remedies that members of the collecting society are entitled to, or any relief available to them, under their membership agreement, the common law or any applicable legislation governing the legal entity accredited as a collecting society.

Administration of rights

6.(1) A collecting society shall administer the rights of its members and the proceeds of the exercise of such rights in accordance with the Copyright Act, **1978,** the Performers' Protection Act,, **1967,** and these Regulations.

(2) The aim of a collecting society shall be to administer public playing rights effectively and efficiently, to maximise the economic exploitation of the rights entrusted by the rightholders for their direct benefit and not to generate or accumulate unneeded profits in the hands of the collecting society itself, and to distribute the proceeds of such exploitation equitably amongst its members. A collecting society shall distribute at least **80%** amongst its members, and not more than 20% shall be retained by the collecting society after distribution to defray its costs or apply otherwise.

(3) Whenever desirable or expedient, a collecting society shall enter into reciprocal agreements with foreign collecting societies or rightholders, and it shall administer the rights entrusted to it and shall distribute at least **80%** of the money collected to its members.

Licensing

7.(1) A collecting society shall make available, on non-discriminatory terms, for any potential user of public playing rights the complete repertoire of records in respect of which the public playing rights are owned by the South African and foreign rightholders that it represented by it.

(2) A collecting society may enter into framework agreements with representative trade association and user groups concerning the use of the repertoire by potential users affiliated to them. Based on any framework agreement, or in the absence of a framework agreement by way of negotiation, the collecting society may enter into non-exclusive licence agreements with individual users or user groups. Framework agreements and individual non-exclusive licence agreements shall contain such terms and conditions as are necessary to enable the collecting society to comply with its obligations under the Copyright Act, **1978,** Performers' Protection Act, **1967,** and these Regulations.

(3) As part of a framework agreement or a non-exclusive licence agreement, the collecting society may negotiate with trade associations and representative bodies of potential users or user groups, or with individual users, a tariff that determines the amount and the manner of payment of the royalties in respect of the use in question, as well as the conditions of use and the information to be furnished to the collecting society to enable the proper distribution of any payments received.

(4) A tariff accepted by the collecting society and the trade association in question, or by the representative bodies or user groups, as the case may be, may jointly be submitted to the Registrar for approval and publication in the Government Gazette and South African Intellectual Property Law Journal for notification. Any potential user falling within the scope of the tariff as published and complying with its terms shall be granted a ticence by the collecting society upon assuming the obligation of the payment of the royalties established under the tariff. Should a dispute regarding the applicability of a tariff concerning an individual user or user group arise, application may be

made for appropriate relief to the Copyright Tribunal in terms of sections 31 to 33 of the Copyright Act, 1978.

(5) Should a tariff proposed by the collecting society not be accepted by the trade associations and representative bodies or the potential users, user groups, or individual users, such potential users and user groups shall have the option to pay the amount demanded by the collecting society into an escrow account, pending the outcome of a referral to the Copyright Tribunal or, if the parties so agree, pending the outcome of a referral for arbitration under the Arbitration Act, Act no. 42 of 1965, a5 amended. Any potential user or. user group in respect of which a deposit is being made and who furnishes the required information to the collecting society to allow for the later distribution of the funds placed in escrow, shall provisionally be allowed by the collecting society to engage in the use that is subject to the payment of a royalty as provided for in section 9A of the Copyright Act, 1978, and Section 5(1)(b) of the Performers' Protection Act, 1967.

(6) The collecting society may, pending any referral to the Copyright Tribunal or, if the parties so agree, pending any arbitration proceedings, apply to the Copyright Tribunal or the designated body in accordance with the provisions of the Arbitration Act, for a ruling requiring any potential user or user group to make payments to an escrow account of the amount demanded by the collecting society and to furnish information that will permit the tater distribution of the funds to be placed in such escrow account once the Copyright Tribunal or the designated arbitration body has rendered its final decision or award in the matter before it.

Distribution

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

(2) The costs and expenses incurred in the administration of the collecting society shall be calculated in conformity with Generally Accepted Accounting Practices (GAAP) set from time to time by the professional bodies of South African chartered accountants. The manner of bookkeeping and maintenance of records by a collecting society shall be such as to enable the ready verification of revenue received or accrued, as well as expenditures and costs incurred.

(3) A collecting society shall distribute the amounts collected in a manner to reflect as nearly as possibte the actual use of sound recordings and protected performances covered by the repertoire under its administration, taking into account the need for an economical and efficient management of the collecting society.

