



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

PRESENTATION TO THE SUBCOMMITTEE: TRADE AND INDUSTRY

REGULATION OF COLLECTING SOCIETIES

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PRESENTERS

Evelyn Masotja
Deputy Director General, the dti

Dr Ria Nonyana-Mokabane
Chief Director : Legislative Drafting, the dti

Meshendri Padayachee
Deputy Director: IP and Commercial Law, the dti

Pregoria Mabaso-Muvhango
Director : Legislative Drafting, the dti

Kadi Petje:
Senior Manager Copyright: CIPC

PURPOSE OF PRESENTATION

To brief the Subcommittee on Copyright on the regulation of Collecting Societies and matters connected thereto.

Background

- Collecting Societies are established in terms of the Copyright Amendment Act No. 9 of 2002. The Regulations were promulgated in 2006.
- The basis for the regulation of Collecting Societies is well established in the recommendations made in the Copyright Review Commission Report (CRC) of 2011, which focussed on matters pertaining to collective management and the non-payment of royalties (needletime).
- These recommendations may be summarised as follows:
 - South Africa should amend its Copyright Act by adopting *inter alia* the right to communicate literary and musical works to the public and the right to make available copies of sound recordings;
 - The copyright law should be amended to allow the Registrar to take over the administration (as opposed to the withdrawal of accreditation) of any relevant Collecting Society;
 - Legislation be amended to allow for one Collecting Society per set of rights with regard to all rights governed by the Copyright Act of 1978 (performance, needletime and mechanical rights).

Background

- The law should be amended to allow for all music-rights Collecting Societies to fall within the ambit of the Regulations issued under the Act;
- The legislation to be amended as follows: retention of music usage information to be compulsory for essential music users;
- 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;
- 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;
- The Copyright Act must be amended to include a section modeled on that in the US Copyright Act, which provides for the reversion of assigned rights twenty five (25) years after the copyright came into existence;
- The definitions of local music contained in the Electronic Communications Act should be enlarged;and
- 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.

Background

- The amendments made to the Copyright Act in terms of collective management, music, royalties, tribunal etc. are a direct result of the above recommendations to reinforce the regulation of CS.
- The CIPC is the enforcement agency of **the dti** with respect to Intellectual Property (IP).
- In terms of Copyright, the Registrar of Copyright is responsible for registering, accrediting and regulating CS which may include, activities such as the approval of distribution plans and dispute settlement through the current Copyright Tribunal.
- The CRC recommended that the CIPC through the Registrar of Copyright assume all administration of CS and not merely the removal of accreditation as under the current Act, this is supported by **the dti**.
- Therefore, the amendment to the Act makes provision for the CRC recommendations and to strengthen the mandate of the CIPC in terms of CS.

Background

- Since the promulgation of Regulations the following Collecting Societies were accredited:
 - **SAMPRA** – (South African Performers Rights Association) for copyright owners of sound producers, entitled to issue licences, collect royalties and distribute them to its members, but has no responsibility towards performers.
 - **SAMRO** – (South African Music Rights Organisation) for composers, lyricists and publishers.
 - **CAPASSO** – Composers, Authors and Publishers Association. Is a mechanical rights agency which collects and distributes royalties to its members: music publishers & composers.
 - **POSA** – Performers Organisation of South Africa's *Trust - I am not sure if it is still functional as a Collecting Society.*
 - **SARRAL** – (South African Recording Rights Association) for Composers and publishers. SARRAL was liquidated in 2009. The Company was wound up due to misappropriating composers' royalties. The royalties money was used for management and running of the company.

Background

- the proposed legislation reinforces the intention of the Regulations and provides for the establishment of a Collecting Society. The Bill also stands as a statutory measure for non-compliance of a Collecting Society;
- the Bill provides for the accreditation and registration of Collecting Societies and allows the Registrar (the CIPC in this case) to take over the administration;
- Collecting Societies are also required to adhere to good corporate governance principles and comply with Regulations; and
- when Collecting Societies act as agents for copyright holders, it is proposed that the rights of copyright holders remain with them and copyright holders should receive royalties from whoever exploits their rights.

