A COMPARATIVE ANALYSIS OF THE DEVELOPMENT OF PERFORMERS’ RIGHTS IN THE UNITED KINGDOM AND SOUTH AFRICA

By

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DECLARATION

In accordance with Rule G4.6.3,

I. Tanya Wagenaar with student number 192332830, hereby declares that the dissertation for Magister Legum is my own work and that it has not previously been submitted for assessment to another University or for another qualification.

Signature

Date
ACKNOWLEDGEMENTS

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Without their contributions I would be up the proverbial creek without a paddle.
ABSTRACT

Although performers have been rife for centuries, no legal regime was required for their protection owing to the fact that the nature of their performances was transitory. It was not until the invention of the phonogram in 1877, that the need to provide performers with the means to protect the unauthorised uses of their performances became an issue. The subsequent development of performers’ rights has been fuelled by the rapid technological developments of the modern age which has prompted the international community to respond through various international instruments.

Performers initially sought protection in terms of the Berne Convention in 1886, but it was not until the Rome Convention in 1961 that performers were first accorded international recognition. This was followed by the TRIPs Agreement in 1994 and the WPPT in 1996.

This work involves an investigation into the historical development of performers’ rights in the United Kingdom and South Africa. This is followed by a comparative analysis of the current state of performers’ rights as between the United Kingdom and South Africa with a view to proposing recommendations for improving the level of protection accorded performers in South Africa.

Arguments in favour of a regime of performers’ rights as well as possible counter-arguments have been advanced. The general development of performers’ rights as a related or neighbouring right to copyright is focussed on.

The development of performers’ rights in the United Kingdom is discussed with reference to the first English legislative form of protection, namely the Dramatic and Musical Performers’ Protection Act, 1925. This Act only provided performers with criminal remedies, a view that prevailed through several subsequent enactments designed to protect performers as a result of ratification of the Rome Convention. It was not until 1988 when the decision in Rickless v United Artists Corp prompted the legislature to grant performers with enforceable civil remedies through the enactment of the Copyright, Designs and Patents Act, 1988.

Several European Union Council Directives aimed at harmonising the law relating to performers’ rights throughout the Union were issued, mainly in response to the TRIPS Agreement. In order to comply with these Directives, the United Kingdom passed Regulations to bring about the necessary amendments to the Copyright, Designs and
Patents Act. Performers in the United Kingdom were granted moral rights in 2006 as a result of the United Kingdom’s ratification of the WPPT.

The development of performers’ rights in South Africa has been slow when compared to that of the United Kingdom. It was not until 1967 that performers were first legally recognised in South Africa. Although South Africa has yet to ratify the Rome Convention, it was stated in *South African Broadcasting Corporation v Pollecutt* that the Act was clearly passed with a view to complying with the Convention.

South Africa’s ratification of the TRIPs Agreement brought about amendments to the Act, particularly regarding the duration of protection which was increased from 20 to 50 years.

Although South Africa played an active role in the conclusion of the WPPT, it has yet to ratify it. However, amendments were made to the Act in line with this Treaty, such as the incorporation of “expressions of folklore” within the ambit of protection, and the granting of a right to receive royalties whenever a performer’s performances are broadcast. This is commonly known as needletime. South Africa’s reluctance to grant performers with moral rights as provided for by the Treaty is noteworthy.

The introduction of needletime into South African law has resulted in a fierce debate between collecting societies (who represent authors and performers) and the NAB (who represent users of performances). Mainly as a result of this dispute, performers in South Africa have, to date, not received any royalties due to them.

The protection of traditional knowledge has also received attention of late with the Intellectual Property Laws Amendment Bill, 2010 which aims to bring traditional knowledge *inter alia* within the ambit of the Performers’ Protection Act.

The current state of performers’ rights in the United Kingdom and South Africa are compared in order to identify ways in which the level of protection accorded performers in South Africa could be improved. The Copyright, Designs and Patents Act is compared with the Performers’ Protection Act through emphasis being placed on the definition of a “performer”; the definition of a “performance”; the nature of performers’ rights; exceptions to infringement; the term of protection; the retrospectivity of the legislation; and the enforcement measures in place.

Upon analysis, it was found that the Performers’ Protection Act can be amended in several ways in order to increase the level of protection accorded performers in South Africa.
LIST OF ABBREVIATIONS

AEPO/AEPO-ARTIS  Association of European Performers’ Organisation
BBC  British Broadcasting Corporation
BIRPI  United International Bureaus for the Protection of Intellectual Property
BMG  Bertelsmann Music Group
BPI  British Phonographic Industry
CD  Compact Disc
CEO  Chief Executive Officer
CIPRO  Companies and Intellectual Property Registration Office
CWUSA  Creative Workers Union of South Africa
DACST  Department of Arts, Culture, Science, and Technology
DTI  Department of Trade and Industry
EC  European Community
EEC  European Economic Community
EMI  Electrical and Music Industries
EU  European Union
FIA  International Federation of Actors
GATT  General Agreement on Tariffs and Trade
GG  Government Gazette
GHz  Gigahertz
ICESCR  International Covenant on Economic, Social and Cultural Rights
ILO  International Labour Organisation
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<th>Acronym</th>
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<tr>
<td>IP</td>
<td>Intellectual Property</td>
</tr>
<tr>
<td>MEP</td>
<td>Member of the European Parliament</td>
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<tr>
<td>MITT</td>
<td>Music Industry Task Team</td>
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<tr>
<td>NAB</td>
<td>National Association of Broadcasters</td>
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<td>POSA</td>
<td>Performers’ Organisation of South Africa</td>
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<td>PPL</td>
<td>Phonographic Performance Limited</td>
</tr>
<tr>
<td>RISA</td>
<td>Recording Industry of South Africa</td>
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<tr>
<td>SABC</td>
<td>South African Broadcasting Corporation</td>
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<tr>
<td>SAG</td>
<td>Screen Actors Guild</td>
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<tr>
<td>SAMPRA</td>
<td>South African Performing Rights Association</td>
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<td>SAMRO</td>
<td>South African Music Rights Association</td>
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<tr>
<td>SARRAL</td>
<td>South African Recording Rights Association</td>
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<tr>
<td>TRIPs</td>
<td>Trade-Related Aspects of Intellectual Property Rights</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific, and Cultural Organisation</td>
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<td>WCT</td>
<td>WIPO Copyright Treaty</td>
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<td>WIPO</td>
<td>World Intellectual Property Organisation</td>
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<td>WPPT</td>
<td>WIPO Performances and Phonograms Treaty</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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CHAPTER ONE: INTRODUCTION

1.1 GENERAL

On the 14th of February 2008, European Commissioner for Internal Market and Services, Charlie McCreevy, announced at a press conference in Brussels that performing artists should no longer be the “poor cousins” of the music business and stated that:

“[i]t is the performer who gives life to the composition and while most of us have no idea who wrote our favourite song – we can usually name the performer.”

In recent years several South African performers have found themselves in the spotlight on international platforms, such as Johnny Clegg, Charlize Theron, Ladysmith Black Mambazo and Seether. It is therefore important that the understanding of performers’ rights, the applicability of relevant legislative measures, and the subsequent development of the right in South Africa not be overlooked. The more successful and internationally recognised South African performers become, the more pressing the need becomes to protect their rights as artists, namely their performers’ rights.

This dissertation will investigate the development of performers’ rights in South Africa as compared to the development of performers’ rights in the UK.

1.2 SCOPE OF THE PROBLEM

“Until rather less than a hundred years ago, the work of performing artists...had not changed in its essentials for centuries. The performers’ performance was ephemeral and local; it could be seen and heard only by those persons who were actually present, and it had no afterlife, except in the memory of the audience. This situation began to change towards the beginning of the [20th] century, and became something quite different in the years between the First and Second World Wars as a result of three major inventions: the gramophone or phonograph, the cinema and sound radio... With the development of ‘talking pictures’ the cinema had also became a medium of mass entertainment throughout the world... Two other developments – the long-playing gramophone record and nation-wide television – became important after the Second World War. It was by then possible to fix the performances on all kind of materials – records, films, tapes, wire, etc – and also to transmit the sounds and images comprising these performances to millions of people at one and the

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same time, even across national frontiers.”

The further development of technology to include the Internet has “forever changed the relationships between performers, performances and audiences” and therefore also the direct link between performers and their income. This has led to the law being forced to “confront the problem of protecting performers against the unauthorised exploitation of their performances.”

As an intrinsic right that attaches to all performers, the importance of performers’ rights cannot be undervalued. “The problem that performers face is one of control... ideally for performers, they should be granted rights that would return control of their performances to them.” It therefore leads to the following considerations:

a) Why should performers be protected?

b) What is the nature of the relationship between copyright and performers’ rights?

c) Who is entitled to protection?

d) What is the subject matter of protection?

e) What should performers be protected from?

f) What is the nature and theoretical basis of performers’ rights?

g) How should performers be protected?

h) What is the duration that performers should be protected for?

i) Is the protection afforded performers adequate?

j) How does the protection of performers’ rights in South Africa compare to the protection of these rights in a jurisdiction considered to be a major contributor to the intellectual property law arena?

k) What can be done to improve the protection of performers’ rights in South Africa?

The United Kingdom was chosen as a comparable system for the following reasons: South Africa’s Performers’ Protection Act is based on the British Dramatic and Musical Performers’ Protection Act, 1958 and the British Performers’ Protection Act, 1963. Dean

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6 4.
7 11 of 1967.
submits that since “there is virtually no assistance available for the interpretation of the Act,”\textsuperscript{8} some guidance can be obtained from material interpreting the British performers’ protection legislation since South Africa’s “Performers’ Protection Act has taken over terminology and principles from these sources.”\textsuperscript{9}

This comparative analysis will investigate the extent to which performers’ rights have developed both nationally and internationally, and how the progress of performers’ rights in South Africa compares to that of the United Kingdom. Proposals and recommendations for the improvement of the protection of performers’ rights in South Africa will then be advanced.

\textbf{1.3 METHODOLOGY}

In order to answer the questions referred to above, the following methodology will be employed: a comparative analysis of the development of performers’ rights as between the United Kingdom and in South Africa. The legal regimes relating to performers’ rights of the United Kingdom and South Africa will be investigated. Various legal sources, such as legislative measures, case law, applicable international conventions, academic writings and secondary sources will be referenced.

\textbf{1.4 OUTLINE OF THE CHAPTERS}

The broad outline of the chapters of the dissertation is as follows:

Chapter One is this introduction which will include a brief statement of the problem and the methodology that will be followed.

Chapter Two will focus on the rationale of performers’ rights by looking at what performers’ rights entail and how it fits into the model of intellectual property law. The arguments in favour of granting performers with rights in the nature of copyright, and the counter-arguments will be discussed.

In Chapter Three, the general development of a regime of performers’ rights as necessitated by technological developments will be discussed by analysing its origins in copyright.


\textsuperscript{9} 1-111.
Chapter Four focuses specifically on the historical development of performers’ rights in the United Kingdom within the framework of copyright to the present day situation. The discussion will begin with a brief analysis of the development of copyright from 1600 and will include an analysis of the subsequent effect of various international agreements on the law relating to performers’ rights in the United Kingdom. These agreements are the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations (the Rome Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement), and the WIPO Performances and Phonograms Treaty (WPPT).

Chapter Five looks at the historical development of performers’ rights in South Africa. The Chapter begins with a brief analysis of the beginnings of copyright at the Cape from 1600 and the subsequent development of performers’ rights from within the framework of copyright in South Africa. The subsequent effect of international agreements on the law relating to performers’ rights in South Africa will also be discussed. These agreements are the Berne Convention, the Rome Convention, the TRIPs Agreement, and the WPPT.

Chapter Six involves a detailed comparative analysis of the current level of protection that is accorded performers in the United Kingdom and South Africa with a view to identifying areas where the level of protection granted to South African performers can be improved.

Chapter Seven details recommendations to improve the level of protection accorded performers in South Africa as well as the conclusion to the dissertation.
CHAPTER TWO:  THE RATIONALE OF PERFORMERS’ RIGHTS

2.1  INTRODUCTION

In order to fully understand performers’ rights, it is necessary to investigate the rationale behind the protection of performers. This Chapter will look at what performers’ rights are and how this regime fits into the framework of copyright as a form of intellectual property law. The arguments advanced in favour of granting performers’ rights as well as the counter-arguments will be discussed with a view to understanding why a regime of performers’ rights are a necessary form of protection.

2.2  THE NATURE OF PERFORMERS’ RIGHTS

Performers’ rights are aimed at the protection of a specific type of person, namely a performer, who partakes in a performance. Whereas copyright protects the author of a work, performers’ rights protects the person giving a rendition of this work. This rendition is known as a “performance” which can be defined as “the transitory activity of a human individual that can be perceived without the aid of technology and that is intended as a form of communication to others for the purpose of entertainment, education or ritual.”

Performers’ rights are forms of the species copyright which is in turn a member of the family intellectual property law. This branch of the law protects rights of property in creations of the mind. Though copyright protects the rights of the owner to control copying of his work, performers’ rights protects the individual who is interpreting the work. Therefore, this form of protection generally only applies to the performance of literary, musical, dramatic and dramatico-musical works whereas copyright protects a broader spectrum of works. The rights and protection accorded to performers are not copyright but are analogous to, or similar in nature to, copyright. In fact, performers’ protection is supplementary to copyright in that copyright protects literary, musical and artistic works as such, while performers’ rights protects a person giving a rendition of such a work. A book or a sculpture can be appreciated by a sighted person without needing it to be

14 Ibid.
performed by another person, but a dramatic play or a piece of music must be performed in order to be appreciated by the observer or listener.\textsuperscript{15}

Performers’ rights have been labelled with various titles owing to its dependence on copyright. This dependence arises from the fact that since a performer performs an interpretation of a work in which copyright subsists, there cannot be a performance if there is no copyright protected work. As a result, performers’ rights have been referred to as “neighbouring rights”, “secondary rights” or “related rights” to copyright.\textsuperscript{16} The concept of neighbouring rights can be interpreted in a narrow and a broad sense. In its narrow sense, the term refers to the rights of performers, phonogram producers and broadcasters. In its broad sense, it relates to rights similar to, but less than that of copyright.\textsuperscript{17} This is derived from the concept of droit d’auteur or Urheberrect which illustrates the reluctance of civil legal systems to grant full copyright where the object to be protected is derived from a literary or musical work.\textsuperscript{18} Although the terms “neighbouring” or “related rights” are not used in United Kingdom or South African legislation, they are useful as they illustrate the concept that the rights accorded to performers are similar to but less than full copyrights.

\section*{2.3 Arguments in Favour of Recognising Performers’ Rights}

Owing to the fact that in certain instances such as a play or a piece of music, it must be performed in order to be appreciated, the skill and labour of the performer needed to ensure public enjoyment of a particular work is as necessary as the effort of the author.\textsuperscript{19} Therefore, the main arguments in favour of performers’ rights are similar to those in favour of author’s rights.\textsuperscript{20}

The main justifications for granting authors protection are both economic and moral. Since an author has the right to derive economic benefit from the use of his works and is also entitled to control the dissemination of his creations,\textsuperscript{21} it is submitted that a performer is no less deserving.

\begin{thebibliography}{99}
\footnotesize
\bibitem{Arnold} Arnold Performers’ Rights 5.
\bibitem{South African} South African Broadcasting Corporation v Pollecutt 1996 1 SA 546 (A) 558.
\bibitem{Arnold2} Arnold Performers’ Rights 13.
\bibitem{Ibid} Ibid.
\bibitem{6} 6.
\bibitem{Ibid} Ibid.
\bibitem{20} Ibid.
\bibitem{21} Ibid.
\end{thebibliography}
With regard to performers’ rights, the aspect of economic rights did not become an issue until it became possible to fix performances using technology, such as the phonogram\(^{22}\) or cinematographic film. Thereafter, the arguments in favour of granting economic rights to authors became as applicable to performers as only copyright can ensure that performers are remunerated for the exploitation of their works, which includes payment for unforeseen future exploitations of their performances.\(^{23}\)

> “Most economic problems can be solved, at least to the satisfaction of the injured parties, by throwing some rights at the problem.”\(^{24}\)

It is not a question of giving performers an economic incentive to perform as it is giving them the right to be properly rewarded for the exploitation of their performances.\(^{25}\) Furthermore, protection of performers helps to maintain the industries that provide performers with employment, such as the music industry.\(^{26}\)

With regard to the moral aspect, although a performance is an interpretation of an author’s work, it is as much a creation of the mind as a work protected by copyright. Since a performance is so intimately connected with the personality of a performer, the case for moral rights is stronger in the case of performers than that of authors; performers easily satisfy any requirements of originality required for protection in terms of copyright.\(^{27}\) Therefore, the performer should be as entitled to decide whether and how his work is to be exploited as an author does.

Performers’ rights are further justified by the fact that many organisations that represent traditional copyright owners also support performers’ rights.\(^{28}\)

## 2.4 POSSIBLE COUNTER-ARGUMENTS

There have been many arguments advanced against granting rights to performers. Some of the more pertinent views will be discussed forthwith and possible refutations will be advanced.

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\(^{22}\) Audio recording technology, defined in s1 of South Africa’s Performers Protection Act 11 of 1967 to mean “any exclusively aural fixation of sounds of a performance or of other sounds”.

\(^{23}\) Arnold Performers’ Rights 6.

\(^{24}\) Morgan International Protection 31.

\(^{25}\) Arnold Performers’ Rights 7.

\(^{26}\) Ibid.

\(^{27}\) Ibid.

\(^{28}\) Morgan International Protection 33.
The first argument encapsulates the view that performers are less deserving of protection than authors are since their contribution is subsidiary to that of copyright. It is, however, unclear why the fact that a performance is dependent on an author’s work should mean that it is any less deserving of protection, both economically and morally.\textsuperscript{29} This refutation is given strength by the above-mentioned view that performers’ contributions easily meet the standard of originality that is required by copyright.\textsuperscript{30} Performers should be entitled to benefit from compensation schemes and should receive a share of the income that is generated from the uses of their recorded performances\textsuperscript{31} in the same way that authors do.

The second argument is based on the premise that granting rights to performers might prejudice the rights of authors.\textsuperscript{32} This is countered by the view that this is obviously not the case as the only way in which authors might be prejudiced, is economically. The fact that no evidence has ever been produced to prove that author’s remunerations have fallen as a result of rights being granted to performers, illustrates that the market is elastic rather than inelastic which the proponents of this argument assume.\textsuperscript{33}

The third argument is that performers’ rights are a matter for collective bargaining between employers and unions as an industrial relations issue.\textsuperscript{34} However, this argument does not take into account that any such bargaining needs to take place within a legal context.\textsuperscript{35} Although industrial awards entail the payment of fees, it is not clear whether these fees are reflective of awards performers would be entitled to in the future.\textsuperscript{36}

Fourthly, granting rights to performers is practically impossible when considering that in some instances granting a proprietary right to a symphony of 100 performers, for example, is impracticable.\textsuperscript{37} It can be argued that this concern is an exaggeration as such difficulties can always be resolved through the process of collective agreements and licensing.\textsuperscript{38}

\textsuperscript{29} Arnold Performers’ Rights 8.
\textsuperscript{30} Morgan International Protection 32.
\textsuperscript{31} Ibid.
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid.
\textsuperscript{36} Morgan International Protection 33.
\textsuperscript{37} Arnold Performers’ Rights 9.
\textsuperscript{38} Ibid.
The next argument involves the view that performances do not merit protection as they are transitory in nature as opposed to works of copyright that have material form.\textsuperscript{39} This argument has lost its value ever since it became technically possible to record and duplicate performances.\textsuperscript{40} In fact, the advent of technological means to fix performances has justified the arguments in favour of granting performers with enforceable rights and has been further strengthened by the continuing changes in technology associated with performer industries.\textsuperscript{41}

The sixth advanced argument relates to the opinion that free copying is beneficial to performers as the exposure enhances their reputations.\textsuperscript{42} There is no reason why this argument should not apply equally to authors. As a matter of economics this argument is erroneous.\textsuperscript{43}

It has also been argued that granting performers with a rights regime will result in several costs. These relate to the costs associated with establishing mechanisms, in the form of collecting societies, to administer the collection and distribution of payments for the uses of a performer’s performances; and the costs associated with the consequences of rights that cannot be transferred or waived, such as moral rights.\textsuperscript{44} If a performer’s rights are inalienable, he can prevent and disrupt any planned use of his performance.\textsuperscript{45} It is interesting that collecting societies are seen as par for the course in the routine administration of payments accruing to copyright owners and most of these existing societies are capable of administering royalties on behalf of performers. In addition, allowing performers to disrupt any planned use of their performances is still baulked at while it is accepted as being inherent in the scope of rights accorded to copyright owners.

The last argument of importance refers to the “floodgates” concept. If performers are granted rights in the nature of copyright, others will soon start demanding similar rights.\textsuperscript{46} Although performers’ rights are constantly increasing to allow other classes of performers

\textsuperscript{39} Ibid.
\textsuperscript{40} Ibid.
\textsuperscript{41} Morgan International Protection 33.
\textsuperscript{42} Arnold Performers’ Rights 9-10.
\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid.
\textsuperscript{45} Morgan International Protection 50.
\textsuperscript{46} Ibid.
\textsuperscript{Arnold Performers’ Rights 10-11.
within the scope of protection, there has been relatively little campaigning for their extension to other classes of persons.\textsuperscript{47}

\section*{2.5 ANALYSIS}

The interrelationship between copyright and performers’ rights is clear. In some instances, the copyright owner and the performer are one and the same person, such as when a musician performs a song that he has written the lyrics and music for. Some musicians perform the lyrics that they have written to music that has been written for them by someone else. In this case, the performer will be entitled to the rights in the performance (broadcast) of the song as well as the copyright in the lyrics; while the composer will be entitled to rights in the performance (broadcast) of the song and the copyright in the musical composition. The result of this is that the interests of these parties may not coincide and may even be contradictory. However, as an intrinsic right that attaches to all performers, the importance of performers’ rights cannot be undervalued.

The development of technology has resulted in an increasing number of people, such as producers, bootleggers, pirates and consumers, being able to exploit performances in ways that performers have found exceedingly difficult to control.\textsuperscript{48} A system of performers’ rights can return control of performances to performers that have been lost as a result of these technological developments\textsuperscript{49} and can further assist performers to claim their rightful place as owners of their performances.

Since legal rights are not always based on sound economic reasoning, the strongest argument in favour of granting performers’ rights is the hardest argument to test, namely that since a performance is infused with aspects of a performers’ personality, they are morally deserving of rights in order to control the exploitation of their performances.\textsuperscript{50} To validate these rights one can conclude that it is in the public interest that performers and their performances be protected as a part of “the Romantic myth that creative people are heroes of almost divine status”.\textsuperscript{51}

\begin{flushleft}
\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid. International Protection 241.
\textsuperscript{49} 52.
\textsuperscript{50} 50.
\textsuperscript{51} 51.
\end{flushleft}
2.6 CONCLUSION

Although performers’ rights are generally regarded as related rights, and therefore subsidiary to copyright, performers are no less deserving of protection than copyright owners.

Arguments in favour of performers’ rights seem to gravitate on similar arguments in support of copyright, claiming that performers have the same right copyright owners do to benefit economically and morally from their work.

Well-known counter-arguments are easily refuted when viewed from the perspective that performers are as deserving as copyright owners and the treatment of performers as inferior to copyright owners does not seem justified.

Therefore, although copyright protects the creator of a work and performers’ rights protects the person giving an interpretation of the work in question, performers, as deserving individuals, should not have to suffer their rights being undervalued.

The following Chapter will analyse the general development of performers’ rights from its origins in copyright.
CHAPTER THREE: GENERAL BACKGROUND

3.1 INTRODUCTION

Owing to the interdependent relationship between copyright and performers’ rights it is fair to say that performers’ rights historically developed out of copyright as a related right. Therefore, in this Chapter, the general development of performers’ rights will be discussed within the overall framework of copyright.

3.2 THE ORIGINS OF COPYRIGHT

Marcus Valerius Martialis (Martial) was a Roman poet who published his works in Rome between 86 and 103 AD. Known as a witty comic, he thought of himself as the master of his words and anyone who tried to steal his words he labelled plagiarius which was the Latin word for “thief” or “kidnapper” of slaves. This is believed to be the origin of the word “plagiarism” which is the embodiment of the modern versions of copyright infringement.

Around 550 AD St Columba allegedly made a copy of Abbot Fenian’s Psalter “at night in haste by a miraculous light.” Giving judgment in favour of the Abbot, the Irish King Diarmait Mac Cerbhaill stated “to every cow her calf, and accordingly to every book its copy.” Although this is widely believed to be the first ever copyright case, it is accepted that copyright did not exist until the invention of the printing press.

First developed by Johannes Gutenberg in 1436, the printing press involved an extremely laborious process of literally cutting out of wood the letters to be used and placing them in the correct order. As the technology developed, it enabled booksellers to produce multitudes of copies which allowed them to quickly recover the cost of the author’s

54 A book of psalms, one of the earliest examples of Irish writing.
56 Arnold Performers’ Rights 14.
manuscripts and the printing press itself.\textsuperscript{58} This coincided with the Renaissance and the Reformation, the direct result of which was a widespread desire to gain knowledge.\textsuperscript{59} The main adverse consequence to the new technology of printing was that unauthorized or pirate booksellers were also able to print copies of books.\textsuperscript{60}

During the late 15\textsuperscript{th} century, the city of Venice took the initiative in creating a manner of copyright by developing a system of privileges in the nature of monopolies that were granted for the printing of books. By the 16\textsuperscript{th} and 17\textsuperscript{th} centuries the practice had spread throughout Europe and resulted in the beneficiaries of these privileges being willing to pay the sovereigns for these monopolies. The sovereigns not only received remuneration, but they were also able to require approval of the printed material.\textsuperscript{61} The irony of the system was that the beneficiaries were restricted to the sovereigns and printing tradesmen while the creators of the works received no benefit at all.\textsuperscript{62}

During this time a combination of commercial pressure from booksellers as well as the desire for censorship on the part of both the Church and the State led to the development of a recognised system of copyright based on their prerogative claim to the exclusive right to print certain manuscripts, such as the Holy Bible, statutes and later, certain common law texts.\textsuperscript{63}

\begin{quote}
“Both Church and State identified printers as the most effective way to control the thoughts and discussions within their borders, and several English monarchs made strong ties with the printing trade.”\textsuperscript{64}
\end{quote}

Dean writes that in 1556 Queen Mary established a guild of London printers known as the Stationer’s Company. They were granted monopoly rights in the books they published in return for the right to require that all books had to be submitted for official approval and registration. Contravention of these requirements was punished by decrees of the Star Chamber. After the Star Chamber’s obvious limitation of the freedom of the press became out of favour, it was abolished in 1641. Parliament enacted the Printing Licensing Act in 1643 but this was very unpopular due to the arbitrary powers it granted. It was repealed in 1694 and all limitations on copying of printed materials were removed. This led to


\textsuperscript{59} Dean The Application of the Copyright Act 4.

\textsuperscript{60} Caviedes 1998 Boston University International Law Journal 168.

\textsuperscript{61} Dean The Application of the Copyright Act 4.

\textsuperscript{62} 4 – 5.

\textsuperscript{63} Arnold Performers’ Rights 14.

\textsuperscript{64} Lamiell “To Every Book its Copy: Copyright and Natural Law” 2010 http://www.jameslamiell.com /blog/ to-every-book-its-copy (accessed 30-06-2010).
widespread copying and anarchy in the printing field. In response to increasing pressure from the printing industry in England to restore order in the untenable situation, Parliament adopted the Statute of Anne in 1710. This will be discussed in more detail in Chapter Four of this work.