(4) A collecting society shall establish a distribution plan and apply it based on information publicly available, trade information available to its members and on information to be furnished by individual users and user groups in terms of framework agreements and non-exclusive licensing agreements.

(5) The distribution plan and any amendments thereof shall be submitted to the Registrar. The Registrar shall approve a distribution plan if it complies with the following principles and conditions:

(a) A distribution plan shall not provide for arbitrary or discretionary distributions;

(b) Subject to any contractual agreement to the contrary as contemplated in section 9A(2)(b) of the Copyright Act, **1978,** and section **5(4)** of the Performers' Protection Act, **1967,** where a representative collecting society has as members both owners of copyright in sound recordings and performing artists, whether directly or through one or more collective organisations of performers or of owners of copyright in sound recordings, money collected shall be distributed on an equal basis to performers and to owners of the copyright in sound recordings, either directly or to their collective organisation so that copyright owners and performers shall benefit equally on the basis of their volumes of use.

(c) A collecting society may provide in its distribution plan that, with the approval of the highest executive organ of the society, a portion of the proceeds may be set aside for the promotion of the creative arts, and culture and for welfare purposes (including pension benefits) of performing artists. Such portion shall not exceed **10%** of the amount to be distributed in any one year.

CHAPTER 3

Miscellaneous

Entry into force

9. These Regulations shall enter into force on the date of publication in the Government Gazette.

ANNEXURE 5: COPY OF SARRAL'S CONTRACT WITH ONE OF ITS MEMBERS

Appendix 5

CS7

LOCAL COMPOSER CONTRACT

MEMORANDUM OF AGREEMENT

MADE AND ENTERED INTO BY AND BETWEEN:

being the Composer and/or Author of musical works

(hereinafter referred to as "THE OWNER")

and

SOUTH AFRICAN RECORDING RIGHTS ASSOCIATION LIMITED

A company with limited liability duly incorporated in accordance with the Company Laws of the Republic of South Africa (herein represented by GEORGE ROBERT HARDIE) he being duly authorised thereto by virtue of a Resolution of the Board of Directors.

(hereinafter referred to as "SARRAL")

/Agreed...

A G R E E D:

1.

SARRAL are hereby authorised to licence and collect all mechanical royalties in respect of all recordings and mechanical reproductions of all musical compositions controlled by the Owner (hereinafter referred to as "SAID WORKS") for the territory of the World (hereinafter referred to as "SAID TERRITORY")

2.

SARRAL are not authorised to grant permission for the use of any of the Said Works in motion picture soundtracks, except Television Films made by a licensed broadcaster, without first obtaining written or cabled permission from the Owner.

3.

SARRAL agrees to forward the Owner quarterly statements of royalties collected and credited to his account reckoned from 01/07/96 accompanied by monies shown to be due, within sixty (60) days after the expiration of each such quarterly period.

4.

In consideration therefor SARRAL shall be entitled to retain a commission of 7½% of the gross total of royalties collected.

5.

THE Owner agrees to notify SARRAL of all compositions coming within his control for the Said Territory.

6.

THE Owner is entitled to sub-publish all or any of the Said Works in the Said Territory during the term of this agreement provided SARRAL continue to collect at source the Composer's and Author's share of mechanical royalties as determined by any sub-publishing agreement that may be entered into by the Owner.

7.

WHERE necessary to protect, enforce and /or collect mechanical royalties due to the Owner, the Owner shall cede, transfer and assign his copyright to SARRAL for the sole purpose of instituting action for the necessary legal relief in SARRAL'S or its nominee's name. In such event SARRAL shall bear all legal costs and disbursements in regard to the action brought. After the action referred to has been entirely disposed of, SARRAL shall cede, transfer and assign all and any rights it might have received in terms of this clause to the Owner.

8.

THE Owner shall be entitled during the currency of this agreement to apply for membership of SARRAL subject to the Memorandum of Articles of Association of SARRAL.

9.

THIS agreement shall remain in force for Five (5) years from the date hereof and shall thereafter be renewed from year to year by tacit agreement unless terminated by either party giving to the other notice in writing by registered pre-paid post at least two (2) months prior to the expiration of the periods referred to earlier in this clause.

DATED AT JHB THIS 23rd DAY OF JULY 1996

AS WITNESSES:

1. .....

2. .....

BY .....

DATED AT J.H.B THIS 23rd DAY OF July 1996

AS WITNESSES:

1. .....

2. .....

BY .....
SOUTH AFRICAN RECORDING RIGHTS ASSOCIATION LIMITED.