Freedom of association

- Freedom of association with regard to collection of royalties is not impaired as the CRC did not make it compulsory for artists to be part of a Collecting Society in order to get their royalties.
- Artists who wish to administer the collection of royalties for the use of their work can do so using contract.

Collecting rights

- The amendment of legislation to allow for one Collecting Society per set of rights (one Collecting Society for performance rights; one Collecting Society for needletime rights; and
- one Collecting Society for mechanical rights) is due to the confusion around certain Collecting Societies' repertoires, arising as a result of the overlapping membership between organisations.
- This approach could assist the artists greatly by providing certainty to artists on who is collecting and which royalty is being collected. It will further assist in addressing the problem of CS collecting for artists not registered under them.

Collecting society

- Regarding the extension of the CRC recommendation concerned with one Collecting Society per set of rights beyond the music industry, is due to the fact that firstly, there are no Collecting Societies in other areas (Audio Visual sector/Artist Resale Right) that are copyright based. Most significantly, it is important for purposes of consistency and legal certainty to have Collecting Societies.
- Copyright based industries requested that their sector be allowed to have a CS and similar provisions if not the same, can be used to regulate the CS.
- New areas requiring a form of collective management, the royalty streams are not many and therefore one CS can collect for their set of rights, for the artist resale right for example, there is only royalty stream linked to the resale of the work.
- In terms of the audio visual sector the royalty stream will stem from the four economic rights in the Beijing Treaty for audio visual performances and replace the two existing rights. In this sector no one is collecting, save for one individual who assists some performers in collecting their repeat fees from the Broadcaster, this leaves out many who have no assistance.

Indigenous Knowledge: Collecting Societies

- The Intellectual Property Laws Amendment Act, 2013 (IPLAA) provides for the protection of Indigenous work through the Intellectual Property system to prevent misappropriation, but the Act is not in force.
- The current system of collective management for music is applicable to songs that are indigenous because copyright is part of the IPLAA.
- The CIPC will need to advise on how collection may occur in the interim. This should be limited to music as the IPLAA provides for its own mechanisms of protection. Any amendment made by the Copyright Act will form part of the IPLAA but is not dependant on the IPLAA being in force.
- With regard to the maximum period that a Collecting Society may retain royalties before distributing them, this can be addressed by taking into account that Section 22B (5) of the CAB provides that the registration certificate of a Collecting Society is valid for a period not exceeding five (5) years.
- Therefore, it can be deduced from the above mentioned section that a Collecting Society has a maximum period of five (5) years. In the CRC, SAMRO explains that after three (3) years the unclaimed royalties are written back to income and distributed to the members based on the normal distribution criteria.
- This provision is to ensure that monies are not left for years without distribution or that distribution occurs timeously to the correct recipients, this is a mechanism to ensure that the correct recipients receive the correct distribution, the CRC found the practice of distributing unclaimed royalties to be problematic.

Administration fees

- The need to prescribe a maximum administration fee is that, according to the CRC report, Collecting Societies like SAMRO were retaining 30% in administration fees.
- The CRC report provided that the cost- to-royalty income ratio, which is the administration costs as a 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). Therefore, retaining 30% is excessive in relation to the international average.
- Capping it at 20% is reasonable and in line with other jurisdictions and ring fences the administration fees which caps unneeded profits, whereby a portion could rather be used to assist the industry.

Royalties

- Regarding the need to prescribe reporting by users in order to facilitate royalty payments, the CRC report 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 to accurately 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.
- Furthermore, 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.
- Therefore, this is critical as CS must have systems in place to capture correct data in the long term, the latter will ensure payment of royalties to correct recipients.
- There may be a need to prescribe reporting to facilitate royalty payments.