3.3 THE RISE OF PERFORMERS

Initially, copyright laws were primarily concerned with authors. When copyright was extended to include dramatic and musical works, no thought was given to the performers involved. The rationale for this was obvious enough in that performers' protection was not needed as the only way in which their performance could be exploited was by the public paying for admission for entry to a performance. If a performer appeared before an audience of people and performed, there was a performance; if the performer chose not to perform, there was no performance. This was sufficient to determine the limits to the rights that the performer had in that performance. In addition, for hundreds of years performances were made without the aid of technology. The performance existed past the time of its presentation only in the minds of the audience present at the time the performance was given and communication of the performance was limited to the audience physically present. This meant that performances were merely transitory in nature. As a result, performers did not need legal protection in any form.

Arnold writes that historically, authors and performers were initially the same person, for example a poet who sang or recited his poem. The development of religious hymns into drama in classical Greece led to an eventual separation of the two roles of author and performer. The poet Thespis is, for instance, widely considered to be the founder of drama in the sixth century BC when he employed an actor, known as the Protagonist, as well as a chorus to perform his works. Later, a second and a third actor was added, known as the Deuteragonist and the Tritagonis respectively, which developed into the standard form of dramatic performances. During the fourth century BC, comedy started to replace Athenian tragedy with the result that actors started gaining prominence in Greece. Despite this prominence, the social standing and economic power of actors remained below that of authors. This difference in respectability became more evident in Roman theatre where actors were people of low status, such as courtesans and even slaves. The

65 Dean The Application of the Copyright Act 5.
66 Arnold Performers' Rights 16.
67 Morgan International Protection 4.
68 3.
distinction between actors and authors became acute during the second century BC when light entertainment, such as mime, pantomime and farce, were predominantly performed in theatres, but the writing of plays became the task of literary men such, as Seneca, who did not write for public performance but for private readings.\(^\text{69}\)

Real hostility to theatre resulted from the rise of Christianity. To be an actor was forbidden and punished by excommunication. Similarly, devout Christians were banned from attending any theatrical performances with the result that in the sixth century AD, European theatres closed. The only dramatic entertainment to be found in the following 400 years was provided by wandering minstrels and poets.\(^\text{70}\) This state of affairs began to change in the 10\(^{th}\) century when the Church changed direction and started acting out their message to their congregations. Gradually, Easter and Christmas plays developed with priests and choirboys as the performers. Through this, theatre gained back some respectability and developed outside of the Church in the form of vernacular mystery plays. Since these plays were performed by amateurs and were based on scripture they escaped censorship.\(^\text{71}\)

During the 16\(^{th}\) century, secular drama was re-established throughout Europe. The first English theatre was built by Burbage in London in 1576 and was characterised by secular performances. It led to the development of the first professional actors. However, actors continued to be held in low regard. They were thought of as “rogues and vagabonds” unless they were under the protection of the king or the nobility, and were even refused the sacrament in Catholic countries.\(^\text{72}\)

Historically, performances during the 18\(^{th}\) and 19\(^{th}\) centuries were categorized by operas which became the most popular form of entertainment. A star performer, such as an operatic prima donna,\(^\text{73}\) dictated terms to the composer by commissioning an aria\(^\text{74}\) in order to show off her voice. In other words, the more highly-rated singer paid the less well-known composer a standard fee for the work rather than the opposite situation, which apparently is the one envisaged by modern copyright practitioners.\(^\text{75}\) However, with the exception of a few superstars, performers continued to be held in very low regard during

\(^{69}\) Arnold Performers’ Rights 3.
\(^{70}\) Ibid.
\(^{71}\) Ibid.
\(^{72}\) Ibid.
\(^{73}\) The leading woman soloist in an opera company.
\(^{74}\) A solo vocal piece with instrumental accompaniment, as in an opera.
\(^{75}\) Towse “The Singer or the Song? Developments in Performers’ Rights from the Perspective of a Cultural Economist” 2007 Review of Law & Economics 745 746.
the 18th and 19th centuries. Opera houses and theatres were seen as dens of insurgency and female actresses were regarded as no more than prostitutes. Adam Smith, an 18th century economist, evaluated a performer’s talent by stating:

“There are some very beautiful and agreeable talents of which the possession commands a certain sort of admiration; but of which the exercise for the sake of gain is considered, whether from reason or prejudice, as a sort of public prostitution. The pecuniary recompense therefore of those who exercise them in this manner, must be sufficient, not only to pay for the time, labor and expense of acquiring the talents, but for the discredit which attends the employment of them as a means of subsistence. The exorbitant rewards of players, opera-singers, opera-dancers, etc. are founded upon those two principles; the rarity and beauty of the talents, and the discredit of employing them in this manner … Such talents, though far from being common, are by no means so rare as is imagined. Many people possess them in great perfection, who disdain to make use of them; and many more are capable of acquiring them, if anything could be made honorably by them.”

For the next three centuries performers continued to be regarded as outcasts while authors were recognised as having a high cultural status.

Although culturally popular, most composers were not associated with their works. Mozart’s operas were not marketed in his day using his name but rather the name of the poet who wrote the libretto, such as Metastasio or da Ponte. Since copyright only really established itself in the late 19th century, the granting of these rights is thought to be the main reason why primacy of the composer as author came to the fore.

Since the invention of the phonogram by Thomas Edison in 1877, the last 140 years has been marked by technological developments including cinematographic films, broadcasting, radio, television, commercial satellites and the Internet. From its humble beginnings, the phonogram has developed into sound recording devices capable of exploiting and communicating performances to billions of people simultaneously. These devices have allowed for the fixation of the performance by transforming the fugitive performance into an enduring object with its own economic value, thereby enabling a listener to enjoy a performance without having to be at the place or time of the performance. The sophisticated ways in which performances can be fixed and

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76 Ibid.
77 747.
78 Arnold Performers’ Rights 4.
79 Towse 2007 Review of Law & Economics 748.
80 Ibid.
broadcasted has forever changed the relationships between performers and their performances, as well as between performers and their audiences.\textsuperscript{82} In 1909 an American court expressed \textit{obiter dictum} in \textit{Fonotipia Ltd v Bradley}\textsuperscript{83} that a singer’s recorded performance was eligible for protection in terms of federal law,\textsuperscript{84} highlighting the need for a rationale of performers’ protection.\textsuperscript{85}

Therefore, it is fair to conclude that simply put the problem that performers face is one of control.\textsuperscript{86} This loss of control was lamented by a representative of the International Federation of Actors (FIA) to the Rome Diplomatic Conference that concluded the Rome Convention when he stated:

\begin{quote}
\textit{“It was indisputable that it was the mechanical means of reproduction and transmission (recordings, radio and television) which had, in the space of a few years, transformed the actor, who, until then, had been master of his own performance and his own talent, into a supplier for a chain of industries which reproduced and used his talent unrestrictedly.”}\textsuperscript{87}
\end{quote}

As a result of these technological developments performances have become commodities, forming part of a global entertainment industry that has monetary revenues measured in hundreds of billions of dollars.\textsuperscript{88} The primary concern for performers, therefore, is that this loss of control has meant that performers have found it exceedingly difficult to negotiate a share in the profits generated from the secondary uses of their performances.\textsuperscript{89}

In 1990 Lund, speaking for the Norwegian Actors Equity Association, stated:

\begin{quote}
\textit{“With this latest advance in technology we have passed from the realm of images and records of the art of the performer serving decorative purposes for patrons of the arts and as historical material for the student of theatre, and into a time of spin-offs of the live performance. We have in our hands a product for consumption by other audiences in time and space, phenomenally far-reaching in terms of geography and social context. We therefore come, not inevitably but immediately, to the question of performer control of performance. We must deal with the question of commercial exploitation and control mechanisms}\textsuperscript{89}
\end{quote}

\textsuperscript{82} Morgan \textit{International Protection} 3.
\textsuperscript{83} 171 F 1909 (CCEDNY) 951.
\textsuperscript{84} 963.
\textsuperscript{85} Gruenberger 2006 \textit{Cardoza Arts & Entertainment Law Journal} 621.
\textsuperscript{86} \textit{Ibid.}
\textsuperscript{88} Morgan \textit{International Protection} 4.
\textsuperscript{89} 63-64.
directed at the use of technology for the recording of performance and for the private copying of recordings.\textsuperscript{90}

It is tempting to label technology as the villain with the solution being a total ban on anything technological. However, this would be neither practical nor desirable as the problem is not in the technology but in the way it is used.\textsuperscript{91} Technology has made performances permanent, transportable and accessible. They can be contained in audio and audiovisual fixations that can be distributed to audiences the world over.\textsuperscript{92} However, there is a symbiotic relationship between technological industries and the performances that are exploited by them.\textsuperscript{93} Without technology, performances would obviously not be so widely distributed, and without a steady supply of performances the profitability of these industries would be vitally undermined.\textsuperscript{94} Morgan writes that technology has been as much a challenge and a benefit for performers as it has a reason for economic loss; it has provided opportunities for employment and rewards for successful performers much greater than had previously been available.\textsuperscript{95} Actors such as Charlie Chaplin achieved the first mass audiences for their performances during the early 20th century which led to a system of “stars”\textsuperscript{96} in not only the film industry but also in the music industry. These stars achieved an unprecedented level of social credit which can be directly attributed to the advent of the film and music industries.\textsuperscript{97}

The challenge that the law faces is to decide how to meet the demanding issues raised by technology. The answer lies in the creation of a system aimed specifically at the protection of rights associated with performers. Known as “performers’ rights”, this regime aims to return control of performances to performers and to progress parallel to the continual development of technology.\textsuperscript{98} The Association of European Performers’ Organisations (AEPO) is of the view that these rights are essential in that they secure not only an income for performers but also cultivate the continuation and the development of creation and culture in the interest of society as a whole.\textsuperscript{99} Indeed, the Resolution of the

\begin{itemize}
  \item Morgan \textit{International Protection} 4.
  \item 54.
  \item 59.
  \item \textit{Ibid}.
  \item 63-64.
  \item A system whereby ordinary people are elevated to “star” status due to their recognition by the general public as celebrities.
  \item Arnold \textit{Performers’ Rights} 4.
  \item Morgan \textit{International Protection} 5.
  \item AEPO-ARTIS “What are performers’ rights?” www.aepo-artis.org/pages/44_1.html (accessed 30-06-2010).
\end{itemize}
European Parliament on the Protection of Audio-visual Performers states that the European Union has always recognised that the works of performers acts as significant economic drivers for all countries, and that the creative work of today is the cultural legacy of the future.\(^{100}\)

The development of a regime of performers' rights became a necessity once it became clear that technology had also overcome the barriers of geography and distance. This meant that performances were exploited without considerations of geographical or political borders.\(^{101}\) The international nature of the problem, coupled with the recognition that legal norms regulating the use of performances were required at both domestic and international level, were the main reasons for generating an international response to this issue.\(^{102}\) Therefore, it can be said that technology has forced the world to face up to the problem of protecting performers against the unauthorized misuse of their performances.\(^{103}\) As deserving individuals, artists should have the right to control the uses that are made of their performances.\(^{104}\)

### 3.4 Analysis

Changes in the social and economic position of performers can be directly attributed to changes to their legal rights as performers.\(^{105}\) At the start of the 21\(^{\text{st}}\) century it may seem self-explanatory that performers should be protected this way, but for the greater part of the 20\(^{\text{th}}\) century this was not the case.\(^{106}\) The rapid rate at which technology has developed from its origins in the phonogram has resulted in a regime to protect the works of performers being necessitated.

### 3.5 Conclusion

Although performers were rife from as early as the sixth century, their protection was not initially required as their performances were transitory in nature, lacking any material form.

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\(^{101}\) Morgan International Protection 53.

\(^{102}\) 5.

\(^{103}\) 3.

\(^{104}\) 52.

\(^{105}\) Arnold Performers' Rights 5.

\(^{106}\) Ibid.
With the advent of the phonogram came a slew of technological developments that
necessitated the need for performers to be given the tools to control the uses of their
performances.

Various international agreements have established an international system of performers’
rights that sets out the rights and obligations to be integrated into the domestic law of
contracting states. Of particular importance to this discussion is the development of this
system of rights in the jurisdictions of the United Kingdom and South Africa respectively.

The next Chapter will look at how performers’ rights developed specifically in the United
Kingdom. The focus will be on the various international developments that have
influenced the ambit of performers’ rights in this jurisdiction as brought about by several
European Union Directives, as well as the influence of case law.
CHAPTER FOUR: THE LAW IN THE UNITED KINGDOM

4.1 INTRODUCTION

Herewith follows a brief discussion of the historical development of performers’ rights in the United Kingdom from its humble beginnings within the framework of copyright to the present day situation. The discussion will begin with a brief analysis of the development of copyright from 1600 up to the point that performers’ rights became of issue in the United Kingdom.

Included is an analysis of the subsequent effect of various international agreements on the law relating to performers’ rights in this jurisdiction. These agreements are the Berne Convention, the Rome Convention, the TRIPs Agreement, and the WPPT.

4.2 THE ORIGINS OF COPYRIGHT LAW

4.2.1 General

During the 17th century, piracy of published editions of books became so common that authors and booksellers in the United Kingdom were moved to petition for a statutory copyright. The resulting Copyright Act of 1709, known as the Statute of Anne107 (enacted in 1710), conferred exclusive rights on authors for the very first time108 and as a result is today seen as the origin of copyright law.109 The Statute represented:

“the Crown’s recognition of an author’s property right in his or her creation, as well as the recognition that the public had the right to access to disseminations of knowledge.”

It allowed authors the right to prevent others from copying their works without their express permission. The theory behind this form of statutory protection is a utilitarian one, “based upon the policy of promoting the dissemination of thought in the form of works of art and science.”111 Under this theory, an author has a property right in his work but will

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107 Full title: An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned, 8 Anne c. 19.
108 Arnold Performers’ Rights 15.
111 Ibid.
only hold this right for a limited period. In terms of the Statute, the author had the sole right to the printing of his books for a term of 14 years from the date of publication, and if he was still alive at the end of this time period, the term was extended for a further 14 years. Books already in print were granted 21 years of protection. Thereafter, the work became the property of the general public, more commonly known as the public domain. This has been described as an arena in which contents are free from intellectual property rights where the public is able to use such material without needing to obtain permission or to pay remuneration.

The Statute fundamentally changed the understanding of the protection of intellectual works and as a result had a far-reaching effect on the development of copyright law throughout the world.

The converse rationale is the natural rights view. Made popular by John Locke, the view is that “a person is entitled to ownership of the fruits of his or her labor.” The argument was that “an author possessed certain intrinsic rights that existed independent of any statutory measures, whose purpose was limited to recognition and more precise formulation of these naturally existing rights.” The point of departure of this philosophy was that copyright protection was conferred under the common law before the enactment of the Statute of Anne and persisted in Great Britain, even after the enactment of this Statute. The decision of Donaldson v Beckett in 1774 changed this position and “has been construed as conclusive proof that natural law has no place in copyright jurisprudence.” The House of Lords ruled that “copyright was a ‘creature of statute’, and that the rights and responsibilities in copyright were determined by legislation.” There has been confusion regarding the nature of copyright ever since in that copyright

112 Ibid.
113 Arnold Performers’ Rights 15.
117 Dean The Application of the Copyright Act 6.
121 2 Brown's Parl Cases 129, 1 Eng Rep 837; 4 Burr 2408, 98 Eng Rep 257 (1774); 17 Cobbett’s Parl Hist 953 (1813).
has come to be regarded as a natural law right belonging to the author as well as the statutory granting of a limited monopoly.\textsuperscript{124}

### 4 2 2 The Protection of Foreign Works

During the 19\textsuperscript{th} century, there was a dramatic increase in the level of literary activity. Since the Statute of Anne only protected British works, authors whose works were crossing national borders were extremely susceptible to piracy. Several attempts were made by neighbouring countries to establish copyright treaties based on a system of material reciprocity.\textsuperscript{125} This means that protection could only be extended to works of foreign nationals to the same extent that the country that they originate from provides protection.\textsuperscript{126} The system of material reciprocity proved to be practically difficult to apply as it required that domestic courts had to interpret and apply foreign laws.\textsuperscript{127}

In 1838, copyright was extended to the protection of foreign works for the first time with the enactment of the International Copyright Act. It allowed copyright to be conferred on foreign works by Order in Council and was subsequently expanded in a wider act being passed in 1842 known as the British Literary Copyright Act. In 1851, Britain entered into the first bilateral copyright convention which allowed for material reciprocity. This was followed by several others which eventually culminated in a multilateral convention held at Berne in 1886, known as the Berne Convention.\textsuperscript{128}

During this same period in France, frustration with the system of material reciprocity resulted in the enactment of Louis Napoleon’s Decree of 1852 which made counterfeiting of any works, domestic or foreign, a criminal offence. They followed a system of national treatment which means that each signatory must extend protection to the works of eligible foreign performers of other member states on exactly the same basis and to the same extent that their nationals enjoy under domestic law.\textsuperscript{129} It allowed the French to conclude many successful treaties and resulted in authors becoming an influential political group. It led to the first International Congress of Authors and Artists which convened in Brussels in

\textsuperscript{124} Rosenoer Cyberlaw: the law of the internet (1997) 35.
\textsuperscript{125} Also known in South African law as reciprocal treatment.
\textsuperscript{126} Duhaime Legal Dictionary http://www.duhaime.org/LegalDictionary/M/MaterialReciprocity.aspx (accessed 3-05-2010).
\textsuperscript{127} Caviedes 1998 Boston University International Law Journal 170.
\textsuperscript{128} Arnold Performers’ Rights 16.
\textsuperscript{129} Gruenberger 2006 Cardoza Arts & Entertainment Law Journal 633.
1858 which helped to lay the foundation for the establishment of the Berne Convention in 1886.\textsuperscript{130}

\section*{4.3 Influence of the Berne Convention}

\subsection*{4.3.1 General}

At international level, the Berne Convention was the first multilateral effort to address pressing copyright issues.\textsuperscript{131} This Convention created a union of states formed with its primary aim being “the protection of the rights of authors in their literary and artistic works.”\textsuperscript{132} It is regarded as the oldest and largest method of protection for these works\textsuperscript{133} and is still in force today.

Originally drawn up at Brussels in 1886, it was initially seen as a “small treaty allowing for mutual recognition of rights amongst a few largely European countries.”\textsuperscript{134} Since then it has been revised several times\textsuperscript{135} with several texts of the Convention in existence which differ from each another.\textsuperscript{136} Member states have increased to its current number of 164.\textsuperscript{137}

\subsection*{4.3.2 Provisions of the Berne Convention}

The Berne Convention lays down specific minimum standards of protection to copyrighted works that member states are required to comply with through incorporation into their domestic laws.\textsuperscript{138} These minimum requirements have developed over time to include “the right to reproduce the work, to perform the work publicly, to translate the work, to adapt the work, and to broadcast the work.”\textsuperscript{139}

\begin{thebibliography}{99}
\bibitem{130} Caviedes 1998 Boston University International Law Journal 170.
\bibitem{131} Cosgrove 2006/2007 Loyola of Los Angeles Entertainment Law Review 394.
\bibitem{132} Article 1.
\bibitem{133} Kettle “Dancing to the Beat of a Different Drummer: Global Harmonization – And the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings” 2002 Fordham Intellectual Property, Media & Entertainment Law Journal 1041 1076.
\bibitem{134} Bently & Sherman Intellectual Property Law (2001) 34.
\bibitem{138} Caviedes 1998 Boston University International Law Journal 171.
\bibitem{139} Bently & Sherman Intellectual Property Law 35.
\end{thebibliography}
There are two key elements of the Convention. Firstly, it adopts the principle of national treatment. The direct result of this is that a member state “should not discriminate between its own nationals and those of other countries of the Union.” The second key provision is that copyright in works should not be subject to formalities. “Thus, even if registration is a prerequisite to protection within a country, it cannot bind works coming from a country that has no such formality requirement.

Seen by scholars of international law as “a breakthrough in the custom of international agreements generally, rather than merely with regard to intellectual property rights”, it created copyright laws in countries where previously none had existed.

**4 3 3 The Relevance for Performers**

Although the Berne Convention only provides protection for authors of copyrighted works, it is important from a performer’s point of view in that initially, performers sought protection under this Convention. The assertions of performers that they should be regarded as authors and their performances as “works” drew sympathy when it became clear in the years leading up to World War II that unauthorized copying of musical works was endangering the recording industry. However, it became apparent during the Rome Revision Conference of 1928 and again at the Brussels Revision Conference of 1948 that these issues could not be resolved through the Berne Convention and the claims of performers pertaining to their rights as performers, was accordingly rejected. The call for international protection of the rights of performers did not go unheard, however, and as resolutions were adopted at both these Conferences that “expressed the wish that participating governments consider what measures could be taken to protect the rights of performers” and “the wish that studies be undertaken, particularly in respect of the protection of performers as a neighbouring right.” The artistic quality of performances was emphasized and it was determined that the protection of performers would have to be achieved outside the ambit of the Berne Convention. This paved the

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140 Article 5(1) and (3).
141 Bently & Sherman Intellectual Property Law 34.
145 Morgan International Protection 119.
147 Morgan International Protection 119.
148 Wishes.
149 Morgan International Protection 119.
150 119-120.
way for the drafting of an international agreement in 1961 called the Rome Convention to be discussed later in this Chapter.

4.3.4 Implementation

The United Kingdom assented to the Berne Convention on 5 December 1887\textsuperscript{151} which is seen as the most important international influence on the development of copyright in the United Kingdom.\textsuperscript{152} The International Copyright Act, 1886 gave effect to this Convention in the United Kingdom.\textsuperscript{153}

The Musical (Summary Proceedings) Copyright Act, 1902 came into effect on 1 October 1902 and was further reflective of the intentions of the Berne Convention. It provided that the owner of the copyright in a musical work could apply to a court with evidence that pirated copies of his work was being used unlawfully. The court could then order that these copies be seized without warrant and brought before the court. Should the copies be proven to be pirated, the court could then order them destroyed or delivered to the owner.

After the Berlin Revision Conference of 1908, the Copyright Act, 1911 was passed in Britain, its first modern copyright act. It established neighbouring rights for the first time in the form of copyright in sound recordings\textsuperscript{154} and provided that copyright existed in the act of creation, not in the act of publishing. This signified the implementation of the newest developments brought about by the 1908 Conference into British law\textsuperscript{155} but did not repeal the Act of 1902.\textsuperscript{156}

4.4 THE ORIGINS OF PERFORMERS’ RIGHTS

“As with copyright, the law of performers’ rights is a child of technology.”\textsuperscript{157}

As previously discussed, technology allowed performances to be fixed which allowed them to be exploited without any regard for the performer involved. Through the

\textsuperscript{151} WIPO Contracting parties: Berne Convention.
\textsuperscript{152} Bently & Sherman Intellectual Property Law 34.
\textsuperscript{153} Arnold Performers’ Rights 16.
\textsuperscript{154} Ibid.
\textsuperscript{155} Coyle “The History of Copyright” 2002 Lawdit http://www.lawdit.co.uk/reading_room/room/view_article.asp?name=../articles/The%20History%20of%20Copyright.htm (accessed 21-07-2010).
\textsuperscript{156} S11(4).
\textsuperscript{157} Morgan International Protection 52.
enactment of the 1911 Act the plight of performers was neglected and it wasn’t until 1925 that any attempt was made to protect the rights of performers.\textsuperscript{158} The Dramatic and Musical Performers’ Protection Act, 1925 created a criminal offence for the infringement of performers’ rights, but did not, at least superficially, grant any civil remedies.\textsuperscript{159} This meant that performers had little incentive to institute action in the courts as there was no injunctive relief and they could not personally profit.\textsuperscript{160} Therefore, this right was of limited practical value.

In 1930 this interpretation of the Act was put to the test in \textit{Musical Performers’ Protection Association Ltd v British International Pictures Ltd}.\textsuperscript{161} Famously known as the \textit{Blackmail} case, it involved the making of Alfred Hitchcock’s film, \textit{Blackmail}, in which the defendant (the production company) hired musicians to provide background music for the film. The musicians were all paid but they did not consent in writing to the use of their performances in the film. Later, they assigned their rights under the 1925 Act to the plaintiff association which then instituted action against the production company.\textsuperscript{162} McCardie J. was of the view that since the legislature used the word “fine” and not “penalties”, the legislature did not:

\begin{quote}
“omit to give a right of property to the performers, but that they deliberately so worded the Act so as to preclude any notion that a right of property was conferred.”\textsuperscript{163}
\end{quote}

In addition, these fines accrued to the Crown and not to the performer. He further reaffirmed his position by stating that otherwise there would be 100 separate rights of property in a performance given by an orchestra of 100 performers which would lead to an impossible situation.\textsuperscript{164} He accordingly held that the Act did not give a civil right of action, only a criminal penalty for rights infringement.\textsuperscript{165}

The view that performers did not have civil remedies prevailed through the Report of the Gregory Committee, established in 1951 to decide on possible changes to the Copyright Act. The primary considerations of the Committee related to the influence of technological

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161 & (1930) 46 TLR 485.
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162 & Arnold Performers’ Rights 19.
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163 & (1930) 46 TLR 485 488.
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164 & Arnold Performers’ Rights 19.
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advances as well as the influence of the Brussels Revision Conference of 1948\textsuperscript{166} on performers’ rights.\textsuperscript{167} A proposal by the Musicians’ Union, Equity and the Variety Artistes’ Federation that performers should be given a right in the nature of copyright was rejected by the Committee. They reasoned that it would not be possible to extend copyright to performers and undesirable to grant performers a more limited right.\textsuperscript{168} As a result of the report, the Copyright Act, 1956 was passed without conferring any civil rights on performers.\textsuperscript{169}

The Dramatic and Musical Performers’ Protection Act, 1958 effectively consolidated the 1925 Act and the amendments made by the 1956 Act.\textsuperscript{170} No substantive changes were made to the law with the passing of this Act which meant that performers were still not accorded a civil right of action.\textsuperscript{171}

4.5 INFLUENCE OF THE ROME CONVENTION

4.5.1 General

Essentially, a state can ensure that performers who are its nationals are protected in other states by entering into regional agreements, bilateral agreements or multilateral agreements that “are intended to have broad international effect.”\textsuperscript{172} The Rome Convention of 1961 is a multilateral agreement enacted to protect the rights and interests of performers, producers of phonograms and broadcasting organisations. It is jointly administered by the World Intellectual Property Organisation (WIPO),\textsuperscript{173} the International Labour Organisation (ILO) and the United Nations Educational, Scientific, and Cultural Organisation (UNESCO).\textsuperscript{174} The central principle is that of national treatment which ostensibly means that once ratified, a contracting state is required to provide protection to foreign works to the same extent that nationals of its own state are protected.

\textsuperscript{166} Of the Berne Convention.
\textsuperscript{168} Arnold \textit{Performers’ Rights} 20.
\textsuperscript{169} \textit{Ibid}.
\textsuperscript{170} Cosgrove 2006/2007 Loyola of Los Angeles Entertainment Law Review 395.
\textsuperscript{171} Arnold \textit{Performers’ Rights} 20.
\textsuperscript{172} Morgan \textit{International Protection} 5.
\textsuperscript{173} The Convention was originally administered by the United International Bureaus for the Protection of Intellectual Property (BIRPI) until the inception of WIPO in 1967.
For the purposes of this dissertation the rights of performers as conferred by the Rome Convention will be primarily concentrated on.