Appendix 6

MEINTJES, RETIEF & VENNOTE/PARTNERS

GEOKTROOIEERDE REKENMEESTERS/CHARTERED ACCOUNTANTS

DATUM/DATE

IF VERW-fYOUR REF.

OUSVER.W./OURREF

ROSESTRAAT 9 ROSE ST
FLORIDA 1710
TOSBUS/P.O BOX 1408
FLORIDA 1710
TEL: 472-35920/4
FAKS/FAX; 472-3595
E-MAIL: mein-ret@iafrica.com

REPORT OF THE INDEPENDENT AUDITORS TO THE MEMBERS OF SOUTH AFRICAN RECORDING RIGHTS ASSOCIATION UMITED(LIMITED BY GUARANTEE)

We have audited the annual financial statements of SOUTH AFRICAN RECORDING RIGHTS ASSOCIATION LIMTED(BY GUARANTEE) set out on pages 8 to 15 for the year ended 31 December 2003. These financial statements are the responsibility of the company's directors. Our responsibility is to express an opinion on these financial statements based on our audit.

Scope

We conducted our audit in accordance with statements of South African Auditing Standards. Those Standards require that we plan and perform the audit to obtain reasonable assurance that the financial statements are free of material misstatement. An audit includes;

- examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements,
- assessing the accounting principles used and significant estimates made by management, and
- evaluating the overall financial statement presentation.

We believe that our audit provides a reasonable basis for our opinion.

Qualification

We were unable to verify the correctness of the receipts from the SABC in terms of the Blanket License and were unable to verify the correctness of the royalty distributions.

Qualified audit opinion

In our opinion,except for the effect on the financial statements of the matters referred to in the preceding and following paragraphs, the financial statements fairly present, in all material respects the financial position of the company at 31 December 2003 and the results of its operations and cash flows for the year then ended in accordance with South African Statements of General Accepted Accounting Practice, appropriate to the business and in the manner required by the Companies Act in South Africa

Emphasis of matter

We draw your attention to the note on going concern in the directors' report, as well as the note in the directors' report that there is an application pending for the liquidation of the company as well as various summonses and claims which are being defended by the company.

Supplementary information

The supplementary schedules set out on page 13 do not form part of the annual financial statements and are presented as additional information. We have not audited these schedules and accordingly we do not express an opinion on them.

Meintjes Retief and Partners
Registered Accountants and Auditors

Florida
08 June 2005

Vennote/Partners: P.J.E. MEINTJES, J.P.O. RETIEF

MEINTJES, RETIEF & VENNOTE/PARTNERS
GEOKTROOIEERDE REKENMEESTERS/CHARTERED ACCOUNTANTS

DATUM/DATE

IF VERW-fYOUR REF.

OUSVER.W./OURREF

ROSESTRAAT 9 ROSE ST
FLORIDA 1710
TOSBUS/P.O BOX 1408
FLORIDA 1710
TEL: 472-35920/4
FAKS/FAX; 472-3595
E-MAIL: mein-ret@iafrica.com

REPORT OF THE INDEPENDENT AUDITORS TO THE MEMBERS OF SOUTH AFRICAN RECORDING RIGHTS ASSOCIATION UMITED(LIMITED BY GUARANTEE)

We have audited the annual financial statements of SOUTH AFRICAN RECORDING RIGHTS ASSOCIATION LIMTED(BY GUARANTEE) set out on pages 8 to 15 for the year ended 31 December 2004. These financial statements are the responsibility of the company's directors. Our responsibility is to express an opinion on these financial statements based on our audit.

Scope

We conducted our audit in accordance with statements of South African Auditing Standards. Those Standards require that we plan and perform the audit to obtain reasonable assurance that the financial statements are free of material misstatement. An audit includes;

- examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements,
- assessing the accounting principles used and significant estimates made by management, and
- evaluating the overall financial statement presentation.

We believe that our audit provides a reasonable basis for our opinion.

Qualification

We were unable to verify the correctness of the receipts from the SABC in terms of the Blanket License and were unable to verify the correctness of the royalty distributions.

Qualified audit opinion

In our opinion,except for the effect on the financial statements of the matters referred to in the preceding and following paragraphs, the financial statements fairly present, in all material respects the financial position of the company at 31 December 2004 and the results of its operations and cash flows for the year then ended in accordance with South African Statements of General Accepted Accounting Practice, appropriate to the business and in the manner required by the Companies Act in South Africa

Emphasis of matter

We draw your attention to the note on going concern in the directors' report, as well as the note in the directors' report that there is an application pending for the liquidation of the company as well as various summonses and claims which are being defended by the company.