Discussion Points

- Freedom of association vs one collecting society per right
- Extending CRC recommendations beyond music sector
- Possible inclusion of indigenous knowledge works
- Maximum period to distribute royalty
- Prescribed maximum admin fees
- Prescribed reporting by users to facilitate royalty payment
- Conclusions

Important aspects in Collective Management of rights

- Capacity to license the rights
- Capacity to collect the royalty
- Capacity to distribute the royalty
- Data of usage from users
- Technology to provide solutions
- Transparency and accountability (good governance)
- Collecting societies must always have zero balance after each distribution
- Good copyright legislative framework

One Collecting Society per right

- The need for SA to have a system of one Collecting Society per right was an area of much focus during the Copyright Review Commission (CRC) in 2010 and the industry agreed.
- Different category of right holders being members of one Collecting Society has availed practical challenges. Members pursued opposing interests on how the Collecting Society must administer the rights entrusted to it.
- Owners of sound recordings who are often performing artists and composers changed positions depending on where much benefit emanated (Absence of a shared interest and there is a likelihood of advancing opposing developmental goals).
- Users resisted royalty payment when approached by more than one Collecting Society on the same right. Imagine ten (10) collecting societies on same rights.
- It becomes quiet challenging to set a tariff where different right holders are members of one Collecting Society (In instances where the court has not determined a tariff).

Extending Collecting Society beyond music

- There is a need for Performers in the audio – visual sector to earn royalty by virtue of a statute and Collecting Management of rights will become the machinery to achieve that goal.
- The Collecting Societies in the audio - visual sector will preparing South Africa to join the WIPO Beijing Treaty on the protection of audio - visual performances.
- Both Actors and Producers of audio – visual works will participate and be represented equally in the decision making process in the Collecting Societies in the same manner as administration of rights in sound recordings (needletime).
- The sector has been engaged and workshops took place.

Collecting Societies for Indigenous Knowledge works

- South Africa has not yet passed an Act of Parliament to protect Indigenous Knowledge-therefore it is not possible to avail Collective Management of rights where the works are not enjoying protection under law.
- The protection of Indigenous Knowledge is still a topic of discussion at World Intellectual Property Organization (WIPO).
- Another point that is worth mentioning is that we are still waiting for a **directive** whether the Department of Trade and Industry (**the dti**) or Department of Science and Technology (DST) will be given the legislative mandate on Indigenous Knowledge.

Maximum period to retain royalties prior distribution

- It may be practically challenging to legislate on maximum period that Collecting Societies may retain royalties before distribution.
- We advise that the Sub-committee must consult with Collecting Societies to gauge if this will not hamper the administration and management of the rights.
- We know that users are licensed by Collecting Societies on different periods.
- We advise that the legislation should regulate where necessary and not stifle the business of rights administration.

Maximum Administration Fees

- This is imperative so that Collecting Societies do not accumulate unneeded profits to the detriment of its members (right holders).
- If the Collecting Societies indeed maximize the commercial exploitation of the rights under its administration, it will favorably affect the administration costs.
- Administration costs are very important in the business of rights management simply because they talk directly to governance aspects (Transparency and Accountability).

**Prescribe reporting by users
to facilitate royalty payment**

- This is imperative although the culture and respect for IP by South African businesses and society at large is not encouraging.
- We have seen Collecting Societies in other jurisdictions bearing the costs relating to reporting of usage and this might be an option for South Africa.
- **Technology** is readily available to provide a solution in this regard and Collecting Societies can consider it.
- **Data of usage** is the basis of distribution as absence of data leads to incorrect payment of beneficiaries.

Conclusions

- Collecting Societies or a system of Collective Management of Rights should be seen as another way of unifying the creative sectors.
- When unified and organised they are likely to share the same strategic and developmental goals.
- Currently the creative sectors remain fragmented and there is a likelihood of advocating different positions therefore maintaining the status quo.
- Another area that requires legislative intervention is the concluding of Reciprocal Agreements by Collecting Societies with their counterparts in other jurisdictions.
- Reciprocal Agreements must bring value to members of the Collecting Societies otherwise they should not be concluded to avoid one way royalty trafficking.



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THANK YOU