As previously discussed, the road leading to the conclusion of the Rome Convention began during the Brussels Revision Conference of the Berne Convention of 1948 when it was determined that protection for the rights of performers would be achieved outside the auspices of the Berne Convention. In the decade following the Brussels Revision Conference of 1948, a series of meetings resulted in several draft conventions that were considered by the international community. After five years of negotiations, the final step towards the conclusion of the Rome Convention came in the form of the Draft International Convention Concerning the Protection of Performers, Makers of Phonograms and Broadcasters prepared by a Committee of Experts. Known as “the Hague Draft”, it served as the foundation of discussions at the Diplomatic Conference held in Rome in 1961. After the ten-day Conference, a final draft was eventually accepted on 26 October 1961. Of the 42 attendees, only eighteen signed the draft but it signified a momentous step in the direction of protection for a category of person who previously had no such protection. Upon ratification, the various contracting states would then be obliged to incorporate the provisions of the Convention into their national laws. In so doing, they would create performers’ rights under their laws where previously none may have existed.

4 5 2 The Relevance for Performers

When the need arose internationally for performer protection, protection of authors had already been established. The argument that performers should be regarded as authors was “challenged by an invocation of a romantic notion of authorship” and rejected internationally. According to the more popular arguments, authors can only be those who create original works. Since performers merely interpret an already existing work, they cannot, therefore, be regarded as authors. Seen by Caviedes as being to performers’

175 Morgan International Protection 119-120.
176 120.
178 Morgan International Protection 120.
182 Ibid.
rights what the Berne Convention was to authors’ rights, the Rome Convention’s main purpose:

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

This view is emphasised in Article 1, appropriately titled “Safeguard of Copyright Proper”, which states that the Rome Convention shall not affect the protection of copyright in literary and artistic works in any way and that no provision of the Convention shall be interpreted as prejudicing this protection. Through this statement, the primacy of copyright was made an issue at the Conference. Several experts have tried to interpret the provision as suggesting that not only the protection of copyright should be left intact from the protection of related rights, but also the exercise of copyright. This was rejected in the Report of the Rapporteur-General which provided that the need to obtain the consent of an author for the use of a work embodied in a performance is not affected by the provisions of the Rome Convention. Conversely, the need to obtain the consent of the performer does not cease to exist because consent of the author is also required.

Gruenberger observed that the main reason for this development was author’s associations which feared negative legal and economic effects on their rights as authors if performers were accorded strong forms of protection. They argued that granting an exclusive right to performers would allow them to forbid the uses of their fixed performances. Furthermore, granting performers a right to claim remuneration would effectively mean that “the same ‘cake’ could have to be divided among more claimants.” A compromise was reached at the Rome Convention and the concept of “related rights” or “neighbouring rights” was born.

4 5 3 Provisions of the Rome Convention

As a result of this compromise, the Convention prejudices the rights of performers in several ways. Vanheusden submits that the Rome Convention established a minimum

186 Morgan International Protection 123.
level of protection available to performers which, upon ratification, must be incorporated into the contracting state’s domestic law.¹⁸⁸

“Despite the groundbreaking nature of the Rome Convention, for a variety of reasons connected with the special interests of broadcasters and recording companies, performers were granted a somewhat lower level of protection than were broadcasters and recording companies.”¹⁸⁹

The Convention provides that:

“The protection provided for performers by this Convention shall include the possibility of preventing:

(a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;

(b) the fixation, without their consent, of their unfixed performance;

(c) the reproduction, without their consent, of a fixation of their performance:

(i) if the original fixation itself was made without their consent;

(ii) if the reproduction is made for purposes different from those for which the performers gave their consent;

(iii) if the original fixation was made in accordance with the provisions of Article 15 and the reproduction is made for purposes different from those referred to in those provisions.”¹⁹⁰

The protection given under this Convention takes the form of “possibility of preventing” which essentially means a performer has the possibility of preventing certain acts relating to his performances from being conducted. In contrast, producers (recording companies) and broadcasters are given the right to authorise or prohibit reproduction of their product which in essence amounts to a far stronger form of protection accorded to them than to performers. However, this limited form of protection does not apply to cases where the performer’s performance or a fixation of his performance, is broadcasted to the general public. In addition, once a performer has consented to the fixation of his performance, this

¹⁹⁰ Article 7(1).
“possibility of preventing” ceases to apply. Therefore, only the live performance of a performer enjoys protection. A performance that becomes fixed or is broadcasted is not guarded by the Convention which essentially means that a performer cannot prevent infringement through the secondary exploitation of his performance. Arnold observes that:

“it is clear that the intention was that provision by national law of something less than a performers’ copyright...should be permissible.”

With regard to the equitable remuneration referred to above, Article 12 provides that:

“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 phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.”

This means that if a performers’ performance is incorporated into a fixation and published for commercial purposes, the user is obliged to pay a single remuneration to the rights holders. However, the rights holders entitled to payment in this context are referred to as the performer, the producer of the phonogram, or both, which in essence means the performer is not guaranteed remuneration. Due to the fact that only a single equitable remuneration is payable, it is therefore up to the contracting states to decide whether the beneficiary of this right is to be the performer or the phonogram producer, or both of these parties. Furthermore, Article 16(1) contains Reservations which allow a contracting state to notify the Secretary-General of the United Nations that they will not be complying with the provisions of Article 12 at all.

“Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may at any time, in a notification deposited with the Secretary-General of the United Nations, declare that:

(a) as regards Article 12:

(i) it will not apply the provisions of that Article;

(ii) it will not apply the provisions of that Article in respect of certain uses.”

This simply means that contracting states can choose not to pay any remuneration whatsoever.\textsuperscript{194}

Another disadvantage that performers experience is that the Convention, unlike the Berne Convention, does not provide subjects with a moral right, even though provision for it was made in the draft Convention.\textsuperscript{195}

With regard to the duration of protection, Article 14 provides that performers are to be protected for a period of 20 years only, calculated from the end of the year the performance took place in, or was incorporated into a fixation. The Convention is also not retroactive so performances which took place before its implementation are not protected.\textsuperscript{196}

Lastly, Article 19 provides that once a performers’ performance has been incorporated into a film, all rights that he may have had under Article 7 have no further application. In fact, to date the law has failed to provide rights to performers in the audiovisual field and has left the international protection of this type of performer in a difficult situation.\textsuperscript{197}

It is opined that the minimum standards referred to above were designed to allow national laws of contracting states to go further in terms of the level of protection they provide to performers.\textsuperscript{198}

"[I]t is always open to states, whether or not they are parties to the convention, to provide protection at a higher level than the conventional minima."\textsuperscript{199}

Regardless, the Convention has been severely criticised for the level of protection it provides. By only providing for the “possibility of preventing” certain acts and not providing a right to authorise and prohibit these acts “the protection granted to performers is relatively weak, limited to aural interpretations and recordings and widely open to exceptions."\textsuperscript{200}

\textsuperscript{194} Vanheusden “Performers’ Rights in European Legislation: Situation and Elements for Improvement” AEPO-ARTIS 12.
\textsuperscript{195} Arnold Performers’ Rights 23.
\textsuperscript{196} Gruenberger 2006 Cardoza Arts & Entertainment Law Journal 644.
\textsuperscript{197} Morgan International Protection 249.
\textsuperscript{198} Barnard “Performers’ Rights” Music Law Updates.
\textsuperscript{199} Morgan International Protection 120-121.
Another criticism levelled at this Convention is that the drafters may have disadvantaged performers by placing them in the same group under the same Convention as phonogram producers and broadcasting organisations.\textsuperscript{201}

“Grouping together such heterogeneous rights in one international convention under a single label has caused inequities in the protections granted to the disadvantage of the performing artists.”\textsuperscript{202}

4.5.4 Implementation

In the years following its approval, the Convention has been slow to gain adherents.\textsuperscript{203} Caviedes submits that a possible reason for this is its regulatory scheme. The Berne Convention regulates subject matter for a body of a law that already existed at the time of its implementation whereas the Rome Convention “extended to the relatively undeveloped territory of neighboring rights and as such has acquired adherence and membership more slowly.”\textsuperscript{204} Although the limited number of adherents is cause for concern, there has been an increase in contracting states in recent years with the current membership standing at 91.\textsuperscript{205} In addition, many countries have agreed to give neighbouring rights holders at least the protection conferred by the Convention without actually assenting to it.\textsuperscript{206}

“In order to measure the Rome Convention’s success accurately, one must consider its effect upon those nations that have not acceded to the treaty, but have nevertheless drafted domestic legislation in compliance with the Rome Convention.”\textsuperscript{207}

South Africa is such a nation.

Even though the protection levels under the Rome Convention for intellectual property rights are not considered to be as high and effective as those provided for under other conventions and treaties\textsuperscript{208} it is still considered to be a major benchmark in the development of performers’ rights. The interests of performers “took a significant step

\begin{thebibliography}{99}
\bibitem{Caviedes1998a} Caviedes 1998 \textit{Boston University International Law Journal} 175.
\bibitem{Gruenberger2006} Gruenberger 2006 \textit{Cardoza Arts & Entertainment Law Journal} 628.
\bibitem{Arnold2007} Arnold \textit{Performers’ Rights} 23.
\bibitem{Caviedes1998b} Caviedes 1998 \textit{Boston University International Law Journal} 175.
\bibitem{Arnold2008} Arnold \textit{Performers’ Rights} 24.
\bibitem{Caviedes1998c} Caviedes 1998 \textit{Boston University International Law Journal} 175.
\end{thebibliography}
forwards” and as a result is considered to be where “[t]he story of performers’ rights essentially begins”.

The United Kingdom signed the Rome Convention on 26 October 1961 with ratification following on 30 October 1963. It gained entry into force on 18 May 1964 following the coming into force of the Performers’ Protection Act, 1963.

4 6 THE DEBATE OVER GRANTING CIVIL REMEDIES TO PERFORMERS

4 6 1 General

As discussed above, the British Act of 1958 did not confer a civil right of action on performers in the United Kingdom, it merely maintained the status quo by only giving performers a criminal remedy. This legislative position prevailed in the United Kingdom through the approval of the Rome Convention and was in fact reinforced by the Convention. Owing to the fact that the Convention only gave performers the possibility of preventing certain acts without giving them the right to authorise and prohibit, “it was argued that the approach through the criminal law could continue.” Unfortunately, the 1963 Act amended the 1958 Act only in limited ways. The Act’s sponsor in the House of Lords, Lord Mancroft, stated that the aim of the Act was to make “the small changes required in our law to ratify this Convention of Rome.” It expanded the protected class of performers but still declined to give performers anything more than a criminal sanction for infringement. He went on further to proclaim that, in the United Kingdom, the system of protection for performers was working satisfactorily owing to the fact that there were very few prosecutions under the 1958 Act.

209 Barnard “Performers’ Rights” Music Law Updates.
210 Towse 2007 Review of Law & Economics 749.
214 Arnold Performers’ Rights 24.
216 Arnold Performers’ Rights 25.
It was hoped that the Performers’ Protection Act, 1972 would rectify this situation but the Act merely increased the criminal penalties that were already available under the previous Acts.  

Despite this, Arnold writes that legislative reform was underway in that in 1972 the Whitford Committee was appointed to review the law of copyright in the United Kingdom. In 1977 they reported back, recommending against giving performers a copyright in their works stating that this could lead to considerable practical difficulties but did not provide any reasons as to why. However, they did advocate for civil remedies such as an injunction and damages.

### 4.6.2 Judicial Developments

Between 1977 and 1987 there were several judicial challenges to this untenable situation.

#### 4.6.2.1 Apple Corps Ltd v Lingasong

The first of these was *Apple Corps Ltd v Lingasong Ltd* in which the Beatles and their record company sought to restrain the making of records from a tape recording of a concert they performed at the Star Club in Hamburg without their written consent. It was argued that this infringement was actionable on the basis of breach of statutory duty, a position that was not advanced in the *Blackmail* case. This argument was, however, rejected by Sir Robert Megarry V.C who observed that in his opinion the protection provided for under the Rome Convention did not imply a civil remedy and stated that the structures were to remain as they were with the only remedy being a prosecution.

#### 4.6.2.2 Ex parte Island Records Ltd

In *Ex parte Island Records Ltd* several performers and their record companies applied for an Anton Pillar order against a bootlegger. It was held that there were no grounds to grant this order but the plaintiffs appealed, basing their argument on two specific grounds.

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218. Arnold *Performers’ Rights* 35.
219. Ibid.
223. [1978] Ch 122.
224. A person who makes recordings of live performances without the permission of either the performer or the recording company.
The first was that a civil right of action existed for breach of statutory duty under the 1958 Act (as amended by the 1963 Act), and second, that where criminal acts caused damage to a business, trade or interest in the nature of property, a civil action could be brought. The first of these arguments was rejected by the majority of the three judges with Shaw and Waller L.J. concluding that while it could be argued that the Statute was for the benefit of a class of persons, no defined duty was imposed. The second ground was, however, allowed with both Lord Denning M.R. and Waller L.J. finding that the rights of the performers were rights in the nature of property rights, damage to which by criminal acts gave rise to civil remedies. Therefore, if performers could show that they were losing royalties from lost sales as a result of these criminal offences, a private right of action could be accorded to them. The decision signified the first step towards the granting of civil remedies to performers and sparked a judicial debate that would continue for a further ten years.

4623 Lonrho Ltd v Shell Petroleum Co Ltd

The decision in Island Records was questioned in Lonrho Ltd v Shell Petroleum Co Ltd (No. 2) in which the plaintiffs claimed damages for alleged breaches by the defendants of sanction orders against Rhodesia. Speaking for the House of Lords, Lord Diplock disapproved of the decision in Island Records and stated:

“Lord Denning MR, however, with whom Waller LJ agreed ... appears to enunciate a wider general rule, which does not depend on the scope and language of the statute by which a criminal offence is committed, that whenever a lawful business carried on by one individual in fact suffers damage as the consequence of a contravention by another individual of any statutory prohibition the former has a civil right of action against the latter for such damage. My Lords, with respect, I am unable to accept that this is the law.”

Later that same year, Julian Jeffs Q.C. supported the view of Lord Diplock by finding in Warner Bros Records Inc v Pan that infringement of performers’ rights under the Acts did not amount to breach of statutory duty. Two months later, Vinelott J. held in the

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225 A criminal offence but one for which an injured person has a civil claim if they have suffered damage as a result of the breach.
227 142F-H.
228 137C-D and 144C-E.
231 187B-F.
233 395.
court a quo decision of *RCA Corp v Pollard*\(^{234}\) that the *Lonrho* case had effectively overruled *Island Records* which was affirmed by Peter Gibson J. in *Ekland v Scripglow Ltd.*\(^{235}\)

### 4624 *RCA Corp v Pollard*

When *RCA* came before the Court of Appeal in 1983, Oliver L.J. found that *Island Records* had in fact not been overruled by *Lonrho* and was therefore binding:

> "As regards the first of these, the matter is, as I see it, concluded against the plaintiffs by the decision of this court in Ex parte Island Records Ltd ... That decision is binding on us and, for my part, it seems to me, if I respectfully say so, to be well founded."\(^{236}\)

This meant that infringement of performers’ rights did not amount to breach of statutory duty under the Act of 1958 (as amended by the Act of 1963), but damage to interests in the nature of property rights did give rise to a civil right of action. This position was reaffirmed by Harman J. in *Shelley v Cunane*.\(^{237}\)

Meanwhile, in Scotland, Lord Kincraig expressed the tentative opinion that performers were entitled to a civil right of action in the case of *Silly Wizard Ltd v Shaughnessy*.\(^{238}\)

> "Without expressing any concluded view on the matter I would have thought that an Act which is designed to protect dramatic and musical performers would be one which would be intended to give a right of action to these performers, who would have no control over the question as to whether a prosecution would be taken for a breach of any particular section. It does not seem to me that if this Act was intended as a protection to these performers it would be left to the prosecuting authorities only to decide whether action should be taken on a breach."\(^{239}\)

Despite these decisions going backwards and forwards, some temporary successes were achieved in the move towards granting performers a civil right of action. However, the appeal case of *RCA* reversed any such achievements when it was reluctantly held that the 1958 Act (as amended by the Act of 1963) did not provide civil remedies to performers or record companies. Lawton L.J. stated that:

\(^{234}\) [1982] 3 All ER 771; [1983] 1 Ch 135.  
\(^{236}\) 150D-G.  
\(^{238}\) [1984] FSR 163.  
\(^{239}\) 174.
“[t]his is a result that I find unpleasing; but I remind myself that it is for Parliament, not the judges, to provide new remedies for new wrongs.”

4 6 2 5 Rickless v United Artists Corp

It was not until 1988 that the debate was finally settled in the infamous and momentous Rickless v United Artists Corporation.\(^{241}\) The facts were as follows. The defendant put together a new film, The Trail of the Pink Panther, using clips and out-takes\(^{242}\) from scenes performed by the late Peter Sellers in previous Pink Panther movies.\(^{243}\) The plaintiff claimed that as owner of the rights to the late Peter Sellers as an actor, the defendant needed to obtain permission from the actor’s executors before making his film. In deciding this matter the court had to consider if the 1958 Act (as amended by the 1963 Act) gave a performer civil remedies for breach of statutory duty or whether it only provided a criminal offence; and whether the Act rendered the reproduction of a performance without the permission of the performer after his death unlawful. The court a quo decided in favour of the plaintiffs on both questions and awarded damages in the amount of US $1 million. The defendants appealed to the Court of Appeal claiming that section 2 of the 1958 Act (as amended by the 1963 Act) did not confer a civil right of action on the plaintiff. In his judgement, Sir Nicolas Browne Wilkinson V.C. stated:

“The section, on its face, only creates a criminal offence. However, in certain circumstances such a statutory provision can confer private rights of action enforceable under the civil law. Whether any particular statute does give rise to such private rights of action depends on ‘a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted:’ Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 398, 407.”

The judge concluded (with Stephen Brown L.J and Bingham L.J. concurring) that the Act of 1958 (as amended by the 1963 Act) did give a civil right of action to the plaintiffs and that the making of The Trail of the Pink Panther constituted a breach of these rights. The appeal was accordingly dismissed confirming that section 2 did give a civil right of action to performers in addition to criminal penalties. The basis for this decision was that, by providing for criminal penalties, the Act imposed an obligation or prohibition for the benefit of a particular class of persons, namely performers, which consequently gave a cause of action to any aggrieved performer.\(^{245}\) Sir Nicolas Browne Wilkinson V.C. contradicted all

\(^{240}\) [1983] 1 Ch 135.
\(^{242}\) Discarded excerpts.
\(^{243}\) Arnold Performers’ Rights 31.
\(^{244}\) [1988] QB 40.
previous observations relating to the Rome Convention and stated that Parliament must have considered that the Performers’ Protection Act, 1963 could give rise to civil remedies otherwise they would not have been able to carry out their intention to give effect to the Convention:

“Two things seem to be clear. First, under the Convention the performer himself was to have ‘rights.’ Secondly, the performer’s rights were to include something which, in some circumstances, would make it possible to prevent unauthorised reproduction, i.e., a quia timet injunction. Therefore, compliance with the Rome Convention required that there should be an English Act of Parliament which enabled the performer to obtain an injunction to prevent unauthorised reproduction on records. The Performers’ Protection Act 1963 was passed expressly ‘to enable effect to be given to’ the Rome Convention. The Act of 1963 merely altered the class of acts which infringe sections 1 and 2 of the Act, i.e., the Act continued on its face as one imposing criminal sanctions only. In my judgement Parliament must have considered that the Performers’ Protection Act 1963 gave rise to civil rights to obtain an injunction, since otherwise Parliament would not have been carrying out its declared intention of giving effect to the Convention.”

As a result of this case, the position relating to performers in the United Kingdom changed substantially. Having previously not had any recourse to civil remedies, performers were traditionally disadvantaged when it came to enforcing their rights as performers. The decision in Rickless not only accorded performers with a civil right of action but also significantly enhanced the level of protection provided for them under the Act.

463 Legislative Reform

As previously stated, the Rickless case settled the dispute regarding the content of performers’ rights in the United Kingdom. At the same time that judicial progress was being made, so too was legislative progress. The Whitford Report of 1972 was followed by Green Papers in 1981 and a White Paper in 1986 which ultimately led to the enactment of the Copyright, Designs and Patents Act, 1988 which came into force on 1 August 1989. Part II of this Act, entitled Rights in Performances, effectively reversed the decision of RCA, endorsed the decision of Rickless and repealed the previous Acts in their entirety by giving performers a statutory civil right of action to prevent the unauthorised exploitation of their performances for the very first time. Infringement of these rights

246 [1988] QB 40 52F-53A.
247 Arnold Performers’ Rights 35.
248 Ibid.
was actionable as a breach of statutory duty\textsuperscript{249} and protection lasted for a period of 50 years from the end of the year in which the performance took place.\textsuperscript{250}

These new rights were not full copyrights and the legislature painstakingly avoided using the word “copyright” when they drafted the Act.\textsuperscript{251} However, some are of the opinion that by conferring performers with property rights, performers’ rights have inched closer to copyright and “in effect a new copyright was conferred on performers.”\textsuperscript{252}

\section*{4 7 DEVELOPMENTS BEFORE AND AFTER THE TRIPS AGREEMENT}

\subsection*{4 7 1 General}

In the years following the Rome Convention, the need to provide for a more comprehensive and extensive regime of protection for performers became evident. The steps leading up to the conclusion of the TRIPs Agreement will be focussed on herewith.

\subsection*{4 7 2 Harmonising National Laws of European Union Member States}

The Copyright, Designs and Patents Act was not the only form of statutory protection granted to performers. The executive body of the European Union, the Commission of the European Communities,\textsuperscript{253} began investigating ways in which to provide improved and uniform protection for related rights owners within the European Union as early as 1988.\textsuperscript{254} The result was several Council Directives which aims to reconcile certain objectives within the member states of the European Community.\textsuperscript{255} The first of these objectives is to establish an internal market and to ensure that competition within this market is not distorted. Another objective is “to help the cultures of the Member States to blossom” by encouraging cooperation between member states in the areas of artistic and literary creation.\textsuperscript{256} By harmonising certain aspects of member states’ national laws in the areas of copyright and related rights, the above-mentioned objectives can be achieved and in so \textsuperscript{249} S194.  
\textsuperscript{250} S191.  
\textsuperscript{251} Arnold Performers’ Rights 36.  
\textsuperscript{252} WIPO Ad Hoc Informal Meeting on the Protection of Audiovisual Performances 5.  
\textsuperscript{253} For legal reasons sometimes referred to as the EEC.  
\textsuperscript{254} Cosgrove 2006/2007 Loyola of Los Angeles Entertainment Law Review 398.  
\textsuperscript{255} The European Community was established in terms of the Treaty establishing the European Economic Community (EEC Treaty) signed in Rome in 1957. It was later changed to the European Community which the UK joined in 1975. In December 1991 the EC was changed into the European Union (EU) in terms of the Maastricht Treaty.  
\textsuperscript{256} Vanheusden “Performers’ Rights in European Legislation: Situation and Elements for Improvement” AEPO-ARTIS 14.
doing, stumbling blocks to the free movement of people, goods, capitals and services can be surmounted.\textsuperscript{257}

Collectively, the legislation, legal acts and court decisions which constitute the body of European Union law is known as the \textit{acquis communautaire} (\textit{acquis}) and roughly translated means “that which has been acquired of the Community”. It is constantly evolving and consists of:

\begin{itemize}
\item[a)] the content, principles and political objectives of the treaties;
\item[b)] the legislation adopted in application of the treaties as well as case law of the European Court of Justice;
\item[c)] the declarations and resolutions adopted by the European Union;
\item[d)] measures relating to foreign as well as home affairs;
\item[e)] measures relating to justice and the security policy; and
\item[f)] international instruments concluded by the European Union and those entered into by member states while exercising European Union activities.\textsuperscript{258}
\end{itemize}

The European Union is committed to maintaining the \textit{acquis} and to developing it further. Before joining the European Union, applicant countries have to accept the \textit{acquis} in its entirety and any derogations are only granted in exceptional circumstances. Member states are then expected to incorporate the \textit{acquis} into their domestic legislation as soon as they assent to being members of the community.\textsuperscript{259}

With regard to the European Union directives, member states are given a reasonable time within which to comply and are required to bring into force the laws, regulations and administrative provisions necessary to give effect to the directives’ provisions. In the United Kingdom, these regulations amend and extend the Copyright, Designs and Patents Act insofar as its provisions do not conform to or comply with the directives.

The increasing pressure on the European Community to harmonise their laws relating to the protection accorded to performers was illustrated in the 1993 joined cases of \textit{Phil Collins v Imtrat Handelsgesellschaft mbH; Patricia Im-and Export Verwaltungsgesellschaft mbH and Another v EMI Electrola GmbH}.\textsuperscript{260} The matter originated from a 1983 incident in

\begin{itemize}
\item[257] Ibid.
\item[259] Ibid.
\end{itemize}
which Phil Collins (a British national) gave a concert in the United States of America which was recorded without his permission. The defendants then distributed this recording, a bootleg, in Germany in response to which Collins brought a summary action in a German Regional Court for an injunction restraining Imtrat from marketing the recording and for the seizure of copies not yet sold. At the time of the alleged infringement, the United States of America was not a member of the Rome Convention. German law was not obligated to provide protection to foreigners for performances occurring in a country that was not a Rome Convention country. The court decided to stay proceedings and seek a preliminary ruling in the European Court of Justice instead.

The issue before the court was whether the laws relating to copyright and related rights were subject to the prohibition of discrimination established in terms of Article 7(1) of the Treaty establishing the European Economic Community, now found in Article 6 of the European Community Treaty. If so, was a member state that gave protection to performances of its nationals, irrespective of the place of the performance, also obligated to provide that protection to nationals of other member states? The European Court of Justice held that the provisions on prohibition of discrimination contained in Article 7(1) did include the law relating to copyright and related rights. In addition, this prohibition may be directly invoked before national courts by a performer from another member state to demand that he/she be given the same level of protection that is formerly reserved for their nationals.

The effect of this decision is that “countries with lower protection levels could not profit from the fact that their nationals would receive more generous national treatment abroad than what those countries provide to foreigners.” The entire Community must provide for national treatment and honour these rights as a result of the Phil Collins decision, “even though the works in question may have been in the public domain for nearly twenty years in most other European Community states.”

4721 The Rental and Lending Rights Directive

The first of the directives relevant to performers’ rights was the Directive on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual

264 220-221.
Property (the Rental and Lending Rights Directive)\textsuperscript{265} of 1992 which aimed to harmonise laws relating to rental and lending of all categories of works and to harmonise laws concerning a range of related rights.\textsuperscript{266} It repeated some of the main provisions of the Rome Convention but in some instances extended beyond it.\textsuperscript{267} The Directive required member states to grant performers exclusive rights relating to rental and lending rights,\textsuperscript{268} fixation,\textsuperscript{269} reproduction,\textsuperscript{270} broadcasting and communication to the public,\textsuperscript{271} and distribution rights.\textsuperscript{272} The Directive also required that performers should share in a single equitable remuneration for the public performance or broadcasting of recorded performances\textsuperscript{273} even after the performer had transferred his rental right to a producer. Article 4 further provides that this right to receive remuneration cannot be waived:

\begin{quote}
1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.

2. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.

3. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers."
\end{quote}

Although the Directive was supposed to be implemented by member states by 1 July 1994,\textsuperscript{274} it was only given effect in the United Kingdom on 1 December 1996 after extensive lobbying by interested parties.\textsuperscript{275} In order to give effect to the Directive in the United Kingdom, the Copyright and Related Rights Regulations, 1996\textsuperscript{276} was enacted through which new rights were created for performers. In so doing, the United Kingdom also fulfil their obligations under the European Economic Area Act, 1993 in accordance with Council Decision 92/100/EC.\textsuperscript{265} Arnold Performers' Rights 37.\textsuperscript{266} Caviedes 1998 Boston University International Law Journal 213.\textsuperscript{267} Articles 1(1), 2(1) and 2(4).\textsuperscript{268} Article 6(1).\textsuperscript{269} Article 7(1) and (2).\textsuperscript{270} Article 8(1).\textsuperscript{271} Article 8(2).\textsuperscript{272} Article 9(1).\textsuperscript{273} Article 9(2).\textsuperscript{274} Commission of the European Communities Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union (2002) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0502:EN:NOT (accessed 27-07-2010).\textsuperscript{275} Arnold Performers' Rights 38.\textsuperscript{276} SI 1996/2967.
with the United Kingdom’s duties under the European Area Agreement.\textsuperscript{277} The subsequent Regulations resulted in amendments to the Copyright, Designs and Patents Act\textsuperscript{278} which is reflected in sections 182A to 182C. Furthermore, the remedies for infringement of performers’ property rights, namely damages, injunctions, accounts of profits, delivery up and seizure, effectively mirror those set out in Chapter VI of the Copyright, Designs and Patents Act which protects copyrighted works (with the exception of moral rights).\textsuperscript{279} However, the reality of this Directive was that while the owner of a sound recording\textsuperscript{280} was entitled to exploit it in any way he wished, the performer’s only right with regard to that recording was to receive remuneration.\textsuperscript{281} In addition, the Commission to the Council, the European Parliament and the Economic and Social Committee concluded in its report on the Directive that:

“only partial harmonization has been achieved and the legislative measures applied by member states still vary to a large extent. Not all member states have changed their law and some have only made minor changes.”\textsuperscript{282}

The Directive has since been repealed by the Directive on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property of 2006.\textsuperscript{283}

\textbf{4 7 2 2 The Satellite Broadcasting Directive}

The next European Community directive of relevance to the progress of performers’ rights is the Directive on the Co-ordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Transmission (the Satellite Broadcasting Directive) of 1993.\textsuperscript{284} The main relevance of this Directive as far as performers are concerned is that the provisions of the Rental and Lending Rights Directive

\begin{itemize}
\item \textsuperscript{279} Barnard “Performers’ Rights” Music Law Updates.
\item \textsuperscript{280} Usually a recording company.
\item \textsuperscript{281} Barnard “Performers’ Rights” Music Law Updates.
\item \textsuperscript{282} Commission of the European Communities Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union (2002).
\item \textsuperscript{283} Council Decision 2006/115/EC. The effect of this Directive was not to introduce new rights for performers but to codify the existing law relating to rental and lending rights. Paragraph (1) of the introduction provides that the “Council Directive 92/100/EC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property has been substantially amended several times. In the interests of clarity and rationality the said Directive should be codified”.
\item \textsuperscript{284} Council Decision 93/83/EC.
\end{itemize}
relating to performers’ rights are to be applied to satellite broadcasting as well. This Directive was also given effect in the United Kingdom by the Copyright and Related Rights Regulations, 1996.

4723 The Term Directive

The third relevant directive was the Directive on the Duration of Copyright and Related Rights of 1993 (the Term Directive). The objective of this Directive was to harmonize the term of protection granted to copyright and certain related rights amongst the European Union member states in order to overcome the practical difficulties experienced as a result of the differing periods of protection amongst member states. The term of protection of the rights of an author of a literary or artistic work subsisted for the life of the author and for 70 years after his death, irrespective of the date when the work was lawfully made available to the public. As far as related rights were concerned, Article 3(1) mandated that the term of protection must be 50 years for performances in sound recordings calculated from the end of the year in which the recording of the performance first took place, or the end of the year in which the recording of the performance was first released. The Directive also introduced the principle of reciprocity for protection of non-European Union nationals as opposed to the principle of national treatment which was previously applied to them. Article 7(2) provided that:

“The terms of protection laid down in Article 3 shall also apply in the case of rightholders who are not Community nationals, provided Member States grant them protection. However, without prejudice to the internal obligations of the Member States, the term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the rightholder is a national and may not exceed the term laid down in Article 3.”

This meant that non-European Union nationals were granted the same level of protection as under their own domestic law rather than the protection given to European Union nationals, which took the form of national treatment, but only insofar as it doesn’t exceed the protection granted by the European Union country. The Directive was due to be implemented by the 1 July 1995 but was not given effect in the United Kingdom until 1 January 1996 through the Duration of Copyright and Rights in Performances Regulations,

285 Council Decision 93/98/EC.
286 Arnold Performers’ Rights 38.
287 Article 1(1).
288 When it is first lawfully published, played or shown in public.
289 Ibid.
290 Arnold Performers’ Rights 39.
1995.\textsuperscript{291} This was incorporated into the Copyright, Designs and Patents Act by way of amendment as reflected in section 191 of the Act. This Directive has since been repealed by the Directive on the Term of Protection of Copyright and Certain Related Rights of 2006.\textsuperscript{292} However, no substantial changes were made to the term of protection afforded to performers.\textsuperscript{293}

The limited term of protection assigned to performers has been the subject of much controversy. Not only is it far inferior to the term assigned to the works of copyright owners,\textsuperscript{294} it ostensibly means that recordings that represent the musical heritage of the United Kingdom will continually fall into the public domain. For instance, around 2013 the entire Beatles’ catalogue and the early Rolling Stones’ catalogue will both become freely available for unlicensed copies to be produced and sold throughout Europe.\textsuperscript{295} The direct result of this is loss of revenues to both recording companies and performers that own the rights to their performances. Recent attempts of influential players in the music industry to extend the term of protection afforded to performers will be discussed later in this Chapter.

\textbf{4 7 3 Approval of the TRIPs Agreement}

During this time, the United States, Japan and the European Union submitted complaints that their business interests were being threatened through piracy and counterfeiting. Global corporate players were treating the world as one market requiring world-wide standards of intellectual property protection.\textsuperscript{296} As a result, many coherent proposals for the harmonisation of intellectual property protection were advanced and the upcoming Uruguay Round of Multilateral Trade Negotiations to Amend the General Agreement on Tariffs and Trade (GATT) negotiations were awaited with a great deal of optimism and determination to see the adoption of an intellectual property agreement supportive of the corporate agenda.\textsuperscript{297} This round of negotiations took place in 1994 and resulted in the TRIPs Agreement, approved by Council Decision 94/800/EC and concluded within the

\begin{thebibliography}{99}
\bibitem{1} SI 1995/3297.
\bibitem{2} Council Decision 2006/116/EC.
\bibitem{3} No further developments were introduced in the area of the term of protection provided to performers and the Directive was intended purely for codification purposes. Paragraph 1 of the introduction states that “Council Directive 93/98/EC of 29 October 1993 harmonising the term of protection of copyright and certain related rights has been substantially amended. In the interests of clarity and rationality the said Directive should be codified”.
\bibitem{4} S12(2) of the Copyright, Designs and Patents Act provides protection to these works for the lifetime of the author plus 70 years beyond his death.
\bibitem{5} Cosgrove 2006/2007 Loyola of Los Angeles Entertainment Law Review 400-401.
\bibitem{7} Ibid.
\end{thebibliography}

\section*{474 Provisions of the TRIPs Agreement}

One of the main shortcomings of the various intellectual property agreements which exist under the banner of WIPO is that they don’t have adequate measures for ensuring that members give effect to them by providing the required level of protection at domestic level. This was the main motivation behind the adoption of the TRIPs Agreement which does make provision for its enforcement by adherents.\footnote{Dean “International Copyright” in \textit{Handbook of South African Copyright Law} (2004) 1-93.} \footnote{Ibid.}

Widely regarded as probably the most significant step forwards in the development of performers’ rights since the Rome Convention,\footnote{Article 14(1).} the TRIPs Agreement provides that:

“In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.”\footnote{Article 14(5).}

The provision that performers be granted the possibility of preventing certain acts follows the wording of the Rome Convention, with one notable exception. The agreement does not protect performers’ visual and audiovisual fixations which essentially means that the TRIPs Agreement only protects musical performances.\footnote{Gruenberger 2006 \textit{Cardoza Arts & Entertainment Law Journal} 641.}

Furthermore, it provides that:

“The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place.”\footnote{Article 14(5).}
This means that performers must be granted protection for a period of 50 years, an extension of the term provided for under the Rome Convention. It also requires that its members implement enforcement measures to permit effective action against any form of infringement of rights covered by the Agreement.\textsuperscript{305} In terms of Article 70(2) protection under this Agreement is to be guaranteed retroactively to works which was not the position under the Rome Convention.

The principle of independence from the rights of other rights holders\textsuperscript{306} is given effect in Article 2(2) which provides that:

\begin{quote}
"Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under ... the Berne Convention ... [and] the Rome Convention."
\end{quote}

This expresses the desire of the authors to create a mutually supportive affiliation between the WTO and the WIPO\textsuperscript{307} and is emphasised in Article 9(1) which states that “Members shall comply with Articles 1-21 and the Appendix of the Berne Convention (1971).” This obligation exists regardless of whether or not member states are contracting states of the Berne Convention and it is then in the best interests of WTO members to become direct members of Berne as their views can then be expressed within the Convention assemblies.\textsuperscript{308}

Under this Agreement, member states are obliged to provide for national treatment as well as minimum protection. Minimum protection takes the form of minimum standards that must be provided in each of the following areas: the subject-matter to be protected, the rights to be conferred, permissible exceptions to those rights, and the minimum duration of protection.\textsuperscript{309} Member states must grant these minimum rights to eligible performers, even if they do not grant them to their own nationals.\textsuperscript{310} The Agreement further introduces a new principle, namely the most-favoured nation treatment, which had never previously been applied to intellectual property.\textsuperscript{311} Article 4 provides that:

\begin{small}
\textsuperscript{305} Article 41-62.  
\textsuperscript{306} Gruenberger 2006 Cardoza Arts & Entertainment Law Journal 632.  
\textsuperscript{307} Caviedes 1998 Boston University International Law Journal 198.  
\textsuperscript{308} Ibid.  
\textsuperscript{309} WTO “Overview: The TRIPs Agreement” http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (accessed 12-08-2010).  
\textsuperscript{310} Gruenberger 2006 Cardoza Arts & Entertainment Law Journal 633.  
\textsuperscript{311} Caviedes 1998 Boston University International Law Journal 194.
\end{small}
“Any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”

This is significant for developing countries for whom reciprocity was of no value owing to the fact that they produced very little technology and therefore had very little to protect. However, this principle is limited with regard to performers in that it only applies to benefits guaranteed under the TRIPs Agreement.

The concept of national treatment is similarly restricted in its scope in that it, too, only applies to those rights provided for under the TRIPs Agreement. Had the principle not been limited, member states would have been obliged to apply the protection they grant to their domestic performers to the same extent to eligible foreign performers. This would lead to an imbalance amongst states that only conform to the minimal protection provisions of the TRIPs Agreement, but benefit from a high level of protection in other states.

Although the Agreement repeats most of the provisions of the Berne Convention and to a lesser extent those of the Rome Convention, the advancement of performers’ rights is still significant in that all WTO member countries are required to:

“[G]ive effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”

In addition, member states must remain committed to the enhancement of intellectual property rights within their respective countries in order to reap the benefits under the TRIPs Agreement. Currently, WTO membership stands at 153 which is a great deal higher than the number of states that have ratified the Rome Convention. This means

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312 194-195.
316 Article 1(1).
317 LoVoi “Competing interests: Anti-piracy efforts triumph under TRIPs but new copying technology undermines the success” 1999 Brooklyn Journal of International Law 445 463.
319 The Rome Convention currently has 91 contracting parties.
that internationally, a much greater number of states directly provide protection to their performers than ever before. Morgan writes that owing to the fact that it has a high level of international acceptance, performers’ rights has progressed from being a mainly European concern to one affecting nearly all developed states, including the United States of America.

4.7.5 Implementation

In terms of Article 65 of the TRIPs Agreement the provisions apply from the expiration of one year after the date of entry into force of the Agreement, which means that its provisions were operational from 1 January 1996. Developing countries were granted an extension of four years which meant the Agreement only became operational from 1 January 2000. This delay was also extended to any other member state which was in the process of transforming into a market, free-enterprise economy and which was undergoing structural reform of its intellectual property law system. Least-developed countries were granted a delay of ten years within which time to apply the provisions of the Agreement. With regard to its implementation, the European Court of Justice held in *Hermes International v FHT Marketing Choice BV* that the European Community and the member states had shared competence to conclude the TRIPs Agreement which means that in areas where the European Community has legislated, member states must not only apply these legislative measures but must also as far as possible, comply with the TRIPs Agreement.

As a European Union member state, the United Kingdom has been a member of the WTO since its enactment on 1 January 1995. Although they have ratified the TRIPs Agreement, the minimum standards provided for regarding performers’ rights were already reflected in the Copyright, Designs and Patents Act. The Act has, therefore, remained unchanged as a result, with amendments being made to other pieces of British legislation such as the Registered Designs Act, 1949. However, Arnold submits that it may be

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320 Morgan *International Protection* 121.
322 1 January 1995.
323 AEPO-ARTIS “The TRIPs Agreement of the GATT which became the WTO (World Trade Organisation) since 1994”.
325 Paragraph 28.
326 WTO Members and Observers.
probable that the courts will have regard to the TRIPs Agreement when and where appropriate, even in areas which are not the subject of European Union legislation.  

4.8 INFLUENCE OF THE WPPT

4.8.1 General

The inadequacies of the Rome Convention and the TRIPs Agreement were suffered by most of the rights holders they purported to protect, especially performers and producers of phonograms.  

In 1997, the Assistant Director General of the WIPO, Mihaly Ficsor, stated that the Organisation recognised two features regarding the development of related rights. Firstly, technological developments and secondly, a process of “guided development” as opposed to the implementation of new international norms. This “guidance” took the form of recommendations, principles and model provisions relating to neighbouring rights for legislators. Towards the end of the 1980’s it was realised that guidance was not sufficient and that binding international norms were necessary. The development of performers’ rights under the auspices of WIPO continued simultaneously with the negotiations that resulted in the WTO, and ultimately the TRIPs Agreement. In 1992, a Committee of Experts was established by the Assembly of the Berne Union to prepare a Possible Instrument (Treaty) for the Protection of Rights of Performers and Producers of Phonograms (the precursor to the WPPT). Its mandate extended to almost all areas of the protection of performers and producers of phonograms (excluding broadcasters) where the clarification of existing international norms and the establishment of new norms were needed. The progress of their work accelerated with the adoption of the TRIPs Agreement and on 20 December 1996 two agreements were signed at the Geneva Diplomatic Conference, namely the WIPO Copyright Treaty (WCT) and the WPPT. For the purposes of this discussion, only the WPPT will be concentrated on.

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327 Arnold Performers’ Rights 42.
329 Morgan International Protection 121.
330 UATM “Introduction to the WIPO Performances and Phonograms Treaty (WPPT)” 1.
331 Morgan International Protection 122.
4.8.2 Provisions of the WPPT

During the early phases of the development of the Treaty the idea emerged that it should be seen as a special agreement entered into under Article 22 of the Rome Convention. This was rejected.\textsuperscript{332} Had this been approved, the same slow adherence the Rome Convention has witnessed would then apply \textit{mutatis mutandis} to the WPPT.\textsuperscript{333} Article 1(3) therefore provides that:

“The Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.”

This implies that in the event of conflict between the Rome Convention and the WPPT in countries that are members of both, the Rome Convention would prevail.\textsuperscript{334} In addition, the relationship between copyright and related rights is clarified by reproducing the text of Article 1 of the Rome Convention verbatim by stating that:

“Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.”\textsuperscript{335}

The same primacy of copyright that other agreements have clung to is evident here.

The Treaty provides for national treatment to be extended to nationals of other contracting parties by providing that:

“Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.”\textsuperscript{336}

Nationals of noncontracting parties are accorded reciprocal treatment and in order to give effect to this requirement it became necessary for the United Kingdom to pass legislative instruments to stipulate the level of protection available in European Union and non-European Union countries. The Performances (Reciprocal Protection) Convention Countries Order, 1999\textsuperscript{337} was such a measure. When dealing with a performer from a

\textsuperscript{332} UATM “Introduction to the WIPO Performances and Phonograms Treaty (WPPT)” 3.
\textsuperscript{333} 2.
\textsuperscript{334} AEPO-ARTIS “The WIPO Performances and Phonograms Treaty of 20 December 1996”.
\textsuperscript{335} Article 1(2).
\textsuperscript{336} Article 4(1).
\textsuperscript{337} SI 1999/1752.
foreign state, the Order was consulted to determine what level of protection the foreign performer was entitled to.

The most important and urgent task of the Geneva Conference was to offer clarity on the existing norms and, where possible, to create new norms in response to issues raised by new developments in digital technology, especially the Internet. As a result, these issues were referred to as the “digital agenda” and covered aspects such as definitions; rights applicable to storage and transmission of performances and phonograms in digital networks; limitations on and exceptions to rights in the digital arena; technological measures of protection; and rights management information.338

With regard to definitions, the WPPT follows the structure of the Rome Convention by providing a series of definitions that are in essence the same as those provided for under the Rome Convention. The digital impact is reflected in that certain definitions have been augmented to include references to fixations of digital representations of sounds generated by electronic means. This is found in the definitions of “phonogram”, “fixation”, “producer of phonogram”, “broadcasting” and “communication to the public”.339 It should be stressed, however, that the reference to “representation of sounds” does not expand the relevant definitions as provided under existing treaties; it only reflects the desire to offer a clarification in the face of current technology.340 Interestingly, the definition of “performer” has been extended to include performers of folklore341 but does not include variety artists such as jugglers or acrobats.342

There were several main advances made in the area of performers’ rights with the adoption of the WPPT. The first of these is that performers were accorded moral rights for the first time. Article 5(1) provides that these rights operate independently of their economic rights and gives the performer the right to be identified as the performer and to object to any distortion, mutilation or modification of his performance that would be prejudicial to his reputation. These rights are transferrable to his heirs upon death for as long as the economic rights apply343 and are to be incorporated into national legislation by

338 UATM “Introduction to the WIPO Performances and Phonograms Treaty (WPPT)” 2-3.
339 Article 2(b)-(d), (f)-(g).
340 UATM “Introduction to the WIPO Performances and Phonograms Treaty (WPPT)” 3.
341 Expressions of folklore.
342 Article 2(a).
343 Article 5(2).
the various contracting states. This follows the wording of Article 6 of the Berne Convention, which applies to copyright owners.

The second aspect to advance with the adoption of this Treaty is the area of economic rights accorded to performers. Performers are given the “exclusive right to authorise” broadcasting; communication to the public and fixation of live performances, direct or indirect reproduction of performances fixed in phonograms; distribution of fixed performances; renting for commercial purposes of fixed performances; and making available on demand of fixed performances which allows performers to claim damages should these rights be infringed. This is a significant improvement on the “possibility of preventing” such acts as provided for by the Rome Convention and the TRIPs Agreement.

The Treaty also provides for a single equitable remuneration to be paid to performers and phonogram producers if a fixation of the work is broadcasted or communicated to the public with reservations. This means that performers are accorded rights in the sound recordings of their performances which amount to the payment of a royalty every time the said performances are broadcasted or communicated to the public. However, because this is subject to reservations, in much the same way as the Rome Convention and the TRIPs Agreement, contracting states are given the option of limiting or refusing to pay this remuneration. There is a difference, however, in that under the Rome Convention and the TRIPs Agreement this right to remuneration is payable to the performer, or the producer, or to both and it is at the discretion of the contracting state to decide who is to benefit, if at all. The WPPT provides that this right must be granted to both parties which signifies an improvement in the level of protection granted to performers.

The duration of these rights lasts for a period of 50 years from the end of the year in which the performance was fixed in a phonogram, substantially the same as the term accorded by the TRIPs Agreement.

344 Article 5(3).
345 Article 6.
346 Article 7.
347 Article 8(1).
348 Article 9(1).
349 Article 10.
350 Article 15(1).
351 Article 15(3).
352 UATM “Introduction to the WIPO Performances and Phonograms Treaty (WPPT)” 7.
353 Article 17(1).
Lastly, member states are required to provide enforcement measures against the circumvention of anti-copying measures that facilitates the practise of bootlegging by providing that:

“Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.” 354

Despite these measures, in recent years these activities have assumed industrial proportions offering perpetrators considerable profits with minimal risk. 355 Regardless, the WPPT has introduced a new form of protection for rights holders by establishing the first international instrument to grant independent protection to technological measures used by rights holders to protect their works. 356

4.8.3 Implementation

When viewed from the perspective of the European Union, the Treaty has made only modest advancements for performers but is a considerable step forwards from both the Rome Convention and the TRIPs Agreement. 357 However, its limited scope of protection has been disappointing to rights holders as a result of the failure of the WPPT to provide any form of protection to performers in the audiovisual sector. It is widely believed that the American film industry is to blame for this state of affairs. 358 The American entertainment industry is their largest export industry after the aerospace and aviation industries. 359 Outwardly influenced by the power of Hollywood producers, the United States of America has continuously opposed setting universal standards for the protection of audiovisual performers, content to rely on national protection found in terms of its employment law, labour law, the Screen Actors Guild (SAG) agreement and individually negotiated

354 Article 18.
357 Arnold Performers’ Rights 44.
contractual agreements.\textsuperscript{360} Currently, there is no protection for performers when their performances are fixed in a film and broadcasted to the public.

Although the WPPT was adopted in 1996, it only entered into force on 20 May 2002.\textsuperscript{361} To date, 86 states\textsuperscript{362} have ratified the Treaty with more states having had experience with performers’ rights since the adoption of the Rome Convention.\textsuperscript{363}

After signing the WPPT, the European Union subsequently issued the Directive on the Harmonising of Certain Aspects of Copyright and Related Rights in the Information Society\textsuperscript{364} in 2001 which required member states to reform their domestic laws to comply with this Directive. The Directive harmonises the rights related to uses of copyright material in the information society as well as e-commerce, such as the rights in copying and communication to the public. It also limits the extent of permitted exceptions to these rights and grants protection to technological measures used to safeguard these rights.\textsuperscript{365} The Directive has two main objectives. The first is to adapt legislation pertaining to copyright and related rights to reflect ongoing technological developments; and the second is to transpose into community law the main obligations arising out of the Treaties on copyright and related rights adopted in December of 1996, namely the WCT and the WPPT.\textsuperscript{366} These would assist with the “creation of a harmonised legal framework that is consistent with international norms that would provide legal certainty to market players, would be sustainable, and would preserve a balance between protecting the rights of rights holders and the freedoms of users.”\textsuperscript{367}

The United Kingdom enacted the Copyright and Related Rights Regulations, 2003\textsuperscript{368} in order to give effect to this Directive. Although the Copyright, Designs and Patents Act already provided protection similar to many of the obligations prescribed by the Directive, these Regulations amended the Act insofar as it does not comply with the Directive.\textsuperscript{369}

\textsuperscript{360} Ibid.
\textsuperscript{361} Arnold Performers’ Rights 43.
\textsuperscript{363} Morgan International Protection 122.
\textsuperscript{364} Council Decision 2001/29/EC.
\textsuperscript{367} 5.
\textsuperscript{368} SI 2003/2498.
\textsuperscript{369} Legislation.gov.uk “Statutory Instrument 2003 No. 2498 Explanatory Note”. 

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With regard to the rights of performers, the Copyright, Designs and Patents Act was amended by redefining the meaning of the word “broadcast” and performers were given a new exclusive right in order to control the making available of their works to the public. A performer’s rights are also infringed if his performance is made available to the public without his permission. The Act was further amended to cater for the more extensive legal protection granted for technological measures which relates to the circumvention of any technological protection measures carried out with the knowledge and awareness that that one was pursuing this objective. In addition, civil remedies and criminal sanctions were enhanced to make them effective, proportionate and dissuasive.

Although the Regulations were supposed to give effect to the WPPT, the United Kingdom failed to ratify the WPPT until 14 December 2009 due to their reluctance to grant performers moral rights. They were, however, able to give effect to the above-mentioned Directive as it does not deal with moral rights and the Regulations implementing this Directive entered into force on 31 October 2003.

4 9    DEVELOPMENTS FROM 2005

4 9 1    Copyright and Performances (Application to Other Countries) Order

With regard to the protection of foreign works, performers’ rights exist only if the performance is a qualifying performance in terms of the Copyright, Designs and Patents Act which provides that it must be given by a qualifying individual or take place in a qualifying country. A “qualifying individual” is a subject or a resident of a qualifying country and “qualifying country” refers to the United Kingdom and any other member state of the European Union as well as any other country designated by Order in Council which enjoys reciprocal protection.

The next legislative Order of importance to performers’ rights to be enacted was the Copyright and Performances (Application to Other Countries) Order, 2005 which repealed the Performances (Reciprocal Protection) Convention Countries Order, 1999. It

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370 S6.
371 S20.
372 S182CA.
373 Legislation.gov.uk “Statutory Instrument 2003 No. 2498 Explanatory Note”.
374 S296ZA, 296ZD and 296ZE.
375 S97, 101 and 107.
376 S181.
377 S208.
378 SI 2005/852.
granted protection to countries that were parties to the Rome Convention\(^{379}\) and extended limited protection to countries that were party to the TRIPs Agreement.\(^{380}\) Some countries were granted reciprocal protection by reason of their undertaking to become a party to the WPPT.\(^{381}\)

This Order has subsequently been repealed by the Copyright and Performances (Application to Other Countries) Order, 2008\(^{382}\) which has in turn been replaced by the Copyright and Performances (Application to Other Countries) (Amendment) Order, 2009.\(^{383}\)

492 Reciprocity as interpreted in *Experience Hendrix LLC v Purple Haze Records Ltd*

Although section 180(3) of the Copyright, Designs and Patents Act confers rights in performances retrospectively, problems arise when a performance took place in a country that was not granted reciprocal protection prior to the commencement of the Act. This was highlighted in the 2005 case of *Experience Hendrix LLC v Purple Haze Records Ltd*.\(^{384}\) In 1969 the late Jimi Hendrix gave several performances in Stockholm, Sweden of which a recording was made by a Swedish broadcasting association. Hendrix died intestate in London in September 1970. Thirty years later, a deed of assignment executed and transferred Hendrix’s entire estate to Experience Hendrix. At the time the Swedish performances were given, private law rights and remedies for the exploitation of live performances did not exist. Although the Copyright, Designs and Patents Act does confer these rights retrospectively,\(^{385}\) it only does so for qualifying performances from qualifying countries.\(^{386}\) Sweden only joined the European Union in January 1995 so was, therefore, not a qualifying country at the time the recordings were made. The defendants, Purple Haze Records Ltd, made and sold copies of the performances in the United Kingdom. In the court *a quo* Experience Hendrix sued Purple Haze claiming that the performances were qualifying performances and that Hendrix’s performers’ rights under section 182A

\(^{379}\) Article 3.
\(^{380}\) Article 2.
\(^{381}\) Article 6(2).
\(^{382}\) SI 2008/677. This order provided for reciprocal protection in the same way that the order of 2005 did but included countries that became members of the Rome Convention and/or the TRIPs Agreement after the order of 2005 was adopted.
\(^{383}\) SI 2009/2745. This order provided for reciprocal protection in the same way that the order of 2008 did but included countries that became members of the Rome Convention and/or the TRIPs Agreement after the order of 2008 was adopted.
\(^{384}\) [2005] EWHC 249 (Ch).
\(^{385}\) S180(3).
\(^{386}\) S181 and 206.
and 182B of the Act had been infringed. The defendants denied these claims and asserted *inter alia* that the claimant’s case depended on the court’s interpretation of the Copyright, Designs and Patents Act which should support the view that the performances in question were not qualifying performances as Sweden was not a qualifying country at the time the performance was given.