Supplementary information

The supplementary schedules set out on page 13 do not form part of the annual financial statements and are presented as additional information. We have not audited these schedules and accordingly we do not express an opinion on them.

Meintjes Retief and Partners
Registered Accountants and Auditors

Florida
15 November 2005

Vennote/Partners: P.J.L. MEINTJES, J.P.O. RETIEF

/EINTJES, RETIEF & VENNOTE/PARTNERS

EOKTROOIEERDE REKENMEESTERS/CHARTERED ACCOUNTANTS

ISESTRAAT 9 ROSE STREET
ORIDA 1709
SBUS/P.O. BOX 1408
ORIDA 1710

TEL: 011 472 3552
FAKS/FAX: 011 472 3595
E-MAIL: mein-ret@iafrica.com

EPORT OF THE INDEPENDENT AUDITORS TO THE MEMBERS OF SOUTH AFRICAN ECORDING RIGHTS ASSOCIATION LIMITED (LIMITED BY GUARANTEE)

e have audited the financial statements of South African Recording Rights Association Limited (Limited Guarantee) set out on Pages 4 – 12 for the year ended 31 December 2005. These financial tements are the responsibility of the company's directors. Our responsibility is to express an opinion on ise financial statements based on our audit.

OPE

conducted our audit in accordance with generally accepted Auditing Standards. These standards uire that we plan and perform the audit to obtain reasonable assurance that the financial statements free of material misstatement. An audit includes:

- Examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements,
- Assessing the accounting principles used and significant estimates made by management, and
- Evaluating the overall financial statement presentation.

believe that our audit provides a reasonable basis for our opinion.

ALIFICATION

were unable to verify the correctness of the SABC returns in terms of the Blanket License as we have ccess to SABC records, although in our opinion the recordal was treated appropriately by the pany.

ALIFIED AUDIT OPINION

ur opinion, except for the effect on the financial statements of the matters referred to in the preceding following paragraphs, the financial statements fairly present, in all material respects, the financial ion of the Company at 31 December 2005 and the results of its operations and cash flows for the then ended in accordance with South African Statements of General Accepted Accounting Practice, opriate to the business and in the manner required by the Companies Act in South Africa..

HASIS OF MATTER

raw your attention to the note on going concern in the directors' report, as well as the note in the tors' report that there is an application pending for the liquidation of the company as well as various nonses and claims which are being defended by the company.

PLEMENTARY INFORMATION

supplementary schedules set out on page 12 do not form part of the annual financial statements and sented as additional information. We have not audited these schedules and accordingly we do not ss an opinion on them.

TJES, RETIEF & PARTNERS
TERED ACCOUNTANTS (SA)
STERED ACCOUNTANTS AND AUDITORS

Florida
10 October 2006

APPENDIX 7: RESPONSE TO THE TERMS OF REFERENCES OF THE CRC

NO'S	TERMS OF REFERENCES REQUIREMENTS	THE CRC HIGH LEVEL RESPONSES	REFERENCES TO CRC REPORT

1.	Assess the effectiveness of the structure of collecting societies in South Africa, including those that belong to authors, composers, recording companies, musicians/artists and others. The CRC should assess,advise and make recommendations on how the collective management of copyright can be improved.	The failure to distribute the needletime royalties is partly due to the inappropriateness of the structure for the needletime collecting societies. SAMPRA was accredited as the music producers' collecting society and SAMRO as a performers' society. The Regulations or the Registrar did not envisage how they would work together in making sure that the royalties are effectively distributed by them. Currently, there is an unresolved dispute between the parties as a result of this ambiguity.
		
		Due to the confusion around NORM and SAMRO's repertoire, arising as a result of the overlapping membership between the two organisations, there are payment backlogs for the mechanical rights by the major music users, like television stations and mobile telephone networks.
		
		In order to deal with the above, the CRC has recommended the following:
		
		• One collecting society per right (one collecting society for performance rights, one collecting society for needletime rights and one collecting society for mechanical rights).
		
		• In order to facilitate the above recommendation, a merger of some of the collecting societies' operations is recommended:
		  • SAMPRA to merge with SAMRO's needletime unit;
		  • NORM to merge with SAMRO's mechanical rights unit; and
		  • SAMRO's performance rights unit to remain with SAMRO.
		
		If the proposals are not fully implemented within two years, an appropriate procedure will have to be followed for the accreditation of the relevant society.
		