This argument was rejected by Hart J. who held that since a performance given in the United Kingdom before the enactment of the Copyright, Designs and Patents Act in 1988 was a qualifying performance; there was nothing to suggest that a performance given before that date in another member state of the European Union could also not be a qualifying performance.\(^{387}\) If the Copyright, Designs and Patents Act was intended to have retrospective effect, then the fact that Sweden was not a member of the European Union, and therefore not a qualifying country, would be irrelevant. The judge held that the Stockholm performances were therefore qualifying performances for the purposes of section 181 by stating that:

> “Whatever the solution may be to it (if indeed there is one), it is not to be found by interpolating an artificial temporal restriction into the definition of a qualifying country.”\(^{388}\)

This decision was upheld on appeal in 2007\(^{389}\) with all three judges concurring that Hart J’s ruling in the court *a quo* decision was correct.

What is apparent from this judgement is that the time when a performance qualifies as a qualifying performance is not judged by the date the performance took place, but the date the alleged infringement took place.\(^{390}\)

Upon application, this means that if a performance took place in a country that was not a qualifying country in terms of the Copyright, Designs and Patents Act at the time of the performance, the performance in question would still qualify for protection in terms of the Act if the date of infringement took place at a time when the country in question was a qualifying country.\(^{391}\) In addition, this case confirms that performances which took place in

\(^{387}\) [2005] EWHC 249 (Ch) paragraph 16.
\(^{388}\) *Ibid.*
\(^{389}\) [2007] EWCA Civ 501.
the European Union are protected regardless of the fact that they may be several decades old and "could act as a watershed in the fight against illegal copying and distribution."\(^{392}\)

### 4.9.3 The Intellectual Property (Enforcement, Etc.) Regulations

The law relevant to performers' rights developed further during mid-2006 when the United Kingdom enacted the Intellectual Property (Enforcement, etc.) Regulations\(^ {393}\) which implemented the Directive on the Enforcement of Intellectual Property Rights.\(^ {394}\)

> "The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market."\(^ {395}\)

It serves to harmonise the relevant laws relating to standing, evidence, interlocutory measures, injunctions and seizures, costs, damages as well as judicial publication and requires that all member states must apply effective, dissuasive and proportionate remedies and penalties against anyone who engages in counterfeiting and piracy.\(^ {396}\) Of particular importance to performers' rights is that a performer is presumed to be the performer if his name appears "in the usual manner";\(^ {397}\) the court is to have the power to respond to a legitimate claim by a plaintiff in order to obtain information about the origin and distribution of unauthorised recordings;\(^ {398}\) injunctions are available to performers in order to take action against intermediaries whose services are used to infringe their rights;\(^ {399}\) the court is required to take into account any unfair profits made by the infringer when assessing damages and must further consider factors such as moral injury;\(^ {400}\) and lastly, the court must be given the power to order that their decisions be publicised.\(^ {401}\)

The above-mentioned Regulations came into force in the United Kingdom on 29 April 2006 and the Copyright, Designs and Patents Act was amended accordingly.

\(^{392}\) Ibíd.
\(^{393}\) SI 2006/1028.
\(^{394}\) Council Decision 2004/48/EC.
\(^{395}\) Paragraph 10.
\(^{396}\) Article 3(2).
\(^{397}\) Article 5(b).
\(^{398}\) Article 8.
\(^{399}\) Article 11.
\(^{400}\) Article 13(1).
\(^{401}\) Article 15.
4 10 THE ISSUE OF MORAL RIGHTS

4 10 1 General

Of major significance to the development of performers’ rights in the United Kingdom was their reluctance to grant moral rights to performers similar to moral rights they grant to copyright owners.

4 10 2 The Early Development of Moral Rights

Moral rights originated from ancient Greece and Rome where they existed without notions of property rights being attributed to creative works. Greek playwrights, poets and philosophers received attribution for their works but this courtesy was not extended to authors of musical works as they were regarded to be forces of nature. Roman law recognised that “the failure to designate the actual author as the originator of his own work constituted thievery.” During the Renaissance, artists sought further protection for their creative works. For example, Michelangelo claimed the moral right of attribution (the right to be recognised as the author) by secretly carving his name into a sculpture that had been wrongfully attributed to someone else. He later averred the right of disclosure by denying access to Pope Julius II to his unfinished work in the Sistine Chapel. In terms of this right, the customer pays for the finished product but the artist alone decides when the product is completed. When the Pope later gained access to the Chapel by bribing Michelangelo’s assistants, Michelangelo physically barred the Pope from entering stating that the work would be finished when he had “satiated his creative sense.”

4 10 3 The Modern Concept of Moral Rights

The modern notion of moral rights originated in France. Following the French Revolution, France adopted its first copyright act in 1793, modelled after the British and American copyright systems. Initially, interpretations of the French statutes were influenced by public demand for “the genius of the individual citizens” and by “the spirited writings and debates of prominent French intellectuals and literary figures of favouring safeguards

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403 Ibid.
404 222.
centred on the creator in artistic endeavours.⁴⁰⁵ In 1828, France's highest court recognised the right of disclosure in *Widow Vergne v Creditors of Mr Vergne*.⁴⁰⁶ In this case, Vergne, a well-known composer and author, had performed several of his compositions in a national competition. He died before he could publish any of these compositions and his creditors attempted to seize these in order to settle some of his earlier debts. The court held that the creditors could not seize the unpublished compositions as his heir, Widow Vergne, had exercised Vergne's moral right not to disclose his works.⁴⁰⁷

In 1836, the same court decided a dispute between a composer and a musical director of concerts in *Masson de Puitneuf v Musard⁴⁰⁸* by recognising the right of attribution, possibly the earliest recognition of this right.⁴⁰⁹ A concert director had purchased the rights to the plaintiff's musical works but instead of assigning the author's name, the defendant inserted a fake name on the bill. The court held that in order to grant the appropriate credit, accurate attribution must be given to the composer of the musical works by the user, namely the director.⁴¹⁰

In 1845, an author of children's books took action against a publisher in an attempt to block efforts by the latter to alter the author's works through deletion of certain parts, even though the author had sold all of his legal rights to the publisher in question. In *Marquam v Lehuby⁴¹¹*, the court ruled that deletions altered and mutilated the original work and subsequently caused damage to the author's creative standing. As a result, the publisher's attempts to revise the works were prevented. This represented the court's recognition of the author's right of integrity.⁴¹²

This decision was followed in 1898 by the much-publicised case of *Eden v Whistler⁴¹³* wherein James McNeill Whistler refused to deliver his portrait of Lady Eden to Lord Eden. The French court upheld Whistler's refusal by applying the same right of disclosure Widow Vergne had relied on in 1828.⁴¹⁴

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⁴⁰⁵ 222-223.
⁴⁰⁶ Cour d'appel [CA] [regional court of appeal] Paris le ch Jan 11 1828 S Jur II 1828 5.
⁴⁰⁷ Bird & Ponte 2006 *Boston University International Law Journal* 223.
⁴⁰⁸ Cour d'appel [CA] [regional court of appeal] Paris le ch Aug 8 1836.
⁴¹⁰ Ibid.
⁴¹³ CA Paris 1898 DP II 465 aff'd 1900 DP I 497.
Moral rights developed at a slower rate in the United Kingdom than in their French counterparts. Early cases interpreting the Statute of Anne revealed little intention to protect artistic integrity. In 1720 the court held in *Burnett v Chetwood* that an unauthorised translation of a copyrighted work was not an improper reprinting of the work, thereby concluding that a translation amounted to a new contribution. In 1740 the court decided in *Gyles v Wilcox* that an unauthorised abridgement of a work protected by copyright was not an infringement. In *Gilbert v Boosey and Co.* in 1889, the plaintiff, W.S Gilbert (of Gilbert and Sullivan fame) authored a comic opera called *The Brigands*. He assigned his copyright and right of representation to the Booseys who later produced the opera. It included two songs that were attributed to Gilbert that had not been written by him. Gilbert was of the opinion that these two songs were inferior to anything he would have written and argued that they were damaging to his reputation. He sought an injunction preventing the use of these songs which the court rejected stating that where Gilbert had not "bound [the copyright assignee’s] hand and foot not ... to alter the piece in any way," an injunction could only be granted if the defendant acted in bad faith or the plaintiff’s reputation had been damaged in a substantial way. Owing to the fact that the songs were not "scandalous or indecent", the court held that Gilbert had not suffered any substantial injury and rejected his claim accordingly. Gilbert responded to this decision by writing a letter published in *The London Times* stating:

“In common honesty I think I am entitled to ask that I shall not be made to shine with the lustre of another man’s intellect. No man is bound to have his fortune made for him against his will, and I believe I am justified in asking that a song which is not my song shall not be put forward on the public stage as my song, even though Lord Justice Cotton is not satisfied that there is anything in the substitution of their song which can in any way cast discredit on Mr. Gilbert or on his reputation, both dramatic and otherwise.”

In essence, the courts denied authors the rights to control adaption of their works by others and this remained the position until the enactment of the Act of 1911. In terms of this Act the author’s possession of derivatives of his work was recognised which included

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415 234.
416 (1720) 35 Eng Rep 1008 (Ch).
417 1009 as referred to in Bird & Ponte 2006 Boston University International Law Journal 234.
418 (1740) 26 Eng Rep 489 (Ch).
419 490 as referred to in Bird & Ponte 2006 Boston University International Law Journal 235.
420 87 LT 355 (1889).
421 356 as referred to in Bird & Ponte 2006 Boston University International Law Journal 236.
422 Ibid.
the right to control translations, cinematic developments and dramatisations of his compositions.424

4 10 4 Early Recognition in the United Kingdom

Moral rights first received formal protection in 1928 in the United Kingdom with the adoption of the Berne Convention, the first instrument to provide international protection for these rights. Article 6bis provides for both the rights of attribution and integrity for copyright owners.425 Even though the right of attribution was recognised by the Berne Convention, misattribution was not prohibited by statute until the implementation of the Copyright Act, 1956.426 The Act provided that artists could prohibit both false attributions and false representations that a work was an adaption of another person’s creation.427 After the enactment of this Act, artists enjoyed a measure of latitude in protecting rights of integrity. In 1959 the court awarded damages arising from a magazine’s revision of an article without the author’s consent in Joseph v National Magazine Co.428

Although the right of disclosure was well-established at this stage, protection of the right of attribution developed slower. In the 1966 matter of Eothen Films Ltd. V Industrial and Commercial Education Macmillan Ltd,429 the defendants allegedly published a brochure in which they claimed that the main concept of a film produced by the plaintiffs was “devised by the defendants.”430 During an ordinary motion session the court granted the plaintiffs an injunction to prevent the distribution of the brochures during that week.431 This was overturned by the Court of Appeal stating that even though the defendants might have used false information in their brochure, the plaintiffs could not succeed in an action against them unless they could show “clear prima facie evidence of actual malice in the sense of a wrongful intention to injure the plaintiffs.”432 This created a difficult burden for artists attempting to defend their moral rights as not only did they have to prove the misattribution, they also had to prove that this was accompanied with the intention to injure.433

425 224.
426 237.
427 S43.
428 1 LR Ch 14 (1959); 3 All ER 52 (1958).
430 358 as referred to in Bird & Ponte 2006 Boston University International Law Journal 235.
432 358 as referred to in Bird & Ponte 2006 Boston University International Law Journal 236.
433 Bird & Ponte 2006 Boston University International Law Journal 236.
In 1967, legislators in the United Kingdom strode to keep pace with international developments relating to moral rights which resulted in the Berne Convention being revised. As a result, moral rights were extended and now last until the economic rights in the work expire which could extend beyond the death of the author. At a minimum, these rights expire at the death of the author. Implementation of moral rights is left to the discretion of the signatories of the Convention and this approach has led to the emergence of variations in the application and enforcement of moral rights amongst member states in the European Union. However, certain principles remain the same. Bird and Ponte observes that:

“Moral rights seek to protect the artist’s creative process by protecting the artist’s control over that process and the finished work of art. If artists feel more secure about the treatment they as creators and their creations will receive, they are more likely to create. Recognizing moral rights is one way a society can encourage artists to create.”

In 1977 the British government expressed uncertainty as to whether modern British law was able to meet its obligations regarding moral rights in terms of the Berne Convention, and whether these rights were actually protected in the United Kingdom. Moral rights were therefore recognised independently in 1988 with the enactment of the Copyright, Designs and Patents Act.

Moral rights stand independent of copyright ownership and protection and in essence have four basic protections at its core which is provided for by the Copyright, Designs and Patents Act. First, is the right to be identified as an author (the right of attribution); second, is the right to object to derogatory treatment (the right of integrity); third, is the right not to be falsely attributed to a work (the right of attribution); and last is the right to privacy of certain photographs or films.

These moral rights were traditionally only accorded to authors and it was not until the implementation of the WPPT in 1996 that the same rights were envisaged for performers. This has not substantially changed the substance of moral rights; choosing to recognise the same two rights the Berne Convention recognised, namely the rights of attribution and

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434 238.
435 220.
436 238.
437 220.
438 S77.
439 S80.
440 S84.
441 S85.
integrity, but for the benefit of performers. It further requires that member states adopt enforcement measures that allow performers to bring deserving legal actions under the terms laid out by the WPPT.\footnote{Article 23.} Despite the United Kingdom’s undertaking to comply with the WPPT,\footnote{The WPPT was signed by the UK on 13 February 1997.} they failed to ratify the Treaty for many years due, in part, to their refusal to grant moral rights to performers.

4 1 0 5 The Performances (Moral Rights, Etc.) Regulations

The first step towards recognising a moral right for performers in the United Kingdom came in the form of the Performances (Moral Rights, etc.) Regulations\footnote{SI 2006/18.} (the Moral Rights Regulations) which came into force on 1 February 2006. These Regulations make the necessary amendments to the Copyright, Designs and Patents Act in order to enable the United Kingdom to ratify the WPPT.\footnote{Legislation.gov.uk “Performances (Moral Rights, etc) Regulations 2006: Explanatory Note” http://www.legislation.gov.uk/uksi/2006/18/note/made (accessed 16-08-2010).} However, Arnold avers that the United Kingdom granted moral rights in a “characteristically grudging fashion” and does not believe that the result complies with the provisions of the WPPT. A more direct translation of the WPPT would not only warrant compliance, but would also ensure stronger rights for performers.\footnote{Arnold Performers’ Rights 54.}

In terms of these Regulations, two new moral rights for performers are created, namely the right to be identified as performer;\footnote{S205C.} and the right to object to derogatory treatment.\footnote{S205F.}

Performers’ moral rights will last for the same amount of time as the performers’ property and non-property rights, which is 50 years from the end of the year in which the performance was made; or 50 years from the end of the year during which it was released.\footnote{S205I.}

Although moral rights are not assignable\footnote{S205L.} provision is made for the transmission of these rights to an heir on the death of the performer\footnote{S205M.} and the rights can be waived.\footnote{S205J.} These

\footnote{442 Article 23.} \footnote{443 The WPPT was signed by the UK on 13 February 1997.} \footnote{444 SI 2006/18.} \footnote{445 Legislation.gov.uk “Performances (Moral Rights, etc) Regulations 2006: Explanatory Note” http://www.legislation.gov.uk/uksi/2006/18/note/made (accessed 16-08-2010).} \footnote{446 Arnold Performers’ Rights 54.} \footnote{447 S205C.} \footnote{448 S205F.} \footnote{449 S205I.} \footnote{450 S205L.} \footnote{451 S205M.} \footnote{452 S205J.}
rights are not retrospective and therefore do not apply to performances which took place before 1 February 2006.453

Following the enactment of these Regulations, the United Kingdom ratified the WPPT on 14 December 2009 and it entered into force on 14 March 2010.454

4 11 THE DURATION DEBATE

4 11 1 General

As previously mentioned, performers' rights are regarded as related rights to copyright. These can be either exclusive rights, such as the right of reproduction, distribution, rental and the making available of the performances of a performer; or they can be rights to receive equitable remuneration for the commercial uses of performances. In the case of music, exclusive rights are normally transferred to the producer of the sound recording (recording companies) by means of individual contracts which, in turn, license these exclusive rights to broadcasters, rental shops or online music shops.455 The right to equitable remuneration is not transferred to producers. Rather, they are exercised by the performers themselves through various collecting societies who collect these fees from broadcasters and public venues who play the performers' music in public.456

Section 191 of the Copyright, Designs and Patents Act provides that protection for performers' rights expires at the end of the period of 50 years from the end of the calendar year in which the performance takes place;457 or if during that period a recording of the performance is released, 50 years from the end of the calendar year in which it is released.458

This means that protection of a performance, and therefore any royalties derived from the performance, can in principle, last for 100 years provided that the performance is released almost 50 years after the performance was first performed. Unfortunately, performances are generally released soon after they are performed with the result that most performers

453 S180(3).
456 Ibid.
457 S191(2)(a).
458 S191(2)(b).
only enjoy protection for roughly 50 years. When compared to the term of protection accorded to copyright owners of literary, dramatic, musical and artistic works (the lifetime of the author and 70 years beyond his death)\(^ {459}\) the inequalities become obvious. The question asked by performers is why should the composer of a song receive protection and royalties for his entire lifetime which transfer to his heirs upon his death for a further 70 years, while the performer of the song is only entitled to receive protection and royalties for 50 years from when the song was first performed or released?

Should this term of protection be maintained, roughly 7 000 performers in the United Kingdom alone would lose their right to the equitable remuneration over the next ten years\(^ {460}\) which seems like a drop in the ocean when it is considered that in 2004 data provided by collecting societies throughout Europe recorded the total number of performers to be nearly 400 000.\(^ {461}\)

This loss of income does not seem as urgent for “superstars” such as Sir Cliff Richards or the Beatles, but this expiry is serious for the thousands of session musicians who contributed to sound recordings in the late fifties and sixties. They will lose this income stream at the time they need it the most, made worse by the fact that online retailing promises a new source of income.\(^ {462}\)

### 4.11.2 The Gowers Review of Intellectual Property

In 2005, the government of the United Kingdom announced in its General Election manifesto that it was committed to modernising “copyright and other forms of protection of intellectual property rights so that they are appropriate for the digital age”. Owing to the fact that protection for sound recordings in most other countries exceeds that of the United Kingdom\(^ {463}\) the British Phonographic Industry (BPI) was prompted to state that the European Union was “out of sync with the rest of the world”.\(^ {464}\) In December 2005 a review of intellectual property rights in Great Britain was commissioned by British

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\(^{459}\) S12(2).


\(^{461}\) 16.

\(^{462}\) 18.

\(^{463}\) Mexico = 75 years, Australia = 70 years, Brazil = 70 years, USA = 95 years.

Chancellor of the Exchequer, Gordon Brown. Andrew Gowers was asked to head the review which subsequently became known as the Gowers Review of Intellectual Property. Specific questions were raised by the Call for Evidence in order to solicit comments, opinions and recommendations regarding the future of intellectual property law in Britain. Whether the current term of protection on performers’ rights in sound recordings was adequate was one of the issues raised by the Review. The burning issue relates to a loss in income that performers face when the term within which they are entitled to claim royalties for the broadcasting of their performances expires. Once this happens, these performances fall into the public domain and the performer of the work is no longer entitled to an income. Many recording artists are aggrieved by the disparity in the protection granted to performers and that which is granted to authors (composers). In terms of British law, authors are generally entitled to receive royalties for their entire lifetime and their heirs benefit for 70 years after the authors pass away. The result is an inequality between performers and authors that leaves authors protected for their lifetimes and performers without pensions.

At the Call of Evidence, representatives from Electrical and Music Industries (EMI) and Phonographic Performance Limited (PPL) argued for an extension to the term of protection on the grounds that it would generate incentives to the creative process. Dissenters argue that this view is unpersuasive observing that “those who create works – whether literary, visual, or musical – will do so regardless of the legal framework that is in place, simply because artistic endeavour knows no economic calculus for its impetus” and economic rights for performers did not exist in its current form until 1996. This debate is dominated by several strongly supported views, opinions and positions.

The arguments in favour of a term extension that were focussed on in the Review can be summarised as follows.

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465 Editor of the Financial Times.
467 S12(2).
469 A collecting society for performers.
471 Ibid.
472 Ibid.
473 UK Intellectual Property Office “The Impact of Copyright Extension for Sound Recordings in the UK” 12.
Firstly, there is a need for parity with other countries that protect sound recordings for a longer term than the United Kingdom does, particularly with the United States of America where performers and recording companies receive remuneration for very limited uses of their performances for a period of 95 years.

Secondly, the disparity between the term of protection offered to copyright owners and that which is offered to performers is unfair. In view of the development music has enjoyed over the past few decades, performers submit that their contribution is at least equal to, or in some cases, more pronounced than that of the authors (composer, lyricist, the photographer/art designer of the cover, and the writer of the sleeve notes). It is hard to believe that the person who designs the compact disc (CD) cover enjoys greater protection than the musicians who perform on the recordings. In addition, the moral rights accorded performers are weaker than those accorded authors in both substance and in duration. Authors are protected from “other derogatory action in relation to the said work” in terms of the Berne Convention, while performers are only entitled to “other modifications” in terms of the WPPT. With regard to duration, in the United Kingdom, moral rights for performers are only protected for 50 years from when the performance was released. This means performers can be faced with distortions and mutilations of their early performances during their lifetimes, while authors enjoy protection of their moral rights for their entire lifetimes and beyond.

Thirdly, under the current conditions, the ability of the music industry to finance new talent has been severely undermined by online piracy which has accounted for significant

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475 The USA is the only developed country not to provide performers with the right to claim royalties (needletime) every time their music is broadcasted on radio.
477 This is in terms of the Sonny Bono Copyright Term Extension Act, 1998 which Harms J is of the opinion was enacted primarily because the aged Sonny Bono, ex-husband of Cher, happens to be a member of the House of Representatives. See Harms “A few negative trends in the field of intellectual property rights" 2009 THRHR 175 178 in this regard.
480 Article 6bis(1).
481 Article 5(1).
losses. An extension of the term of protection would encourage more investment in new music as there would be a longer time to recoup the costs of any initial outlay.

Fourthly, the view at present is that consumers may not have access to the widest choice of music at reasonable prices, and that such an extension would increase the number of works available to the public.

Lastly, a term increase would maintain the positive trade balance in the United Kingdom.

The Gowers Review was released in December 2006 and recommended that the European Union retain the duration of protection on sound recordings and performers’ rights to that of 50 years from the date of release. This was in line with the Directive on the Term of Protection of Copyright and Certain Related Rights of 2006 (the Term Directive) which codified the original Term Directive of 1993.

All the above-mentioned arguments in favour of extending the term of protection were systematically refuted in the Review.

With regard to the first argument, the Review contended that the breadth of protection offered to performers in the United Kingdom justified a shorter term of protection as opposed to that offered in other countries. This is illustrated by the fact that although the term is only 50 years in the United Kingdom, performers receive royalties for almost all of the public performances of their works, while in the United States of America, almost 70% of eateries and drinking establishments are not required to pay royalties to performers. The same exception applies to roughly 45% of all shops. In addition, performers in America only receive royalties for airplay on digital radio while performers in the United Kingdom receive royalties for all radio performances.

In answering the issue of unfairness between copyright owners and performers, the Review maintained that it was unclear that a term extension from 50 years to 70 or 95

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485 Ibid. 56.
486 Council Decision 2006/116/EC.
487 Ibid. 54-55.
years would rectify the unequal treatment of performers and producers from copyright owners, who benefit from life plus 70 years of protection.\textsuperscript{491}

The Review further maintained that current incentives to the creation of new material in terms of the Copyright, Designs and Patents Act were adequate on the grounds that there are currently a large number of music groups already creating music without any expectation of a financial return. Dave Rowntree, musician with the band \textit{Blur}, commented that he had:

\begin{quote}
“never heard of a single one [band] deciding not to record a song because it will fall out of copyright in ‘only’ fifty years. The idea is laughable.”
\end{quote}

\textsuperscript{492}

In addition, the Review maintained that such a term extension would not provide incentives to invest as revenue earned so far into the future will have no effect on current spending decisions.\textsuperscript{493}

With regard to the argument that a term extension would increase the number of works available to the public, the Review countered by alleging that if a term extension was introduced, follow-on creators in the future would have to negotiate licenses to use the works in question during this extended time. This would have the following potential implications which could have negative effects for all creators:

a) The estates and heirs of performers would be able to prevent such usage rights; and
b) finding rights holders would be problematic.\textsuperscript{494}

Lastly, the Review concludes that a term extension would more likely have a negative effect on the balance of trade in the United Kingdom and on consumers. This is owing to the observation that although the British music industry is very successful, the United Kingdom is also a large importer of music. This means that the extra revenue obtained from the sale of music would be remitted overseas, a fact that would not reflect favourably on the trade balance in the United Kingdom.\textsuperscript{495}

\textsuperscript{491} 55.
\textsuperscript{492} 57.
\textsuperscript{493} \textit{Ibid.}
\textsuperscript{494} 59.
\textsuperscript{495} 60-61.
The Review concluded by finding, therefore, that the arguments advanced by the various interested parties in favour of a term extension were unconvincing and that the term of protection accorded to performers should stay at 50 years.496

4113 The Lobbying Continues

Despite the outcome of the Gowers Review, performer and industry lobbying continued. Immediately after the release of the Review Sir Paul McCartney, Sir Cliff Richard, U2, Yoko Ono, Barry Gibb, Katie Melua, Cerys Matthews and over 4,500 lesser-known artists signed an advert published in the Financial Times contesting the findings of the Review and calling for an extension of the term of protection to 95 years.497 The advert demanded “fair play for musicians” which highlighted the efforts of the so-called “Beatles Extension”. If successful, the endeavour would guarantee that artists receive royalties and compensation payments for the unlawful private copying of their performances for their entire lifetimes.498 Sir Cliff Richard stated:

“I'm absolutely fed up with singing Living Doll499 but I have sung it constantly since 1959 because every time I sing it live it generates sales of the original record and royalties to me.”500

Well-known performers would not be the only artists to benefit from a term extension.