		• The scope of the Regulations should be broadened in order to incorporate collecting societies for performance and mechanical rights.
		•
		• The Registrar is to be empowered to oversee the other collecting societies (for performance and mechanical rights) as well.
			Paragraph 6.1 & Chapter 5
			
			Paragraph 8.1.7
			
			Paragraph 6.3.4
			
			Paragraph 6.3.4
			
			Paragraph 6.3.4
			
			Paragraph 6.3.4

NO'S	TERMS OF REFERENCES REQUIREMENTS	THE CRC HIGH LEVEL RESPONSES	REFERENCES TO CRC REPORT
2.	Assess the relationship of collecting societies that exist in South Africa to determine the extent and access in royalties from public and private broadcasters, and how the distribution is done to artists. The CRC should assess, advise and make recommendations.	With regard to the performance rights, SAMRO has concluded agreements with almost all public and commercial broadcasters (except DMX). SAMRO is paid monthly and the cue sheets are also submitted monthly. The distributions to the songwriters, composers, publishers, sister collecting societies and agencies of the international recording labels like EMI are done once a year based on the cue sheets submitted by the respective broadcasters. With regard to mechanical rights, there are no agreements between the SABC and the relevant collecting organisations (SAMRO and NORM). NORM has appropriate agreements with private television stations and the relevant mobile communications networks, but the situation with SAMRO is unsatisfactory. The agreements are not in place due to the confusion around SAMRO's repertoire versus NORM's repertoire. Therefore no collection has been made by SAMRO from these entities. Refer to the CRC's recommendation on a merger of some of the collecting societies' operations under 1 above.	Paragraph 8.3 Paragraph 8.1.7 Paragraph 8.1.7
3.	Assess the nature of private and public agreements that the radio and TV stations have with local and international collecting societies and access how royalties are distributed and the pattern of perceiving for local *vis a vis* international rights owners. The CRC should assess, advise and make recommendations.	There are no agreements between the local broadcasters and the international collecting societies. The agreements between the broadcasters and SAMRO allow the broadcasters to use SAMRO's repertoire, which includes all SAMRO's members' songs and the members of all foreign collecting societies with reciprocal agreements with SAMRO. In practice, the situation is different because the full performance rights liability is paid to SAMRO. Even if a rights holder is not a member of SAMRO, his or her share of the royalty is paid to SAMRO. Based on the cue sheets, the shares of the royalty fees belonging to known recipients are distributed to them. In the case of foreign parties, the distribution is made to the respective foreign collecting societies and to the local agents of the multinational publishers. The amounts payable to non-members are not distributed until the right owners are identified. If the right owners are not identified within three years, the unclaimed amounts are distributed to known members proportionately. The CRC's recommendations are: • The retention period for the unclaimed funds should be increased from three to five years. • Any unclaimed funds after five years should be taken into the social / cultural / pension fund for the benefit of local artists.	Paragraphs10.5 & 10.8 Paragraph 10.9

NO'S	TERMS OF REFERENCES REQUIREMENTS	THE CRC HIGH LEVEL RESPONSES	REFERENCES TO CRC REPORT
4.	Assess the nature and extent of use of music by Mobile Telephony Companies and whether they are paying copyright royalties to rightful owners. The CRC should assess, advise and make recommendations.	Mobile operators have been selling ringtones since 2000 and no payments were ever made for performance and needletime rights. This is due to the fact that the South African copyright law lags behind the digital era. The right to communicate a work to the public at a time and place chosen by the user adequately addresses the transmission of works on networks, as well as the streaming of content. This 'new' right has been adopted in most other jurisdictions and collecting societies are able to licence users for a wide variety of on-line music offerings. In order to deal with this, the CRC recommends amendments to the Copyright Act by adopting the right to communicate the work to the public as one of the exclusive rights of copyright owners. For further details, kindly refer to Chapter 4. With regard to mechanical rights, as reported in 2 above, some of the mobile operators honour their payment commitments in respect of NORM's repertoire, but situation is different with SAMRO and SARRAL.	Chapter 4
5.	Assess the extent of distribution of royalties and determine the percentages distributed nationally *vis a vis* outside South Africa. The CRC should assess, advise and make recommendations.	Foreign distributions for 2009 were: • Local composers and authors: 24,1%; • Beneficiaries: 0,8%; • Publishers: 32,1%; and • Foreign collecting societies: 43%. These percentages were calculated with reference to SAMRO's distribution records. We could not determine the specific figures, because a significant portion of the foreign distributions are distributed via local agents, as opposed to foreign collecting societies. In order to improve the situation, the CRC recommends an increase inlocal music content: • For private radio, from 25% to 50% over a five year period. • For public radio, from 40% to 80% with immediate effect. • For community radio stations, from 40% to 80% with immediate effect.	Chapter 10 with specific reference to paragraphs 10.1 & 10.6 Table 26 (b) Table 26 (a) Table 26 (c)
6.	Assess tariffs associated with licensing agreements. The CRC should assess, advise and make recommendations.	The CRC compared the tariffs charged in South Africa with those charged in other countries and discovered that most of the tariffs applied are significantly lower than those charged in the countries visited by members of the CRC. It has been recommended that the tariffs should be benchmarked and reviewed every five years by the respective collecting societies.	Paragraph 8.2.