“[c]ountless session musicians who have contributed so significantly to the musical heritage of the UK will greet this recognition with delight and relief.”501

Herbie Flowers, who played bass guitar on Lou Reed’s recording of Walk on the Wild Side and David Bowie’s Space Oddity stated:

“The term of protection for performers has not kept up with life expectancy and it is high time it was changed. I played on a couple of very successful tracks, and it would be unfair for me to stop receiving income for these performances after 50 years – probably just at the time when I will need it most.”502

496 61.
498 Charter “Sir Cliff Richard pins hopes on law that will keep cash rolling in until he’s 113” Times Online (17-07-2008) http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/music/article4347643.ece (accessed 12-08-2009).
499 Composed by Lionel Bart.
500 Charter Times Online (17-07-2008).
501 Ibid.
502 Ibid.
A commission survey conducted by Commissioner Charlie McCreevy showed that many European performers begin their careers in their early to mid-20's. If the term of protection was to stay at 50 years from when the performance was given, many of these artists would be in their 70's. Given the life expectancy in the European Union (75 years for men and 81 years for women) this means that performers will no longer receive an income from their performances, at a time when they need it most.\textsuperscript{503}

Studies conducted by Prof Martin Kretschmer, Director of the Centre for Intellectual Property Policy and Management at Bournemouth University, suggest that only the top 10% of performing artists earn substantial amounts of money from royalties.\textsuperscript{504} In 2001, only 5% of all performers earned over £10 000 per year and roughly 77\textendash{}89.5% of all revenue distributed to performers went to the top 20% of artists.\textsuperscript{505}

The Select Committee's Report\textsuperscript{506} entitled New Media and Creative Industries: Fifth Report of Session 2006\textendash{}07 expressed opposing views to that contained in the Gowers Review which is illustrative of the fierce debate between pro-extension lobbyists and anti-extension activists. In the Select Committee's Report the position of a composer who retains copyright for his entire lifetime and 70 years beyond his death, was compared to that of a recording artist who only profits from 50 years of protection from the date the recording was released. The Report questions why a composer should receive greater protection than the artist when each contributed, in most cases, equally to the eventual recording.

\begin{quote} \textbf{[N]obody would deny that the voices of Tina Turner or Frank Sinatra were as important to the success of What's love got to do with it and New York New York as the melodies or arrangements of the songs themselves. They are both unique performers whose energy, persona and vocal styles give them and their songs huge appeal.} \textsuperscript{507} \end{quote}

\begin{footnotes}
\item[504] Kretschmer “Copyright extension will benefit few” Financial Times (18-02-2008) www.ft.com/cms/s/0/1f81e30-ccc2-11dc-ad7e-0000779fd2ac.html (accessed 27-08-2009).
\item[505] Vanheusden “Performers’ Rights in European Legislation: Situation and Elements for Improvement” AEPO-ARTIS 88.
\item[506] Established by the House of Commons in 2006 to survey the new media technologies in the UK by examining the impact upon creators and the links between creator and consumer; and reported on the problem of piracy.
\end{footnotes}
The opposite view is that a composer’s composition is not always associated with a particular recording artist which leads to heated arguments on how to measure success and style.\textsuperscript{508}

In May 2007 a Review by the House of Commons, Culture, Media and Sport commissioned by the United Kingdom Treasury concluded that while the Gowers Review was thorough; it appeared to have been based entirely on economic considerations. The MP’s stated:

“Given the strength and importance of the creative industries in the UK, it seems extraordinary that the protection of intellectual property rights should be weaker here than in many other countries whose creative industries are less successful.”\textsuperscript{509}

The Review recommended that the government of the United Kingdom should put pressure on the European Community to extend the term of protection to at least 70 years.\textsuperscript{510}

4 11 4 A Term Extension Becomes a Reality

On 14 February 2008, European Union Internal Market Commissioner, Charlie McCreevy announced his intention to put forward a proposal that the term of protection for European performers should be increased to 95 years from the date of release of the work. He asserted that the proposal should not have any negative effects on consumer prices and that there should also not be any negative impact on Europe’s external trade balance. He observed that performers should no longer be the “poor cousins” of the music industry and stated:

“I strongly believe that copyright protection for Europe’s performers represents a moral right to control the use of their work and earn a living from their performances. I have not seen a convincing reason why a composer of music should benefit from a term of copyright which extends to the composer’s life and 70 years beyond, while the performer should only enjoy 50 years, often not even covering his lifetime. It is the performer who gives life to the composition and while most of us have no idea who wrote our favourite song – we can usually name the performer.”\textsuperscript{511}

\textsuperscript{508} Ibid.
\textsuperscript{510} Simkin & Smith Copyright World Magazine (02-09-2007).
\textsuperscript{511} McCreevy Press release (14-02-2008).
In April 2008, the Commission concluded that there were general, specific and operational objectives to be achieved for the benefit of performers through a term extension.

The general objective related to the promotion of music production throughout Europe by ensuring a sustainable level of creative processes.\textsuperscript{512}

Three specific objectives were identified, namely:

a) Contribute to enhancing the welfare of performers by ensuring that they receive just reward for their creativity throughout their lives;

b) Contribute to enhancing the competitiveness of the European music industry by equipping the industry to face the onslaught of piracy and the opportunities of dematerialised distribution; and

c) Increase available music by allowing the public access to a large and diverse range of music.\textsuperscript{513}

With regard to the operational objectives, the following were highlighted:

a) Gradually align protection accorded to authors and performers so that performers are not treated as second tier contributors to cultural diversity when compared to authors;

b) Incremental increase in the remuneration afforded performers from as many different sources as possible in order to alleviate their difficult financial situation, especially during their retirement years;

c) Diminish the discrepancies between the European Union and American markets regarding protection which should encourage investment and production of music in Europe;

d) Enhance availability of music at reasonable prices which should encourage the creation of music; and

e) Encourage the digitisation of back catalogues of music in order to ensure that the widest selection choice possible is made available to consumers.\textsuperscript{514}

On the 16 July 2008 the European Community announced its proposal to bring the protection term granted to performers more in line with that granted to copyright owners


\textsuperscript{513} 27.

\textsuperscript{514} \textit{Ibid.}
by extending the term to 95 years. This will enable performers to earn an income for at least their lifetime and will allow producers to adapt to the rapidly changing business environment by maintaining their investment levels in new music. Davies observes that the Proposal also contains other provisions that are helpful to performers. A “use it or lose it” clause was inserted which will allow performers to get the rights to their works back if the producer does not market the work during the extended time period. This means that the performers will then be allowed to find another producer willing to sell his works or he can choose to do it himself. In addition, the record industry will have to set up a “session fund” for the benefit of session musicians in which it will deposit 20% of all monies earned during this extension period.

Despite the European Union recommendations on this issue, the British government continued to oppose any such increase in the term of protection, preferring to consider an increase of 70 years instead. Andy Burnham, Secretary of State for Culture, Media and Sport argued that a period of 95 years is disproportionately long but that a performer should be able to enjoy the fruits of his labour for at least his entire lifetime. He further stated:

“The UK has one of the biggest, most successful and most profitable music industries in Europe. But is faced with serious issues, such as on unlawful file-sharing, and other European countries are looking to us to lead the way. We need a workable system of copyright to underpin the long-term health of our creative industries. Mr Gowers’ review was a thorough and thoughtful one and we have taken forward his recommendation on illegal file-sharing. But on copyright extension we take a different view.”

Despite vocally opposing a term of 95 years, the United Kingdom passed the Copyright in Sound Recordings and Performers’ Rights (Term Extension) Bill, 2008 which effectively proposed extending the term of protection for performers to 95 years from the date of release. Section 3 provides that section 191 of the Copyright, Designs and Patents Act should read:

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516 Ibid.
519 Ibid.
“The rights conferred in relation to a performance expire at the end of the period of 95 years from the end of the calendar year in which the performance takes place or, if during that period a recording of the performance is released, 95 years from the end of the calendar year in which it is released”.

Although the Bill was due to be enacted three months after the date on which it was passed, the subsequent breakdown in negotiations during March 2009 amongst ministers in the European Union’s Committee of Permanent Representatives resulted in the stalling of this statutory measure.

The principle concerns centred on “who gets paid” with the industry lobbyists claiming that a term extension would benefit performers’ and session musicians, while those against a term extension argued that instead of benefitting performers, millions of Euros would be pocketed by the world’s four largest record labels, namely Sony, Warner Brothers, Universal and the Bertelsmann Music Group (BMG). Helga Trupel, a German Green Party MEP, stated that:

“[t]he ghost of the big four is behind all the recommendations we have at the moment. It is very important to put an end to this directive.”

Charlie McCreevy’s claims that a term extension would result in session musicians earning an additional €2,000 per annum was refuted by the Open Rights Group, a civil liberties organisation who conducted their own study and established that some 80% of artists would only earn between €0.50 and €26 each year. The director of the Open Rights Group, Becky Hogge, accused McCreevy of creating a fairy tale:

“The fairy story is of the poor performer who has played on a track in the 1960s and has collected royalties for 50 years. We are told that [without extension] he will lose the main source of income at the very time he needs it most. This looks simple enough for MEPs to give it a happy ending. Like Jack and the Beanstalk, Cinderella and Rapunzel, the story of the poor performer doesn’t really stand up to scrutiny. All the evidence shows that the term extension directive will do very little and almost nothing to help the poor performer and everything to line the pockets of the world’s record labels.”

Furthermore, it is argued that the financial benefits of a term extension will fall to those who need it the least, namely performers who are already wealthy, their estates and recording companies.\(^{524}\)

At the March 2009 meeting of the European Union’s Committee of Permanent Representatives, the United Kingdom was one of a small number of countries that voted against an increase of 95 years, arguing that there were certain requirements that had to be met before an extension could be agreed upon. These relate to the “session fund” measure (the fund that record producers would have to set up for session musicians), and the “clean slate” proposal which aims to prevent the use of previous contractual agreements to deduct money from the royalties that will be earned during the extension period.\(^{525}\) Failure of the United Kingdom to vote in favour of the extension was met with disappointment by various interested parties. In a joint statement issued by the Musicians’ Union, the PPL, the BPI and the Association of Independent Music, the following view was expressed:

> “The UK music sector has lived up to its commitments by reaching an agreement, as demanded by ministers, which will deliver real benefits to musicians in an extended term. In continuing to hold out for further changes, the government has not heeded the repeated pleas of the very musicians it claims to support, which strongly encouraged it to vote for the proposal today.”\(^{526}\)

Despite the averment that owing to the breakdown in negotiations the current presidency of the European Union would not see a term extension,\(^{527}\) the European Community announced their endorsement of a Directive to extend the term of protection for performers from 50 years to 70 years on 23 April 2009. This Directive includes all previous recommendations, namely the term extension, the “session fund” measure, the “use it or lose it” clause, and the “clean slate” provision.\(^{528}\) Andrew Gowers weighed in in defence of his views expressed in the Gowers Review by calling the new Directive “out of tune with reality” and stated that:

\(^{524}\) Kretschmer “Creativity Stifled? A joined Academic Statement on the Proposed Copyright Term Extension for Sound Recordings” 2008 EIPR 341 344.


\(^{526}\) Ibid.

\(^{527}\) Ibid.

“[a]ll the respectable research shows that copyright extension has high costs to the public and negligible benefits for the creative community.”

Monique Goyens, director-general of the European Consumer Organisation, further criticised the Directive by stating that:

“[t]he technology is of the 21st century, the legislation is of the 19th century and the right holder organisations are of the Middle Age.”

As of June 2009, the proposed Directive was sent to the European Union Council of Ministers for its first reading. The fact that Parliament settled on an extension of the term to 70 years after lobbying for an extension to 95 years is seen by some to be an attempt to appease member states of the European Union that were against a term extension in order to ensure that the Directive will be approved by the European Union Council of Ministers. The voting system of this Council is complex with a majority vote of 73.9% needed in order to pass the Directive. If approved, this Directive will amend the Term Directive of 2006 and member states will have two years to incorporate the Directive into domestic law. Although it is likely that the process of amendment in the United Kingdom will involve drawing up regulations to amend the Copyright, Designs and Patents Act, interested parties are likely to first be consulted before such steps can be taken. Should the Directive be rejected by the Council, this would lead to further debate and the consideration of further proposals by the Council which would mean a long wait for the resolution of this issue.

4 11 5 The Current Position

To date the Copyright, Designs and Patents Act has not been amended and still reflects protection at only 50 years from when the performance was first performed or released. Although there are compelling arguments to increase the term of protection accorded neighbouring rights, it is argued that:

531 Boydell “Copyright Term Extension in the EU – Sound Recordings” 2009 Bird & Bird http://www.twobirds.com/English/News/Articles/Pages/Copyright_Term_Extension%20in_the_EU_Sound_Recordings.aspx (accessed 03-12-2010).
“these arguments are founded more upon a philosophical attitude toward the proper scope of performers’ rights than upon a series of cold, economic formulations.”

Therefore, despite the ongoing attempts to procure an extension of the term of protection for performers, the position in the United Kingdom has remained relatively unchanged for the better part of 15 years.

**4.12 CONCLUSION**

In the United Kingdom, the Statute of Anne is regarded as the origin of copyright law. Since it only protected British works, the need to protect foreign works led to the enactment of the International Copyright Act, 1838 and the British Literary Copyright Act, 1842.

The British system of material reciprocity was replaced by the principle of national treatment as applied by the French. This led to the establishment of the Berne Convention the aim of which was the protection of copyright owners. Initially, performers sought protection in terms of the Convention by claiming that they should be regarded as authors and their performances as works. Their plight drew sympathy but it became clear that protection for performers would have to be achieved outside the ambit of the Berne Convention.

In 1925, protection was accorded performers in the United Kingdom in terms of the Dramatic and Musical Performers’ Protection Act which created a criminal offence for infringement. No civil remedies were accorded performers for infringement of their rights. No substantial changes were brought to the law through the enactment of the Dramatic and Musical Performers’ Protection Act, 1958.

The Rome Convention was the first international instrument aimed at the protection of performers and gave rise to the concept of neighbouring or related rights.

The Convention provides minimum standards of protection that member states are expected to incorporate into their domestic laws. In the United Kingdom, this took the form of the Performers’ Protection Act, 1963 as a result of the United Kingdom’s

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534 The “Proposal to extend the term of copyright protection on sound recordings” advanced by the Open Rights Group in response to the term extension debate suggests that perhaps the solution to the problem can be found in bringing the term accorded to copyright owners down.
ratification of the Rome Convention. This Act reinforced the view that performers were only to be granted criminal remedies.

After a series of judicial decisions that went backwards and forwards, this untenable situation was eventually settled in *Rickless v United Artist Corp* in 1988 when the court held that performers were entitled to civil remedies for infringement of their rights.

The Whitford Report of 1972 led to the enactment of the Copyright, Designs and Patents Act, 1988 which endorsed the decision of *Rickless*. Performers were granted civil remedies and the term of duration was extended from 20 to 50 years.

The desire for a uniform protection of related rights owners resulted in several European Union Council directives aimed at reconciling certain objectives within the member states of the European Union. Member states are given a reasonable time to implement the directives by bringing into force the laws, regulations and administrative provisions necessary to give effect to these directives. Relevant directives are the Rental and Lending Rights Directive; the Satellite Broadcasting Directive and the Term Directive. Subsequent to the issuing of these Directives, the United Kingdom passed several regulations in order to give effect to these directives through amendments made to the Copyright, Designs and Patents Act.

The TRIPs Agreement of 1994 is regarded as the most significant step forwards in the development of performers’ rights since the Rome Convention. The agreement provides that national treatment, minimum protection and the most-favoured nation principle be extended to contracting states. The significance for performers is that since a country becomes a member of the TRIPs Agreement through membership of the WTO, performers’ rights has gone from being a mainly European concern to one affecting nearly all developed states.

The United Kingdom has been a member of the TRIPs Agreement since its enactment on 1 January 1995. The minimum standards required by the Agreement were already provided for by the Copyright, Designs and Patents Act, therefore the Act remained unchanged.

The inadequacies of the Rome Convention and the TRIPs Agreement were experienced by performers and led to the approval of the WPPT in 1996. The United Kingdom passed several Orders in Council to give effect to the requirement of material reciprocity provided for by the Treaty.
The most significant steps brought by the Treaty are that performers are given exclusive rights to control the uses of their performances. Moral rights were also granted to performers as well as a right to receive remuneration whenever their performances are broadcasted or communicated to the public.


Owing to the United Kingdom’s reluctance to grant performers with moral rights, the Treaty was only ratified on 14 December 2009. The Performances (Moral Rights, Etc.) Regulations were passed to grant moral rights to performers.

For the better part of the last five years, performers in the United Kingdom have been embroiled in an intense debate concerning the duration of protection. Performers are protected, and are entitled to receive royalties, for 50 years from when the performance is first given or released. Copyright owners, however, generally receive royalties for their entire lifetime plus 70 years beyond their deaths. As a result of this inequality, performers in the United Kingdom lobbied for an extension of the term of protection accorded them.

The Gowers Review of 2006 recommended against extending the term of protection accorded performers. However the campaign continued and in May 2007 a review by the House of Commons, Culture, Media and Sport commissioned by the United Kingdom Treasury recommended that the government of the United Kingdom should put pressure on the European Union to extend the term to 70 years.

In July 2008, a proposal was announced by the European Community to bring the term of protection accorded performers more in line with that accorded copyright owners by extending the term to 95 years. This led to the Copyright in Sound Recordings and Performers’ Rights (Term Extension) Bill which provided that the term of protection should be 95 years. However, this Bill has since been rejected. In 2009 the European Union proposed a directive which was received by the European Union Council of Ministers for its first reading. If approved, the Term Directive will be amended to reflect the term of protection at 70 years.

The following Chapter will focus on the development of performers’ rights from its origins in copyright in South Africa. The effect of the international instruments designed to protect
performers will be focussed on as well as the more recent developments affecting the law of performers’ rights in South Africa.
CHAPTER FIVE: THE LAW IN SOUTH AFRICA

5.1 INTRODUCTION

Herewith follows a brief discussion of the historical development of performers’ rights in South Africa from the date of its first occupation in 1652 to the current day. The Chapter begins with a brief analysis of the beginnings of copyright at the Cape and the subsequent development of performers’ rights from within the framework of copyright in South Africa.

The subsequent effect of the previously mentioned international agreements on the law relating to performers’ rights in this jurisdiction will also be discussed. These agreements are the Berne Convention, the Rome Convention, the TRIPs Agreement, and the WPPT.

5.2 THE ORIGINS OF COPYRIGHT

5.2.1 Dutch Occupation from 1652

When the Dutch annexed the Cape in 1652, Roman-Dutch law was introduced. Since copyright was only developing in the Netherlands at the time, it is submitted that no uniform system of copyright law was applied at the Cape.

5.2.2 The First British Occupation of 1795

In 1795 France took control of the Netherlands and the Batavian Republic was established. Owing to the fact that Britain was at war with France, a British naval task force was sent to the Cape to prevent the French from taking control of it. The British took the Cape by force at the Battle of Muizenberg but with the conclusion of the Peace of Amiens in Europe, the Cape was returned to Batavia in February 1803. British occupation was meant to be temporary so very few changes were made at the Cape during this time of occupation.

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536 Dean The Application of the Copyright Act 174.
5 2 3  The Batavian Occupation of 1803

During the time of Batavian occupation, the Cape was regarded as a province of the Batavian Republic and it was during this time, in 1800, that the first printing press was established at the Cape.\textsuperscript{537} There has been very little mention of Roman-Dutch copyright law in South Africa but this is not surprising when it is considered that even today copyright remains an esoteric branch of the law.\textsuperscript{538} It is possible that 19\textsuperscript{th} century South African lawyers were blissfully ignorant of copyright protection under the Roman-Dutch common law which is illustrated by the fact that between 1861 and 1961 there were only 22 known copyright cases in South Africa.\textsuperscript{539} However, this period of occupation is significant to the development of copyright law in that the first piece of Dutch copyright legislation, namely the Copyright Act of 1803, found application at the Cape as part of the Roman-Dutch common law, while the Cape was an overseas province of Batavia.\textsuperscript{540}

Since copyright was only of interest to the publishing trade around 1806, it did not attract too much attention at the Cape. However, copyright protection did exist under the Roman-Dutch common law and can be summarised as follows. It protected literary, dramatic, artistic and musical works once they were published but only to the extent that they could be reproduced by means of printing. Unpublished works were not protected and no performing right\textsuperscript{541} was accorded to authors.\textsuperscript{542} The protected right belonged to the publisher on condition that he could show that he had compiled the work or that he had lawfully gained the right to publish the work. A work was protected against reproductions wholly or in part and was of perpetual duration, capable of being transferred to heirs. Only works published in the state or territory in question qualified for protection.\textsuperscript{543}

5 2 4  The Second British Occupation of 1806

Owing to the fact that Batavia was a satellite of France, it was inevitable that they would be brought back into the war when war resumed between England and France in May

\textsuperscript{537} 223.
\textsuperscript{538} 224.
\textsuperscript{539} \textit{Ibid}.
\textsuperscript{541} The right to perform the work or any substantial part thereof in public.
\textsuperscript{542} Dean \textit{The Application of the Copyright Act} 346.
\textsuperscript{543} 226-227.
1803. A second British task force was dispatched to the Cape and Britain took control on 18 January 1806 after the Battle of Blaauwberg. 544

During the second British occupation of the Cape, no substantial changes were made to the law in force which meant that the Roman-Dutch common law continued to apply. There is little consensus as to whether this was due to the Articles of Capitulation of 1806, which provided that “the burgers and inhabitants shall preserve all their rights and privileges which they have enjoyed hitherto”, or as a result of a settled principle of English law as well as of public international law that an occupied territory with an already existing legal system would retain its own laws unless so altered by their new ruler. 545

However, it was inevitable that English law would gradually start influencing the law at the Cape and although the Roman-Dutch common law prevailed, a large portion of South African statutory law has been derived from or is based on English law. 546 Examples of these statutory influences can be seen in South Africa’s Law of Evidence. During this time the Statute of Anne, which provided for protection of copyright by conferring exclusive rights on authors, was in force in the United Kingdom. Owing to the fact that the Statute only applied to England, Scotland and Wales, it was not applied in South Africa. 547

5 2 5 Copyright in the South African Colonies

The Dutch (Afrikaner) colonists became increasingly disgruntled under British rule which ultimately led to the Great Trek which began in 1836. White communities were established in the interior areas of Natal, the territory between the Orange and the Vaal Rivers (Orange Free State), and in the lands beyond the Vaal River (Transvaal). 548

The first piece of legislation to have a direct bearing on copyright law in South Africa was the British Literary Copyright Act, 1842 which had repealed the Statute of Anne in Britain. The Act protected all works first published in the United Kingdom, regardless of the nationality of the author and also subsisted in the British dominions, defined in the Act to include “all the colonies, settlements and possessions of the Crown which now are or hereafter may be acquired.”

544 175.
545 196.
546 197.
548 Dean The Application of the Copyright Act 176.
The Act of 1842 was the first Act to introduce performing rights to copyright law in South Africa and extended this right to dramatic and musical works.\textsuperscript{549} However, this protection was limited to copyright owners, namely authors.

The British International Copyright Act, 1886 also applied to British dominions and provided for copyright protection to be extended to works originating from these dominions.\textsuperscript{550}

Owing to the fact that South Africa consisted of several self-maintaining territories, most of these enacted their own copyright legislations during the time of British occupation of the Cape which effectively repealed the Roman-Dutch common law copyright.\textsuperscript{551}

The Cape of Good Hope was the first of the colonies to enact copyright legislation. They passed the Authorising the Importation of Foreign Reprints of Books Act 4 of 1854, The Copyright Act 2 of 1873, The Books Registry Act 4 of 1888, The Copyright Protection and Books Registration Act 18 of 1895, and The Copyright of Works in Art Act 46 of 1905.\textsuperscript{552} Of these, the Acts of 1873 and 1905 are most noteworthy. Copyright in books were regulated while dramatic and musical works were only protected to the extent that they were published in book form. Protection lasted for the lifetime of the author plus five years, or a total period of thirty years whichever was the longest time period.\textsuperscript{553} Despite the limited form of protection that was accorded to authors of dramatic and musical works, no legislative protection was extended to the performers of these works.

In Natal, The Copyright Act 17 of 1897, The Playwrights Act 44 of 1898 and an Act to Amend the Playwrights Act 18 of 1899 was enacted.\textsuperscript{554} The Acts of 1897 and 1898 were the most relevant in this territory. The Act of 1897 granted copyright to published literary and artistic works for the lifetime of the author and for a further seven years beyond his death; or for a period of 42 years, whichever was the longer. The Act of 1898 granted a “play right” in respect of performed operatic or musical works which amounted to a performing right. In terms of this right, authors were entitled to perform their works in

\textsuperscript{549} 346.
\textsuperscript{550} 7.
\textsuperscript{551} Dean “Background to Law of Copyright” in Handbook of South African Copyright Law (1998) 1-3.
\textsuperscript{552} Schedule 5 of the Patents, Designs, Trade Marks and Copyright Act, 1916.
\textsuperscript{553} Dean The Application of the Copyright Act 244.
\textsuperscript{554} Schedule 5 of the Patents, Designs, Trade Marks and Copyright Act, 1916.
public and the duration was essentially the same as that of the Act of 1897. However, as before, performers of these works were not granted any type of protection.

In the Transvaal, several laws and proclamations dealing with copyright were passed, namely Copyright Law 2 of 1887, Copyright Resolution 1895 and Copyright in Military Maps, Proclamation 24 of 1902. Of these, the Act of 1887 was most salient. It protected literary works, musical works, dramatic works as well as engravings and maps. The Act differentiated between published and unpublished works and provided that published works were protected for the lifetime of the author as well as for an additional period of fifty years from the date of publication or from the date of the author’s death, whichever was the longer. Unpublished works were only protected for the lifetime of the author and thirty years beyond his death. The Act granted a performing right to dramatic works and, although musical works were protected by the Act, only dramatico-musical works were accorded a performing right. Therefore, only musical works which formed part of operas and musicals were afforded a performing right. Similarly, although authors of musical and dramatic works were protected, no form of protection was available to the performers of these works.

Interestingly, the Orange Free State Republic did not enact any copyright legislation during its time as a separate colony. As a result, the Roman-Dutch common law form of copyright, as introduced during the time of Dutch occupation, applied there until 1917.

526 The Union of South Africa

On 31 May 1910, South Africa was declared to be a dominion of Britain. With this came a measure of independence in that they were declared to be self-governing and the Union of South Africa was established. This resulted in the unification of the provinces which brought with it a call for consolidation of the many differing laws that applied in these provinces. Codification of copyright law materialised in the form of the United Kingdom’s Copyright Act, 1911 which, as an imperial measure, formed the basis of copyright law in most of what were then English colonies and dominions. Adoption of the 1911 Act was

556 Schedule 5 of the Patents, Designs, Trade Marks and Copyright Act, 1916.
558 Dean The Application of the Copyright Act 348.
560 S1(1) of the British Copyright Act, 1911 as contained in Schedule 3 of the Patents, Designs, Trade Marks and Copyright Act, 1916.
not compulsory, therefore dominions were free to adopt or reject it.\textsuperscript{561} By following the model of this Act, the Union enacted The Patents, Designs, Trade Marks and Copyright Act of 1916.\textsuperscript{562} The Act was a composite Act regulating the laws of patents, designs, trademarks and copyright.

The Act came into force in 1917 and repealed all the Provincial Copyright Acts that were in existence in the various provinces at the time\textsuperscript{563} and thus consolidated the law relating to copyright.\textsuperscript{564} In addition, even though the predominant law in the Union was the Roman-Dutch common law, “our common law has not since 1917 granted any protection in the nature of copyright to works embodying intellectual products.”\textsuperscript{565}

The law relating to copyright was to be found in Chapter 4 of the Act as well as Schedule 3, which contained the text of the 1911 Act. The 1916 Act effectively adopted the 1911 Act as imperial law in the Union\textsuperscript{566} and perpetuated the protection that had previously been accorded to works under British rule. These were the so-called Provincial Copyright Acts, the common law, as well as musical, dramatic or artistic works which had previously only enjoyed copyright protection in the United Kingdom.\textsuperscript{567} The Act of 1916 declared that the British Copyright Act of 1911, subject to certain variation, regulated the law relating to copyright in South Africa.\textsuperscript{568}

“Copyright” as defined in the Act\textsuperscript{569} replaced the meaning of both “copyright” and “performing right” in relation to musical and dramatic works.\textsuperscript{570} This meant that copyright included both the traditional rights accorded to copyright owners as well as a performing right in the case of musical and dramatic works.