NO'S	TERMS OF REFERENCES REQUIREMENTS	THE CRC HIGH LEVEL RESPONSES	REFERENCES TO CRC REPORT
7.	Assess all licensing agreements that universities, other institutions of higher learning and training institutions have with collecting societies, relating to royalties (in relation to copyright work/literary work that are distributed to collecting societies, and further to artists, composers, authors and/or publishers from the collecting societies. The CRC should assess, advise and make recommendations.	The matter is addressed in Chapter 9. The CRC has determined that effective licence agreements are in place between DALRO and institutions of higher learning and training institutions. The collection of royalties is done efficiently. However, neither DALRO nor the publishers have the authority of all authors to collect royalties on their behalf (i.e. in cases where authors did not assign their rights to published works to the publishers). DALRO distributes all the royalties to the publishers without any recourse to the authors of the works' right to remuneration. The CRC recommends that DALRO obtain the right to collect royalties for the reproduction of works from authors. DALRO should also ensure that authors receive their share of royalties of past payments erroneously made to publishers only.	Chapter 9
8.	Assess if all the collected money is distributed and assess the remaining money, if any, that is not distributed by collecting societies, e.g. for administration, social pension or for any other purposes. The CRC should assess, advise and make recommendations.	The CRC analysed the amounts collected. Thereafter distributed the amounts which could not be distributed, because the persons entitled thereto could not be identified and the efficacy of the attempts made to trace such persons. The cost- to- royalty income ratio (administration costs as percentage of total collections) for the collecting societies selected for international benchmarking varies between 10% and 24%, bearing in mind that the maximum allowable ratio is 20% in terms of the current local regulations for needletime collecting societies (which the CRC regards as appropriate).The CRC believes that SAMRO's current ratio of approximately 30% is excessive in relation to the international average. The CRC recommends that SAMRO should be given three years to resolve this matter. SAMRO is the only collecting society in the country which sets aside monies for social and cultural activities.	Chapter 10 with specific reference to paragraph10.8 Paragraph 10.11.6.

NO'S	TERMS OF REFERENCES REQUIREMENTS	THE CRC HIGH LEVEL RESPONSES	REFERENCES TO CRC REPORT
9.	Assess a sample of contractual relationship amongst collecting societies in the music industry and other users such as hoteliers and places of employment. Determine how these contracts are structured and royalties flowing to artists. The CRC should assess, advise and make recommendations.	The contracts between the collecting societies and the general users are based on the flat fixed amount based on the size of the place (e.g. no. of seats, square meters, no. of telephone lines and the others) payable once a year in advance. With regard to the organisations with multiple sites (like retailers and banks), such organisations are granted one licence which covers all the relevant sites. The lists of sites are normally attached to the contracts, since the payment is based on the total size of all sites. Most of the background music users do not keep the playlists (music usage information) and this is based on the costs versus benefits. All monies collected from these users are distributed on an analogous basis reflecting the usage trends in broadcast (including regional and community stations) and other usage data (when available). The CRC recommends that the collecting societies adopt an appropriate formula based on regional statistical sampling surveys (taking into account the music that is being used by the relevant users).	Paragraphs 8.1.6 & 8.4
10.	Assess, for the purposes of the needle time royalty, if all accredited collecting societies are complying with the Copyright Regulations regulating the administration and distribution of the needle time royalty. Recommend a compliance model for good corporate governance of the regime. The CRC should assess, advise and make recommendations.	There are only two accredited collecting societies for needletime, namely SAMRO and SAMPRA. SAMRO has not yet commenced with the distribution activities. The areas of non-compliance by SAMPRA include the failure to submit the audited financial statements for the last two financial years, failure to invite the Registrar to the AGM and failure to submit the relevant documents in accordance with the timelines prescribed by the Regulations.	Chapter 6

NO'S	TERMS OF REFERENCES REQUIREMENTS	THE CRC HIGH LEVEL RESPONSES	REFERENCES TO CRC REPORT
11.	Assess if collecting societies in general, nationally and internationally, collect only from their members and/or non-members. In this regard, assess how are royalties of non-members treated and distributed, including the efforts taken by collecting societies for tracking non-members whose royalties are in custody of collecting societies. The CRC should assess, advise and make recommendations.	The contracts between the collecting societies (SAMPRA and SAMRO) and their respective music users are limited to their repertoire, but they operate as if they have blanket agreements with their respective users. Although this practice is in conflict with the contractual terms, it is better because it simplifies the administration levels for the users. Based on this practice, the collecting societies (SAMPRA and SAMRO) collect royalty income for both members and non-members. The non-members' portion is retained by SAMRO for three years (it is still too early to talk about SAMPRA in this regard) and any unclaimed royalty income at the end of three years is distributed and shared by the known members. SAMRO has an unjustifiably long list of unknown recipients. The CRC is not satisfied with SAMRO's effectiveness in tracking the unknown recipients of the unclaimed royalties. With regard to the seven countries (Brazil, France, India, Norway, Senegal, Switzerland and UK) visited by the CRC, the collecting societies collect for both members' and non-members' shares of royalties. The non-members' portion is retained while the right recipients are being sought through very effective measures (in most cases). The CRC recommends that collecting societies adopt effective measures to trace members and non-members alike.	Paragraph 8.3

NO'S	TERMS OF REFERENCES REQUIREMENTS	THE CRC HIGH LEVEL RESPONSES	REFERENCES TO CRC REPORT
12.	Assess in particular how reciprocal agreements in this regime of collecting societies operate. Further assess the reciprocal agreements amongst collecting societies and their counterparts. Determine who owns the "rights" in this relationship. Are rights alienated to third parties without consent of the owner of the rights?The CRC should assess, advise and make recommendations.	SAMPRA only grants licences in respect of repertoire owned by RiSA's members while NORM only grants licences in respect of repertoire owned by its members. Both SAMPRA and NORM have no reciprocal agreements. The payments for the international parties are done via local agents of international publishers like Sony, EMI and others. As indicated above, SAMPRA operates as if there are blanket agreements between itself and its users (SAMPRA collects the full needletime liability from its users). SAMRO and DALRO are affiliated to numerous similar organisations elsewhere in the world. They have a number of reciprocal agreements with these other organisations in terms of which of these societies administer the rights of the collecting societies in their countries (having been authorised to do so by licences or assignments of copyright effective in the countries in which they operate). SAMRO and DALRO, in turn, are authorised, in terms of these agreements, to administer the repertoire of these societies in South Africa. All these societies apply the principle of national treatment in accounting for royalties. The result, based on the terms on which SAMRO and DALRO collect and account to foreign affiliates, are same as those upon which they collect on behalf of South African composers, publishers and authors. SAMRO acts as assignee of the rights of its members. It is therefore the owner of the rights it administers. Each member is entitled to resigning from SAMRO to the re-assignment of his or her rights. DALRO acts as assignee of publishers and some authors.	Paragraphs 10.5.1 & 10.5.2

NO'S	TERMS OF REFERENCES REQUIREMENTS	THE CRC HIGH LEVEL RESPONSES	REFERENCES TO CRC REPORT
13.	Assess all licences issued by ICASA to public and private radio and TV stations in relation to music genres. Is there compliance with the terms of the license and recommend how enforcement can be improved? The CRC should assess, advise and make recommendations.	Despite the recommendations of the MITT in 2000 about the local content targets, the local music content targets are still too low: • 25% for commercial radio stations; and • 40% for public and community radio stations. The economic benefits arising from the introduction of needletime will be hampered by these low targets. ICASA could not provide the assessment files for 11 radio stations for 2010 and we could therefore not ascertain whether the monitoring activities were performed for the radio stations in question. The CRC believes that there is still room for improvement on the monitoring side. The definition of South African music has gaps and hampers the effective implementation of the local content requirements. The CRC believes that such gaps have to be rectified. ICASA is to implement appropriate processes and systems in order to improve the effectiveness of the monitoring process.	Chapter 11
14.	Assess how reciprocal agreements in the copyright regime operate amongst states. Can a state, such as South Africa, direct how reciprocal agreements should be structured in terms of Section 4 of the Performers Protection Act, 196? The CRC should assess, advise and make recommendations.	There are no reciprocal agreements in the copyright regime between states; a state such as South Africa cannot direct how reciprocal agreements should be structured in terms of Section 4 of the Performers Protection Act.	Paragraph10.5.4