\textsuperscript{562} Originally known as The Union of South Africa Act (of Copyright) 1916.
\textsuperscript{563} Dean “Background to Law of Copyright” in Handbook of South African Copyright Law (1998) 1-3.
\textsuperscript{564} Schedule 5.
\textsuperscript{565} Dean “Background to Law of Copyright” in Handbook of South African Copyright Law (2006) 1-2A.
\textsuperscript{566} Kahn “South African Copyright – A Brief History” iCommons http://archive.icommons.org/articles/south-african-copyright-a-brief-history (accessed 01-07-2010).
\textsuperscript{568} S1(2) of the British Copyright Act, 1911 as contained in Schedule 3 of the Patents, Designs, Trade Marks and Copyright Act, 1916.
\textsuperscript{569} Schedule 1 of the British Copyright Act, 1911 as contained in Schedule 3 of the Patents, Designs, Trade Marks and Copyright Act, 1916.
The Act defined a “dramatic work” but did not specifically define a “musical work”. The definition provided by the Musical (Summary Proceedings) Act of 1902 is thought to have applied at the time.\textsuperscript{571} This Act provided that a “musical work” was:

\begin{quote}
“A\textsuperscript{ny} combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced.”\textsuperscript{572}
\end{quote}

The Act of 1916 provided that if any person was, before the commencement of the Act, entitled to copyright and a performing right in a work, he was entitled at his option to assign the right or to continue to reproduce or perform the work subject to the payment of a royalty.\textsuperscript{573} This seems to be the first South African legislative reference to royalties, the backbone of the performing right. In general terms, a performing right allows a deserving individual to receive a royalty whenever his works are performed in public. In terms of the 1916 provision, only the author was entitled to this benefit, a situation which prevailed until 1965 when it was removed from South African legislation. Today, performing rights are available to copyright owners in both musical works and sound recordings. Performers in South Africa are also entitled to receive royalties when their works are broadcasted to the general public and is more commonly known as “needletime”.

Despite the fairly comprehensive form of protection that was accorded to copyright owners in the Union, performers were legally neglected until after South Africa became a Republic in 1961 when the Performers’ Protection Act 11 of 1967 was enacted.

\section{5.3 Influence of the Berne Convention}

\subsection{5.3.1 General}

On the 3 October 1928 South Africa became a contracting party to the Berne Convention.\textsuperscript{574} There was no immediate effect on South African legislation until 1965 when the Copyright Act\textsuperscript{575} was enacted.

\subsection{5.3.2 The Copyright Act of 1965}

This Act repealed the South African Act of 1916 and was very closely based on the British Act of 1956 which in turn repealed the British Act of 1911.\textsuperscript{576}

\begin{footnotes}
\item[571] Dean The Application of the Copyright Act 314.
\item[572] S3.
\item[573] S151(1)(a)(i)-(ii).
\item[575] 63 of 1965.
\end{footnotes}
However, there were two noteworthy developments relating to performing rights that affected the enactment of the 1965 Act.

In 1932, the view was expressed that the Act of 1916 implied a performing right in a sound recording by providing that:

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

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

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

The significance of this decision is that for the first time, owners of sound recordings (generally recording companies) were accorded a performing right for the public broadcast of their sound recordings. Since the Act of 1911 was included in the Union Act of 1916, it is submitted that this decision applied *mutatis mutandis* in South Africa. Although at the time this right only accrued to copyright owners, it laid the foundation for the right to be extended to performers many years later.

In 1949, the International Federation of Phonographic Industry entered into an agreement with the South African Broadcasting Corporation (SABC) whereby the SABC would pay a

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576 Dean *The Application of the Copyright Act* 10.
578 S19(1) of the British Copyright Act, 1911 as contained in Schedule 3 of the Patents, Designs, Trade Marks and Copyright Act, 1916.
579 Du Plessis “Performing rights: Part 2” *Accountancy SA*.
580 (1934) Ch 450.
581 452.
582 456.
fee per side of a vinyl record to the International Federation of Phonographic Industry every time it was used in a programme.\footnote{Du Plessis “Performing rights: Part 2” Accountancy SA.} This arrangement continued until a Select Committee of Parliament considered a draft Bill on copyright which had been prepared along the lines of the United Kingdom’s Copyright Act of 1956. The Bill provided that separate rights be accorded to sound recordings but this provision was not included in the final enactment with the result that in 1965 the right of recording companies to be paid for the uses of their sound recordings was removed. This development came about at the insistence of the government of the time as well users of recorded music in the commercial sector.\footnote{Ibid.} This development showed the governmental bias in favour of the SABC and it has taken the South African recording industry and performer community “about 40 years to restore a right that should never have been taken away.”\footnote{Ibid.}

Ultimately the South African Act of 1965 was repealed by the Copyright Act 98 of 1978 which is still in force today in its amended form. The needletime right was re-introduced into South African law through amendments to the Copyright Act 98 of 1978 and to the Performers’ Protection Act 11 of 1967. The proposed amendments were published in the \textit{Government Gazette} in 2000\footnote{GG 21156 of 2000-05-10.} but only came into force in 2002. The current debate surrounding the needletime right in South Africa will be discussed at a later stage in this Chapter.

\section*{5 4 INFLUENCE OF THE ROME CONVENTION}

\subsection*{5 4 1 General}

The Rome Convention took place almost immediately after South Africa became a Republic in 1961. Performers’ protection in South Africa took a major step forwards with the enactment of the Performers’ Protection Act.\footnote{Assented to on 10 February 1967, brought into operation on 30 December 1967.} This Act embodies the sections of the Rome Convention that deals with performers’ protection. The Act grants protection to performers of literary, musical, dramatic, dramatico-musical and artistic works and much of the Act’s terminology and phraseology relating to this protection has been borrowed from the Convention.\footnote{Dean “Performers’ Protection” in \textit{Handbook of South African Copyright Law} (2003) 1-111.}
South Africa has not acceded to the Convention but the Performers’ Protection Act was clearly enacted with the view to enabling South Africa to accede to it at some point in the future. In fact, in *South African Broadcasting Corporation v Pollecutt* Harms J stated that the intention of the Performers Protection Act was to give effect to this Convention. As previously mentioned, the success of the Rome Convention does not only lie in how many states have acceded to it, but in the effect that it has had on those nations that have not acceded to it. Since the Performers’ Protection Act was modelled on the Rome Convention, South Africa qualifies as just such a country.

However, South Africa’s reluctance to ratify the Convention is seen by some to be anomalous and the absence of needletime legislation in South Africa from 1965 to 2002 was regarded to be key obstacles to the development of the local music industry. The lack of protection accorded performers was regarded as being out of step with international trends particularly South Africa’s British counterparts who enacted legislation protecting performers as early as 1925. South Africa was compelled to take a tentative step in that direction when they enacted the Performers’ Protection Act in 1967.

### 5.4.2 Changes reflecting the Rome Convention

Although South Africa has not yet ratified the Rome Convention, the Performers’ Protection Act gives effect to those provisions of the Convention providing protection to performers.

Unfortunately, there is practically no assistance available for the interpretation of the Act but Dean observes that some guidance can be garnished from sources interpreting the Rome Convention and the various British statutory measures aimed at protecting performers as the South Africa Act has virtually been based on these.

The Act defines a “performer” as an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise performs, literary or artistic works.

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590 1996 (1) SA 546.
591 557.
595 The Dramatic and Musical Performers’ Protection Act.
597 S1.
The Act does not define a “performance”. However, it is submitted that the definition of “performance” provided for by the Copyright Act of 1965 was applicable which provided that a “performance” was:

“[A]ny mode of visual or acoustic presentation of a work, including any such presentation by the operation of radio apparatus or the exhibition of a cinematograph film or by the use of a record or by any other means, and in relation to lectures, addresses, speeches and sermons includes delivery thereof; and references to performing a work or an adaption of a work shall be construed accordingly.”

Literary and artistic works included musical, dramatic and dramatico-musical works.\textsuperscript{599}

The primacy of copyright is highlighted in section 2 which provides that the rights provided for by the Act shall not restrict copyright existing in any other work.

This provision echoed the Rome Convention\textsuperscript{600} and underlies the premise that permeates every international instrument providing protection for performers, namely that performers’ rights are subordinate to, and dependent on copyright. Therefore, one might say that the aim of the Act is to grant performers with rights analogous to copyright in relation to their performances of literary, musical and artistic works.\textsuperscript{601}

Originally, the Act extended protection to foreign performers who were nationals of contracting states to the Rome Convention\textsuperscript{602} which meant that performers from states that were not contracting parties to the Rome Convention were not entitled to any form of protection in relation to their performances. It provided for a system of reciprocal treatment which subsists today. This means that the rights conferred by the Act are only granted to the same extent that performances emanating from South Africa enjoy protection in that country; and these performances will not be granted any wider protection than that granted in the foreign country.\textsuperscript{603} By providing protection to nationals of Rome Convention countries, this provision can further be construed as an indication of South Africa’s intention to ratify the Rome Convention in the future.

Performers were granted the right to prevent anyone from broadcasting or communicating to the public a performance; the right to prevent a fixation from being made of a

\textsuperscript{598} Ibid.
\textsuperscript{599} As defined in s1 of the original Act of 1967. “Expressions of folklore” were included by the Performers Protection Amendment Act 8 of 2002.
\textsuperscript{600} Article 1.
\textsuperscript{601} Joubert & Faris \textit{The law of South Africa} (2004) 83.
\textsuperscript{602} S4.
\textsuperscript{603} Joubert & Faris \textit{The law of South Africa} 83.
performance; and the right to prevent a reproduction from being made of a fixation of a performance.\textsuperscript{604} These rights were stronger in nature than those provided for under the Rome Convention which only gave performers the “possibility of preventing” these acts. However, fault was not a requirement for civil liability.

The Act further excluded infringements that referred specifically to uses that the SABC was entitled to.\textsuperscript{605} This reference recognised the monopoly that the SABC had in broadcasting in South Africa at the time.

The Act set the duration of protection at only 20 years, which was in line with the term provided for by the Rome Convention. Protection would subsist from the day the performance first took place; or from when it was first fixed in a phonogram.\textsuperscript{606}

Where a performer’s consent was required, this could be dispensed with if a single equitable remuneration was paid to the performer by the SABC.\textsuperscript{607} The amount to be paid was decided on by agreement between the performer and the SABC, failing which it could be determined in accordance with the Arbitration Act, or, if the performer so preferred, by the Copyright Tribunal established in terms of the Copyright Act of 1965. It is important to note that this section did not provide for needletime, which entitles a performer to receive a royalty every time his performance is broadcasted.

Whenever a person knowingly contravened any of the rights of a non-proprietary nature accorded performers in terms of section 5; knowingly sold, hired or distributed for trade any fixation of a performance; or made or possessed the means to make fixations of a performance in contravention of this section, he could be held criminally liable.\textsuperscript{608} The use of the word “knowingly” implies that fault was a requirement for criminal liability.

Should an offender be guilty of criminal infringement of the rights mentioned above, he was liable, upon conviction, to pay a specified fine\textsuperscript{609} or to a specified term of imprisonment.\textsuperscript{610} The court was also entitled, in the absence of proof, to award a specified amount of money in damages\textsuperscript{611} to a performer if the circumstances of the case appeared

\begin{itemize}
\item[S5.] \textsuperscript{604}
\item[S8(3).] \textsuperscript{605}
\item[S7.] \textsuperscript{606}
\item[S8(3)(a)(iii).] \textsuperscript{607}
\item[S9(1).] \textsuperscript{608}
\item[Ranging from R10 to R100 depending on which right was contravened.] \textsuperscript{609}
\item[Ranging from 3 to 6 months depending on which right was contravened.] \textsuperscript{610}
\item[Not exceeding R100.] \textsuperscript{611}
\end{itemize}
it to be reasonable.\textsuperscript{612} The Act further provided that if a court awarded a performer damages that this could be executed as if it were a civil judgement operating in favour of the performer.\textsuperscript{613}

The 1967 Act also provided for civil remedies in the form of an interdict and damages for infringement. With regard to a claim for damages, the Act provided that a performer was entitled to sue in any court for a specified amount with costs.\textsuperscript{614} The performer was further entitled to claim an interdict as well as damages.\textsuperscript{615} Since the legislature in the United Kingdom declined to grant performers civil remedies until 1988, the fact that performers in South Africa were accorded such remedies as early as 1967 means that the protection accorded to South African performers was vastly different in nature.

Contrary to copyright owners,\textsuperscript{616} performers were not granted a moral right in terms of the Act. This was in line with the Rome Convention as well as British legislation that the Performers’ Protection Act was based on.

The Act was not retrospective\textsuperscript{617} which meant that performances delivered before 30 December 1967 were not accorded protection of the statutory performers’ right.\textsuperscript{618} However, it also provided that the Act shall not prejudice any rights acquired by performers before the commencement of the Act.\textsuperscript{619} Dean submits that since the Act had no predecessor, these prior rights could only have been garnished from the common law.\textsuperscript{620} Therefore, the Act did not repeal the common law rights in any way which means they can continue to exist alongside the statutory rights. These common law rights are personality rights, passing-off rights and delictual rights.\textsuperscript{621}

Although the Act was intended to grant a performer with a monopoly regarding how his performance was to be used, the Act did allow for a performer to grant licenses in respect of the uses of his performance.\textsuperscript{622} Therefore, by allowing a performer to enter into a contract with a user agreeing to allow this user to exercise the rights granted to the performer by the Act, these licenses could be granted. However, these contracts were

\begin{itemize}
  \item \textsuperscript{612} S9(1)(a)(i).
  \item \textsuperscript{613} S9(2).
  \item \textsuperscript{614} S10(a).
  \item \textsuperscript{615} S10(b).
  \item \textsuperscript{616} S43 of the Copyright Act 63 of 1965.
  \item \textsuperscript{617} S14(2).
  \item \textsuperscript{618} Dean “Performers’ Protection” in \textit{Handbook of South African Copyright Law} (1998) 1-119.
  \item \textsuperscript{619} S14(1).
  \item \textsuperscript{620} Dean “Performers’ Protection” in \textit{Handbook of South African Copyright Law} (1998) 1-119-120.
  \item \textsuperscript{621} \textit{Ibid}.
  \item \textsuperscript{622} 1-117.
\end{itemize}
only enforceable in South Africa. In 1996, the court interpreted this section as recognising the supremacy of the freedom to contract in *South African Broadcasting Corporation v Pollecutt*.

543 **South African Broadcasting Corporation v Pollecutt**

On 27 November 1984, the SABC entered into three agreements relating to the creation of music for their production *Shaka Zulu*.

Firstly, Pollecutt was appointed by the SABC to compose and direct the music for *Shaka Zulu*. He would retain all his copyright to the music as composer but he granted the SABC the perpetual right to broadcast the music and to license the broadcast of the music without further payment. For this he was to be remunerated R30 000.

The second agreement entailed a commission to provide the music for the production. Pollecutt was required to record and mix the music in 56 three hour sessions which entailed him having to employ and pay for the services of several orchestras and a choir. His agreed fee for this task was R47 032. Of special importance to his cause of action was a particular clause of this agreement which provided that where the musical contributions constituted a performing right, Pollecutt was to give consent on behalf of all the performers to the SABC, allowing them to record, broadcast and commercially exploit their contributions to the television (TV) show without any further remuneration.

The third agreement was a “composer’s release form” in which Pollecutt agreed, in his capacity as composer, to grant the SABC the right to record, broadcast and commercially exploit the production without any further payment.

After the remarkable success of *Shaka Zulu*, Pollecutt entered into a further two agreements. Pollecutt’s cause of action is based on the second of these two agreements.

In terms of this agreement, Pollecutt granted consent to the SABC to attend to the marketing and distribution of the recordings used in *Shaka Zulu*. The consent read as follows:

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623 S13.

624 1996 (1) SA 546 550-551.

625 551.
“In my capacity as musical director/arranger/artiste of the music for the TV series “Shaka Zulu” ... hereby give my unconditional consent to the SABC attending to the marketing and distribution of the mechanical phonographic licences of:

Cassettes, single or long-playing vinyl records, compact discs, video discs, video tapes or any future format.

This consent is subject to the provision that I shall receive from the SABC a royalty of 10% (ten percent) of 90% (ninety percent) of the retail selling price worldwide of any such aforementioned record sold.”

Subsequent to entering into this consent agreement, the SABC entered into a distribution agreement with BMS Publication in terms of which the SABC licensed BMS to manufacture and sell in all countries (except France) records that were derived from the original master copies of music from *Shaka Zulu*. BMS were required to calculate and pay over all royalties due to the performers. Pollecutt was not a party to this agreement and actually objected to the appointment of BMS as licensee but was overruled by the SABC. In due time BMS floundered and failed to pay royalties in terms of their agreement. Initially, the SABC recognised Pollecutt’s right to payment but reneged when they realised the royalties could not be recouped from BMS. This gave rise to Pollecutt’s action against the SABC who claimed for an account and payment of the agreed royalties. This claim was upheld in the Witwatersrand Provincial Division and on 6 August 1992 the court ordered part payment of the royalties due which amounted to R37 635, 34 with an order to account for the balance still owing. Subsequently, a further R195 727, 13 was calculated as due in royalties. The SABC was also ordered to pay party and party costs.

The SABC appealed, advancing several arguments to refute Pollecutt’s claim.

Firstly, the SABC submitted that the consent agreement was not reflective of a positive obligation to pay royalties but was, in fact, dependent or conditional on the receipt of royalties. Since royalties were not forthcoming from BMS, the consent fell away and Pollecutt had to then rely on his intellectual property rights and not on the agreement. The court disagreed stating that this argument made “commercial nonsense”.

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626 552.
628 553.
Secondly, the SABC argued that the fact that Pollecutt had contractually agreed to allow the SABC the right to exploit their contributions to the production of *Shaka Zulu* without any further payment to the performers concerned, meant that he could not rely on his rights in terms of the Performers’ Protection Act. In terms of the Act, a performer of a literary or musical work must consent to the making of a fixation of his unfixed performance and must also consent to the making of a reproduction of a fixation of his performance if this reproduction is to be used for purposes other than those for which he had originally given consent. By agreeing to allow the SABC to exploit the recordings of Pollecutt’s music in the television production, the SABC contended that Pollecutt’s consent in terms of the above-mentioned sections had been given. The court also refuted this argument by highlighting the words “for purposes other than”. This was interpreted to mean that the consent agreement was to allow the SABC to screen the audio-visual production on television, not to allow the SABC to commercially market recordings of the music. Therefore, the court held that Pollecutt’s consent had not been obtained in terms of the Act for the commercial exploitation of the recordings.

Thirdly, the SABC asserted that since Pollecutt had consented to the incorporation of his work in an audio-visual format, namely the television series, his consent was not required for the reproduction of his performance. The Performers’ Protection Act provides that Section 5(1) will cease to apply if a performer consents to such an incorporation of his performance. Similarly, the court disregarded this contention by stating that the records contemplated by the consent agreement were not reproductions of the original performance. The recordings that were commercially exploited were not exact copies of the recordings used in the production as they had to be edited and mixed stereophonically in order to make a commercially viable record. Therefore, Pollecutt’s consent was needed for any commercial dealings of these recordings. The court further cautioned that this Section of the Act had to be interpreted restrictively as it limits rights granted to performers. Harms J stated that in the event of a conflict,

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630 S5(1)(b).
631 S5(1)(c)(ii).
632 1996 (1) SA 546 553.
633 S8(1).
634 1996 (1) SA 546 556.
section 8 must yield to the clear wording of section 5 and more importantly, the section is subject to the supremacy of the freedom to contract.

“If it is assumed that the respondent had no residual rights by virtue of s 8(1), it remained permissible for him to enter into the consent agreement which gave him rights not recognised by s 8(1). This agreement would then by implication have returned to him what had been taken away by the commission agreement and by s 8(1). That is permitted by s 13.”

Lastly, the SABC maintained that Pollecutt had no performer’s right to license as the SABC owned the copyright in the sound recording. As a result, the SABC had the exclusive right to make reproductions of the sound recording. In answering this argument, the court looked at the interaction between copyright and performers’ right and stated that:

“ownership of a tape and ownership of the copyright in what has been recorded on the tape are separate and distinct rights.”

The judge should perhaps also have mentioned that the right of the performer on such a tape is also a separate and distinct right.

Consequently, the SABC failed to show that Pollecutt was devoid of the right to license and dismissed the appeal with costs.

This case holds significance as the only case to date specifically upholding performers’ rights in South Africa.

The level of protection granted to performers remained as provided for by the 1967 Act until it was amended in several important ways by the Intellectual Property Laws Amendment Act 38 of 1997 following the TRIPS Agreement of 1994.

635 Ibid.
636 S13.
637 1996 (1) SA 546 556.
638 557.
639 Visser “Copyright and performers’ rights: Their interplay illustrated” 1996 Juta’s Business Law 81 83.
5 5 INFLUENCE OF THE TRIPS AGREEMENT

5 5 1 General

The main purpose of the TRIPs Agreement is to provide for minimum standards with which countries must comply in relation to their intellectual property laws, and to provide for adequate means to enforce these laws.\textsuperscript{640} South Africa assented to the WTO Agreement and therefore to the TRIPs Agreement in April 1994. Although the law in South Africa relating to copyright and performers’ rights already complied, for the most part, with the provisions of the TRIPs Agreement, amendments were required in order to comply fully with the Agreement.\textsuperscript{641} This was achieved through the enactment of the Intellectual Property Laws Amendment Act which was assented to on the 19 September 1997.

5 5 2 Implementation

The TRIPs Agreement did not require many changes in South Africa, owing in part to the fact that South African intellectual property law complied for the most part with its substantive law requirements; and the procedural law requirements were based on those known throughout the common-law world of which South Africa is a part.\textsuperscript{642} However, some amendments were necessary and those made to the Performers’ Protection Act were brought about by the Intellectual Property Laws Amendment Act.

Section 19-25 of the Act provided for the amendments that had to be made to the Performers’ Protection Act.

The Act effectively removed all reference to the SABC by inserting new definitions for “broadcast”, “rebroadcasting” and “broadcaster” into section 1(1) of the Performers’ Protection Act\textsuperscript{643} and replaced all mention of the word “Corporation” in the Act with the word “broadcaster”\textsuperscript{644}

With regard to the protection provided to foreign performers, section 4 of the Performers’ Protection Act was amended and now provides that instead of providing reciprocal treatment to contracting states of the Rome Convention, protection is to be granted to a

\textsuperscript{641} Ibid.
\textsuperscript{642} Harms 2009 \textit{THRHR} 180.
\textsuperscript{643} S19.
\textsuperscript{644} S22.
foreign performer if he is a national of a country which is a member of the WTO.\textsuperscript{645} This was reflective of South Africa’s recent ratification of the TRIPs Agreement, an annexure to the Marrakesh Agreement Establishing the WTO.

The duration of protection was extended beyond the term of 20 years from the time the performance was first performed, to that of 50 years\textsuperscript{646} which was in accordance with Article 14(5) of the TRIPs Agreement. The duration of protection was still to be calculated from the end of the calendar year in which the performance first took place or was first incorporated in a phonogram. The reason why Parliament opted to provide an alternative basis for the calculation of the term of protection to have regard merely to an aural fixation of a performers’ performance, as opposed to a visual fixation in a cinematograph film, is not entirely clear.\textsuperscript{647} It is submitted that this is reflective of the international community’s reluctance to grant performers in the audiovisual sector the same level of protection as that accorded to other classes of performers.

Section 8(1) of the Performers’ Protection Act, which provided that as soon as a performers’ performance was incorporated in an audiovisual format the performer’s rights in terms of the Act no longer applied and which had been so severely criticised in \textit{Pollecott}, was removed by the Intellectual Property Laws Amendment Act.\textsuperscript{648}

The Intellectual Property Laws Amendment Act also amended the criminal penalties for infringement provided for in the Performers’ Protection Act.\textsuperscript{649} The section now provides that anyone who knowingly contravenes any of the provisions of the Act shall be criminally liable, upon conviction, to pay a fine or to imprisonment for a time not longer than three months.\textsuperscript{650} In addition, the court may, without proof of damages, order the defendant to pay the performer damages not exceeding an amount to be determined by the Minister from time to time by notice in the \textit{Government Gazette}.\textsuperscript{651} If anyone knowingly sells, lets for hire, or offers for sale any fixation of a performance or copy of a fixation of such a performance, the individual will be criminally liable to pay, upon conviction a fine not exceeding the amount to be determined by the Minister from time to time by notice in the \textit{Government Gazette}.\textsuperscript{652} Lastly, if anyone makes, or has in his possession a plate or

\begin{footnotes}
\footnotetext[645]{S20.}
\footnotetext[646]{S21.}
\footnotetext[647]{Joubert & Faris \textit{The law of South Africa} 85.}
\footnotetext[648]{S22.}
\footnotetext[649]{S23.}
\footnotetext[650]{S9(1).}
\footnotetext[651]{S9(1)(a)(i).}
\footnotetext[652]{S9(1)(b)(ii).}
\end{footnotes}
similar means to make reproductions of these fixations; they shall be criminally liable, upon conviction to a fine or to imprisonment not exceeding six months, or both.

Similar amendments were made to the Performers’ Protection Act regarding civil remedies. The Act now provides that the amount to be awarded is not to exceed an amount determined by the Minister from time to time by notice in the Government Gazette.

Lastly, the retroactivity of the Performers’ Protection Act was changed and now provides that the Act shall apply to all performances which took place before the commencement of the Act in the same way as it applies to performances taking place thereafter. This section corresponds with similar provisions of the Copyright Act except that in the case of the Performers’ Protection Act, there are no qualifications to the retrospectivity of the Act. In effect, this means that any performance given in South Africa, or in a WTO country, within 50 years from the date in which rights are sought, shall be eligible for protection under the Act. The result of this is that even performances which had already fallen into the public domain in terms of the 20 year term of protection provided for under the original provisions of the Performers’ Protection Act are “brought back” into the ambit of the Act. No provisions are made for the mitigation of hardships that this could result in.

Although the Intellectual Property Laws Amendment Act strengthened the position of performers in several ways, the reluctance of the legislature to grant performers with moral rights is noteworthy. Even though their copyright counterparts are accorded such rights, performers in South Africa remain vulnerable in this sphere despite South Africa having signed the WPPT, an instrument that clearly provides for moral rights to be accorded to performers.

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653 S10.
654 S24.
655 S25.
656 S43.
657 Dean “Performers’ Protection” in Handbook of South African Copyright Law 1-119.
658 S20 of the Copyright Act 98 of 1978.
659 Signed by Trevor Manuel, then Minister of Finance.
5 6   INFLUENCE OF THE WPPT

5 6 1   General

South Africa played an active role in the conclusion of the WPPT\(^\text{660}\) as chair for technical matters relating to the African group of states and vice-chair of the Drafting Committee.\(^\text{661}\) Although South Africa signed the WPPT on 12 December 1997 it has not yet ratified it. It is probable that South Africa will accede to it at some point in the future in which case significant amendments will have to be made to the Performers’ Protection Act.\(^\text{662}\)

Since the approval of the WPPT, two provisions of the Treaty have received attention from a South African perspective, namely the protection of “expressions of folklore” and the right to needletime.

5 6 1 1   The African Regional Consultation on the Protection of Expressions of Folklore

From 23 to 25 March 1999, this Consultation,\(^\text{663}\) organised by WIPO and UNESCO in cooperation with the Department of Trade and Industry (DTI), was held in Pretoria to consider the protection of expressions of folklore in Africa.