NO'S	TERMS OF REFERENCES REQUIREMENTS	THE CRC HIGH LEVEL RESPONSES	REFERENCES TO CRC REPORT
15.	Assess contractual relationship among artists and big recording companies, such as Sony, EMI, Gallo and Universal and publishing houses pre and post the Copyright Amendment Act, 2002 and Performers Protection Amendment Act, 2002. The CRC should assess, advise and make recommendations.	Neither the pre-2002 nor the post-2002 contracts could be examined because the relevant parties did not submit them to the CRC.	
16. '	Assess contractual relationship amongst artists and independent labels pre and post Copyright Amendment Act, 2002 and Performers Protection Amendment Act, 2002. Assess how distribution is done flowing from these contractual relationships. The CRC should assess, advise and make recommendations.	The pre-2002 contracts could not be examined because the relevant parties could not submit them to the CRC. A sample of post-2002 recording contracts for the big four recording companies' contracts were examined. Based on the sample of the contracts examined, those contracts, which recognise the existence of the needletime rights, all make provision for an equal split between the performers and the recording entities. Other contracts make no reference to the needletime rights even though they were concluded after 2002. With regard to the recoupment of the advances, advance contracts do not make a distinction between different types of royalty sources. The advances are repayable against any type of income payable to the artists. In terms of these contracts, the needletime royalty income may be set-off against the outstanding advances and all contracts of the big four recording entities were in agreement to this. Almost all contracts examined were exclusive; the artists are not allowed to contract with more than one recording entity concurrently. The Commission has recommended the following: • A standard template for the performers' contracts to be drafted by **the dti** and recommended for use by the recording entities. • **the dti**is to fund the audit of artists' financial affairs within the recording entities on a sample basis for next couple of years.	Paragraph10.10
17.	Assess the efficiency of legislation in SA to deal effectively with concerns raised above.	This aspect is addressed in Chapter 3 & 4. The CRC recommends that the Copyright Act and the Copyright Regulations be amended to address technological advances and to provide for an effective regime for the collective management of copyright rights.	Chapter 3 & 4

NO'S	TERMS OF REFERENCES REQUIREMENTS	THE CRC HIGH LEVEL RESPONSES	REFERENCES TO CRC REPORT
18.	Assess how the playing of South African music, for those artists and composers that do not belong to collecting societies and as such no reciprocal agreements exist, is treated by foreign broadcasters. Determine if any royalty is payable and to who exactly is it payable and how is such royalty is treated by the laws of various countries where such royalty is collected. The CRC should assess, advise and make recommendations.	SAMRO's authority to collect royalties is limited to its members' repertoire, but it operates as if it has authority to collect for all repertoire (also that of the non-members) in South Africa. The foreign broadcaster will pay royalties to the foreign collection society for the use of the non-members' works. The foreign collection society will collect on behalf of the South African non-members. The royalty will be paid to SAMRO. The royalty is then payable to the non-members provided SAMRO has effective measures in place to trace the non-members. Refer to the CRC's recommendations in 10 above.	Paragraph 10.5.5

NO'S	TERMS OF REFERENCES REQUIREMENTS	THE CRC HIGH LEVEL RESPONSES	REFERENCES TO CRC REPORT
19.	Assess if all collecting societies comply with the general rules of corporate governance in terms of relevant legislation and the Copyright Regulations 2006 that regulates the administration of the needle time royalty. CRC should assess, advise and make recommendations.	The CRC noted the fact that SARRAL's collapse was preceded by the corporate governance failure. The highlights of this failure include the breakdowns or significant weaknesses in: • The internal controls. For three consecutive years (2003, 2004 & 2005) the entity received a qualified audit report for the failure to verify receipts from theSABC and members' distributions. • Conflict between internal rules and the constitutive document and the fact that the managing director was also the chairman of the organisation. • The out-dated constitutive documents which were also in conflict with the Companies Act of 1973. • The change in accounting policies which were adopted in breach of its contractual obligations to its members. It is clear that the internal control and the audit functions were not overseen by an effective audit committee. With regard to SAMRO, the following gaps were identified within their corporate governance structure: • Constitutive documents are out-dated and are in conflict with the Companies Act. • There are no independent directors. • An internal audit function is not in place. • The disclosure of the executive directors' remuneration is limited (in contravention of the Companies Act of 2008 and the King III), • The members' rights are disempowered by these out-dated constitutive documents. • There is a lack of transparency with regard to the categorisation of membership. The CRC recommends that the regulation of the collecting societies include the adherence to the good principles of corporate governance.	Chapter 7