The Consultation recommended that expressions of folklore should receive adequate protection at national level so that the people of Africa could derive socio-economic benefits as a result of this protection. As a strategy for cultural development, the appropriate national structures should be put in place to ensure the regulation, coordination and protection of folklore, and these structures should be evaluated for adaption and amendment where necessary.\(^\text{664}\)

5 6 1 2   The Music Industry Task Team Report

A call for the reform of South Africa’s music industry followed the deaths of several high profile black performers in the late 1990’s who died in abject poverty.\(^\text{665}\) As a result, the

\(^{660}\) Dean “International Copyright” in *Handbook of South African Copyright Law* 1-93.

\(^{661}\) Wendland “The Digital Agenda” 1997 *Juta’s Business Law* 143.

\(^{662}\) Dean “Performers’ Protection” in *Handbook of South African Copyright Law* 1-111.

\(^{663}\) WIPO-UNESCO/FOLK/AFR/99/1.

\(^{664}\) Recommended to African states.

then Minister for Arts, Culture, Science and Technology, began directing changes to existing legislation aimed at protecting performers’ rights. This process began with the appointment of the Music Industry Task Team (MITT) consisting of several influential players in the music industry who met from 28 February to 3 March 2000 in Johannesburg.

The MITT aimed to provide the Minister with strategies designed to address the problems facing the South African music industry through oral and written submissions on both the national and provincial level, and to indicate priorities regarding these recommendations.

The team identified *inter alia* the following areas of concern in the music industry:

a) Inadequate and outdated legislation, especially with regard to needletime;
b) Widespread piracy that disables the growth of the local industry;
c) Ineffectiveness of the monitoring of local content and the low levels of local content in the media;
d) Prevalence of unfair contracts between musicians and record companies;
e) Legacy of disempowerment and lack of access to knowledge about the economics of the industry coupled with a lack of transparency by important players within the industry;
f) Imbalance of power relations within the industry that negatively affects its growth;
g) Inadequate funding for the development of the industry in South Africa.

The final Report was drawn up based on the submissions of members of the industry, as well as the outcomes of five regional hearings held in Pietersburg, Bloemfontein, Durban, Cape Town and Port Elizabeth held from 8 May to 2 June 2000.

Based on the team’s findings, 37 recommendations were made of which three are important for the purposes of this discussion.

Firstly, the Report recommended that the draft amendments regarding needletime in South Africa should be implemented immediately and argued that no further public consultation on the matter was needed. It suggested that time frames be incorporated as to the amendment of the Act and that negotiations should commence between the

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666 Dr. Ben Ngubane.
669 Department of Arts, Culture, Science and Technology *MITT Final Draft Report* Preamble 1.
broadcasters on the one hand, and producers and performers on the other hand, regarding the appropriate rate to be paid.\textsuperscript{670} The Report further provides that the Minister should establish a joint performers and producers collecting society to administer the collection of royalties which will make the Performers’ Protection Act functional and in line with international standards.\textsuperscript{671}

Secondly, the Report recommends that South Africa should accede to and implement the WPPT in order to ensure protection of South African content in the digital environment and compliance with international norms.\textsuperscript{672}

Lastly, the Report found that the definition of “performer” in the Performers’ Protection Act must be amended to include artists who perform expressions of folklore and suggested that the definition provided for by the WPPT was a useful guide to what the Performers’ Protection Act should provide.\textsuperscript{673}

Proponents of the Report have hailed it as a potential blueprint for reinventing the music industry throughout Africa adding that implementation of the Report’s recommendations could result in South Africa being “a model for the many other African countries that are also seeking to turn the musical creativity and brilliance that abounds across the continent into a genuine and sustainable industry.”\textsuperscript{674}

Following the publication of the Report on 30 August 2001, the National Association of Broadcasters (NAB) voiced strong opposition to some of the recommendations put forward by the MITT on the grounds that the position of broadcasters was not given adequate consideration.\textsuperscript{675} The NAB commented on the MITT’s claim that the NAB was approached to make a submission regarding the Report but that they had declined to participate.\textsuperscript{676} The NAB contended that they had received no such invitation to provide submissions and

\begin{itemize}
\item \textsuperscript{670} Recommendation 1: \textit{Needletime 5}.
\item \textsuperscript{671} \textit{Ibid.}
\item \textsuperscript{672} Recommendation 3: \textit{Implementation and accession to the World Intellectual Property Organisation (WIPO) Treaties 6}.
\item \textsuperscript{673} Recommendation 4: \textit{Broadening the definition of “performer” 6}.
\item \textsuperscript{674} Coetzer “South Africa Sees Report as Blueprint for Continent” \textit{Billboard} (18-10-2001) http://books.google.co.za/books?id=bhEEAAAAMBAJ&pg=PA51&lpg=PA51&dq=South+Africa+Sees+Report+as+Blueprint+for+Continent&source=bl&ots=4WsXUFSbtG&sig=SiogcH4inz54H0vINPsoO5e7g4&hl=en&ei=DCljTffQKZCD5Aa4gJ2GA&sa=X&oi=book_result&resnum=1&ved=0CBUQ6AEwAA#v=onepage&q&f=false (accessed 21-08-2010).
\item \textsuperscript{676} Footnote 7 of the \textit{MITT Final Draft Report}. 
\end{itemize}
that their absence from the discussions could give the impression that the NAB deliberately boycotted the MITT. However, the MITT Chairperson informed the members of the panel during the proceedings that the NAB had personally been approached several times to encourage their participation in the proceedings but that these approaches had been rebuffed.

In addition, the NAB noted that the MITT’s statement that there was no need for any further public consultation on the issue was misguided. The NAB stated that a detailed cost-benefit study was required to determine the effect of needletime, particularly the negative impact needletime was likely to have on South African broadcasters. Since needletime entails that a payment be made to composers and performers every time their works were performed anywhere in public (from restaurants to workplaces to radio stations), the NAB submitted that a cost-benefit study was essential.

Despite these objections, the legislature drafted amendments to be made to the Performers’ Protection Act, specifically regarding the implementation of needletime. These were contained in the Copyright Amendment Bill and the Performers Protection Amendment Bill published on 18 September 2001. The NAB then published detailed submissions on the proposed amendments outlining their objections on 5 October 2001.

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

The NAB argued that the need to comply with international treaties must be weighed up against public interests and that even though the WPPT provides for needletime, it

677 Abrahams (NAB) Letter to Dr Adam (DACST) (10-09-2001) 45.
679 Abrahams (NAB) Letter to Dr Adam (DACST) (10-09-2001) 46.
680 S9.
681 S5.
682 All television broadcasters, all SABC radio stations, the commercial radio industry, and 40 community radio broadcasters.
684 Ibid.
685 Article 15.
also provides that contracting parties are given the discretion of whether or not to adopt the provision relating to needletime. The Treaty provides that the contracting state in question can notify the Director-General of WIPO that it will not apply the provisions relating to needletime at all. Therefore, South Africa can accede to and implement the Treaty without incorporating needletime provisions.

In terms of needletime, broadcasters would have to pay an additional royalty for playing music which would add to the substantial costs they already incur for music use, particularly radio broadcasters. The implementation of needletime would drive the majority of radio stations further into debt and the closure of some would follow.

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

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

Despite South Africa’s non-ascension to the WPPT and the vehement objections of the NAB, several amendments were made to the Performers’ Protection Act by the Performers’ Protection Amendment Act 8 of 2002 in line with provisions of the WPPT.

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686 Article 15(3).
687 NAB Submission on the Copyright Amendment Bill and the Performers Protection Amendment Bill 31.
688 It was estimated by the NAB that the amount paid by broadcasters was as much as R90 million.
689 NAB Submission on the Copyright Amendment Bill and the Performers Protection Amendment Bill 16.
690 19.
691 21.
692 36.
693 40.
694 41.
These relate to the inclusion of “expressions of folklore” in the definition of “literary and artistic works”\textsuperscript{695} and the provision of the right to needletime.\textsuperscript{696}

\section*{5.6.2 Changes reflecting the WPPT}

\subsection*{5.6.2.1 The Performers’ Protection Amendment Act 8 of 2002}

The Performers' Protection Amendment Act came into force on 25 June 2002\textsuperscript{697} and provided that amendments be made to certain sections of the Performers' Protection Act. The most salient of these will be discussed forthwith.

The first amendment relates to the insertion of a definition for “collecting society” to mean a collecting society as established in terms of the Copyright Act.\textsuperscript{698} The Copyright Act defines a collecting society as that which is established in terms of the Copyright Act, only referring to collecting societies in terms of their role as representatives of performers and copyright owners\textsuperscript{699} and the requirement that regulations be promulgated to regulate the establishment of collecting societies.\textsuperscript{700} This is in order to meet the collection and distribution demands that the implementation of needletime would create.

The next amendment relates to the inclusion of “expressions of folklore” to the definition of “literary and artistic works”.\textsuperscript{701} This is in line with the WPPT which provides that the definition of “performers” should also include persons who perform expressions of folklore\textsuperscript{702} and conforms to the recommendations of the African Regional Consultation on the Protection of Expressions of Folklore. However, this inclusion has been met with criticism. In \textit{Pollecutt}, it was held that in order for a performers' right to exist, a work must exist.\textsuperscript{703} Although the Performers’ Protection Act does not define “works”, the definition contained in the Copyright Act should be followed\textsuperscript{704} which amounts to material embodiment of that which has been created.\textsuperscript{705} This suggests that unscripted performances, such as the performances of jugglers and acrobats, should not be included

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{695} Article 2(a). \\
\item \textsuperscript{696} Article 15. \\
\item \textsuperscript{697} GG 23555 of 2001-06-25. \\
\item \textsuperscript{698} S1(a). \\
\item \textsuperscript{699} S9A(1)(b). \\
\item \textsuperscript{700} S4. \\
\item \textsuperscript{701} S1(b). \\
\item \textsuperscript{702} Article 2(a). \\
\item \textsuperscript{703} 1996 (1) SA 551 558A. \\
\item \textsuperscript{704} Dean “Performers’ Protection” in \textit{Handbook of South African Copyright Law} (2003) 1-112. \\
\item \textsuperscript{705} S2(2).
\end{itemize}
\end{footnotesize}
within the ambit of protection.\footnote{Dean “Performers’ Protection” in Handbook of South African Copyright Law (2003) 1-112.} The fact that “expressions of folklore” has been included as being a species of the genre “literary and artistic works” suggests that they too, by definition, must also be works.\footnote{Ibid.} This raises concerns in that many of these expressions of folklore are unscripted, having been handed down from generation to generation, by word of mouth. The question then arises as to whether the legislature intended these forms of traditional expression to be excluded from the ambit of the Act.\footnote{Ibid.} Dean submits that in order to conform to the prescriptions of the Act, only scripted expressions of folklore should receive protection in terms of the Act.\footnote{Ibid.}

The most important and controversial amendment made to the Performers’ Protection Act is the provision of a new economically-natured right accorded performers in the form of needletime, also known as “pay for play” or “performing rights”. In terms of this amendment, performers are given the right to receive a share of a royalty every time a fixation of a performance that was published for commercial purposes is broadcasted to the public, transmitted in a diffusion service, or communicated to the public.\footnote{S3.} Although authors have enjoyed the right to a royalty for the use of their literary and musical works since 1916, needletime refers to the right of both copyright owners and performers to receive royalties for the use of their sound recordings.

The amount to be paid as a royalty is to be determined by agreement between the performer and the broadcaster, or between their representative collecting societies.\footnote{Ibid.} However, the Act further provides that if a performer has authorised the fixation of his performance, he shall be deemed to have given the person responsible for this fixation (the recording company) the exclusive right to receive the royalties due. In addition, the Copyright Act provides that the copyright owner who receives payment of royalties is required to share it with the performer who performed on the sound recording.\footnote{S9A(2)(a).} This means that the performer is only entitled to a share of the royalty and has no exclusive rights.\footnote{S5(4)(a).} Generally speaking, the copyright owners of sound recordings are the recording companies and the extent to which the recording company is obliged to share the royalty with the performer depends on the terms of the contract between these parties.\footnote{Ibid.} Should

\begin{itemize}
\item[707] Ibid.
\item[708] Ibid.
\item[709] Ibid.
\item[710] S3.
\item[711] Ibid.
\item[712] S9A(2)(a).
\item[713] S5(4)(a).
\item[714] Ibid.
\end{itemize}
a performer assign the right to receive this royalty completely over to the recording company, the performer will not receive anything. However, the more progressive recording companies generally agree on a 50/50 share ratio with the performers signed to their labels.\(^\text{715}\)

In the absence of agreement regarding royalties, the matter can be referred to the Copyright Tribunal or arbitration.\(^\text{716}\) Lastly, the Performers’ Protection Amendment Act provides that the right to a royalty is transferable upon death in that any successor in title is entitled to claim this royalty from either the person liable to make the payment, or his successor in title.\(^\text{717}\)

When comparing the needletime right accorded to performers with the needletime right granted to copyright owners, it is clear that the performing right accorded performers is somewhat weaker than the corresponding right granted to copyright owners. Although the term of protection is the same,\(^\text{718}\) the copyright owner is given an exclusive right to receive the royalty whereas a performer is only given the right to share in this royalty. This places the performer at a disadvantage as the performer might have to take legal action against the copyright owner to enforce his performing right. Ideally, a performer should register with an accredited collecting society to administer and enforce payment of this royalty on his behalf.

In order to comply with the implementation of needletime, it was necessary to promulgate Regulations to facilitate the establishment of collecting societies to administer the collection of royalties on behalf of performers.

\section*{5 6 2 2 Regulations on the Establishment of Collecting Societies in the Music Industry}

A system whereby collecting societies are established to collect royalties on behalf of its members is better known as “collective rights management”.\(^\text{719}\)

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\(^{715}\) Peter Lacey (CEO: Musketeer Records) as per telephonic conversation dated 4 November 2010.

\(^{716}\) S5(4)(b).

\(^{717}\) S5(6).

\(^{718}\) S3(2)(c) of the Copyright Act and s7 of the Performers’ Protection Act.

\(^{719}\) French playwright, Beaumarchais, is widely recognised as being the first person to give expression to this idea and his efforts resulted in the establishment of the first collective rights management body. See in this regard Du Plessis “Compliance, Copyright Act and Performers’
The ideal is that these collecting societies be accountable to their members while being regulated by the state. Collective management, therefore, is a mechanism by which collecting societies can be accredited and given an enforceable mandate by which to administer these royalties. “The proper regulation and administration of these ideals pose the true challenge to the guardians of royalties in the music industry.”

On 1 June 2006 the Minister of Trade and Industry published Regulations on the Establishment of Collecting Societies in the Music Industry in terms of the Copyright Act which provides that the Minister may pass Regulations to regulate the establishment, composition, funding and functions of collecting societies.

The relevance of these Regulations insofar as they apply to performers will primarily be concentrated on.

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

In terms of the Regulations, the relevant definitions relating to rights management apply as they appear in the Performers’ Protection Act but provides for the introduction of new terms, namely the “public playing right”, which refers to the right of a performer to receive a royalty in terms of the Act, “members’ rights”, which refers to the public playing rights of performers who are members of the collecting society that is granted accreditation and “framework agreements” which describes licensing agreements that can be entered into by collecting societies and users of works.

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722 Hollis “To Play or Not to Play” 2009 \url{http://www.bowman.co.za/LawArticles/Law-Article-Id-2132417409.asp} (accessed 04-11-2010).
723 \textit{Ibid.}
724 GG 28894 of 2006-06-01.
725 S39(cA).
726 Regulation 2.
727 Regulation 6(2).
728 Regulation 1(iii).
729 Regulation 1(v).
730 Regulation 1(ii)(a) & (b).
Any person or body representing more than 50 rights holders that intends to act as a collecting society must acquire accreditation, upon written application, from the Registrar. Accreditation will be granted, if certain requirements are met, for a period of five years and shall be subsequently renewed, upon application, for a further five years.

In terms of the Regulations, the Registrar shall act as supervisor of accredited collecting societies and requires that a register of all accredited collecting societies be kept; that the collecting societies submit an annual report to the Registrar; and that the Registrar be kept informed at all times regarding the collecting society’s organizational structure and operational features. However, as of June 2006, the Companies and Intellectual Property Registration Office (CIPRO) has been appointed as accrediting authority. This means that CIPRO is the supervising body of accredited collecting societies for all intents and purposes and their decisions can only be contested in a court of law.

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

Collecting societies are required to draw up a distribution plan which sets out how payments are to be distributed for approval by the Registrar. These distributions are to occur at least once a year and a minimum of 80% of all royalties collected during this period must be distributed to members with 20% being retained by the collecting society to defray costs.

Although performers have been entitled to receive royalties for the authorised uses of their performances since 2002, there has been a prolonged delay in the implementation of needletime. This is directly attributable to the delay in the publishing of the Regulations;

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730 Regulation 3(1) and (2).
731 Regulation 3.
732 Regulation 5.
733 Regulation 4(1) – (3).
735 Regulation 7(4).
736 Regulation 7(5).
737 Regulation 8(4).
738 Regulation 6(2).
the time it takes a prospective collecting society to apply for accreditation;\textsuperscript{739} and the refusal on the part of the broadcasters to pay royalties until a more acceptable tariff can be negotiated and agreed upon.

To date, three South African collecting societies have received accreditation, namely the South African Music Rights Organisation (SAMRO),\textsuperscript{740} the South African Performing Rights Association (SAMPRA)\textsuperscript{741} and the South African Recording Rights Association Limited (SARRAL)\textsuperscript{742} SAMRO have been responsible for the collection of royalties on behalf of copyright owners for the use of their works in musical works since 1961, but have established a subsidiary organization to collect needletime royalties on behalf of performers known as the Performers’ Organisation of South Africa (POSA). SAMPRA collect royalties on behalf of recording companies\textsuperscript{743} who are thereafter required to share the royalty with performers; while SARRAL was accredited to collect on behalf of composers of musical works used in sound recordings as well as performers. SARRAL has, however, since been liquidated.\textsuperscript{744}

These groups propose that payment of these royalties are to be effected by means of blanket licenses, also known as “framework agreements”, that are to be entered into between the relevant broadcasters and the relevant collecting societies. Once payments are made to the collecting society in terms of these agreements, the due royalties are then to be distributed to the relevant recording companies who must, in turn, distribute the performers’ share to them.\textsuperscript{745} This is in terms of relevant provisions in both the Copyright Act and the Performers’ Protection Act which provides that the proposed royalties are to be collected by the copyright owner and then shared with the performer which means that the copyright owner has the exclusive right to receive payment of the royalty.\textsuperscript{746}

\textsuperscript{739} Du Plessis “Performing rights: Part 2” Accountancy SA.
\textsuperscript{740} Received accreditation on 1 April 2008.
\textsuperscript{741} Received accreditation on 20 July 2007.
\textsuperscript{742} Received accreditation on 5 March 2007.
\textsuperscript{743} Recording companies belonging to the Recording Industry of South Africa (RISA).
\textsuperscript{746} S9A(1)(a) of the Copyright Act and s(4)(a) of the Performers’ Protection Act.
Despite their accreditation, collecting societies “have yet to pay one rand.” SAMPRA has received royalty payments from only a select few broadcasters but distribution to rights holders has been halted by CIPRO due to objections raised by the NAB. The majority of broadcasters has not yet tendered payment. Rights holders allege that broadcasters, such as radio stations, are breaking the law while broadcasters maintain that the royalty tariffs are too high. In total, it is estimated that up to R1 billion rand is owed to performers and recording companies by South Africa’s commercial radio stations, calculated since the implementation of needletime in 2002. This claim has erupted into a “raging battle that could make a violent punk mosh-pit look like the original peaceful Woodstock hippie farm.”

5.7 CURRENT DEVELOPMENTS

5.7.1 The Needletime Debate Intensifies

In 1999 the following prophetic words regarding the introduction of needletime into SA law were uttered:

“The stage may be set for another battle, or, if common sense and commercial wisdom prevail, the dawning of a golden age of co-operation and competition.”

In addition, SAMPRA submitted their distribution plan to CIPRO for approval but this was declined mainly on the grounds that SAMPRA believe the royalty should be shared equally between performers and recording companies while the Performers’ Protection Act provides that the ratio of the sharing of the royalty is to be determined by agreement, arbitration or by the Copyright Tribunal.

The debate concerning needletime began intensifying during early to mid 2007 when SAMPRA and members of the NAB began corresponding in order to deal with the liability...
of broadcasters in terms of how much must be paid by broadcasters for the broadcasting of sound recordings.\textsuperscript{754}

After several attempts to settle the dispute, the NAB applied to the Transvaal Provincial Division of the High Court\textsuperscript{755} asking the court for relief regarding the following matters.

Firstly, they pray for an order declaring that the Copyright Tribunal has the jurisdiction to hear and determine its application as to the amount that is to be paid as royalties, or alternative relief.

They further pray that the respondents\textsuperscript{756} must be made to pay the costs of the application and that they be further liable to pay the costs of advertising done in terms of a substituted service order granted to the NAB in terms of an \textit{ex parte} application on 22 October 2008.\textsuperscript{757} In terms of this order, service of the proposed application was to be made to unidentified and unrepresented beneficiaries of needletime. This was to be accomplished by publishing the contents of the notice of motion in the entertainment sections of newspapers printed in several official languages circulating throughout South Africa, as well as through announcing the application twice a day for five consecutive days between 06:00 and 18:00 on 33 national radio stations.

The respondents in this matter are not opposed to the referral of the dispute regarding needletime to the Copyright Tribunal but are of the view that the High Court application brought by the NAB is unnecessary as the Copyright Tribunal does have jurisdiction to hear the matter.\textsuperscript{758} This is in terms of relevant provisions in both the Copyright Act and the Performers’ Protection Act which provides that in the absence of an agreement regarding

\textsuperscript{756}The South African Performance Rights Association (SAMPRA), the South African Music Rights Organisation (SAMRO), the South African Recording Rights Association Limited (SARRAL), the National Organisation for Reproduction Rights in Southern Africa Ltd (NORM), Creative Workers Union of South Africa (CWUSA) and others.
the amount of royalties to be paid, any party required to agree to the tariff may refer the matter to arbitration or to the Copyright Tribunal.\textsuperscript{759} The NAB contend that the areas of jurisdiction of the Copyright Tribunal are not clear and as such may not have jurisdiction to hear the matter, hence the High Court application.\textsuperscript{760} However, the respondents argue that the only reason the NAB brought the application is to delay the commencement of payment of royalties in order to put pressure on SAMPRA to accept an inadequate royalty rather than to be subjected to a long and expensive referral to the Copyright Tribunal.\textsuperscript{761} This step is further regarded as an abuse of process.\textsuperscript{762} It is submitted that this view is correct. The Act provides that should there not be an agreement as to the amount of royalties to be paid, any party can refer the matter to the Copyright Tribunal. There are no qualifications on the jurisdiction of the Tribunal; therefore, the High Court application is unnecessary and time-consuming.

The respondents oppose the NAB’s requests as to the costs of the application on the grounds that since they are of the view that the Copyright Tribunal already has jurisdiction to hear the dispute regarding needletime by virtue of statute, they are opposed to the application requesting the High Court to determine whether or not the Copyright Tribunal has jurisdiction. Furthermore, since they are of the view that a substituted service order was unnecessary, they should not be required to bear the costs of advertising.\textsuperscript{763}

Should the High Court determine that the Copyright Tribunal does indeed have jurisdiction to hear the matter, the NAB will refer the following issues for determination.\textsuperscript{764}

Firstly, they would ask the Copyright Tribunal to determine the amount or rate of royalties that are to be paid. SAMPRA has proposed the following tariff which the NAB finds unacceptably high. SAMPRA maintains that if a person chooses to act as a broadcaster and subsequently elects to allocate 100% of its editorial broadcast time to airing sound recordings, then that broadcaster must pay the owner of the sound recording a royalty equal to 10% of its own annual net income derived from the sale of advertising and other sources of revenue. Members of the collecting societies will then be entitled to receive

\textsuperscript{759} Section 5(3)(b) of the Performers’ Protection Act and s9A(1)(c) of the Copyright Act.
\textsuperscript{762} Melamdowitz (Spoor Fisher) Letter to Peter Grealy (Webber Wentzel) (21-10-2008) 3.
\textsuperscript{764} Founding Affidavit 17.
such payment as reflects the extent to which the broadcaster has used the sound recording(s) of their members.\textsuperscript{765} The NAB have countered this proposed tariff by suggesting that the negotiation of the royalty should begin at 0.8\% rising to a maximum of 2\% of net advertising revenue.\textsuperscript{766}

The second issue the NAB requires determination on is the date from when payment of the royalty became due. According to them, payment of the royalty is not retrospective and the relevant provisions of the Copyright Act and the Performers’ Protection Act are interpreted to mean that the royalty only becomes payable once the rate has been agreed to by all interested parties or determined by the Copyright Tribunal.\textsuperscript{767} Therefore, members of the NAB are not liable to pay the royalty until such time as the rate has been determined.

SAMPLE, however, of the view that both Acts are clear that the royalty becomes due as soon as the broadcaster elects to broadcast a sound recording.\textsuperscript{768} Therefore, the royalty became applicable from when the amendments were made to the Performers’ Protection Act and the Copyright Act regarding needletime, namely 25 June 2002.\textsuperscript{769}

In addition, SAMPLE argue that it is unnecessary that the time from when payment becomes due should be determined by the Copyright Tribunal. According to them, it should be determined as a result of litigation at the instance of a rights holder suing a broadcaster for payment of arrear royalties.\textsuperscript{770} However, the NAB counter this argument by stating that the date of commencement of payment of the royalty must be determined by the Copyright Tribunal and that it is of no consequence to obtain a determination of the amount due without a determination of the date due.\textsuperscript{771}

The Act clearly states that no person may broadcast a performance without payment of a royalty to the performer concerned. There is no stipulation that the amount payable be determined before payment becomes due only that a royalty is payable upon broadcast. It is submitted that this interpretation of the Act is correct. Therefore, once the royalty tariff


\textsuperscript{766} Du Plessis (SAMPLE) Letter to Peter Grealy (Webber Wentzel) (3-09-2008) 8.


\textsuperscript{768} Du Plessis (SAMPLE) Letter to Peter Grealy (Webber Wentzel) (03-09-2008) 4.

\textsuperscript{769} Affidavit 15.

\textsuperscript{770} Affidavit 16; Du Plessis (SAMPLE) Letter to Peter Grealy (Webber Wentzel) (03-09-2008) 4.

\textsuperscript{771} Affidavit 16.
has been settled, the members of the NAB will be obliged to pay royalties for all broadcasts made back-dated as from 2002.

The third issue the NAB would seek determination on is payments of claimed royalties into an escrow or trust account. In terms of the Regulations, should a tariff proposed by a collecting society not be acceptable to potential users, these users shall have the option of paying the amount claimed into an escrow account pending the outcome of a referral to the Copyright Tribunal.\(^{772}\) In order to determine the extent to which sound recordings of SAMPRA members have been used, SAMPRA asked the NAB to require their members to submit their playlists\(^{773}\) since the amendment of the Performers’ Protection Act in 2002. However, the NAB has not co-operated. They claim that these playlists are “proprietary to each of the NAB’s members” and that the content and structure of each the lists “is a trade secret and unique”\(^{774}\). Despite assurances that the amount claimed by SAMPRA would be paid by the NAB into an escrow account to be held by the NAB’s legal representatives,\(^{775}\) it has not yet happened and the NAB seek clarification from the High Court as to whether any escrow payments are to be made in the interim.\(^{776}\)

Lastly, the NAB would seek determination of whether or not payment is to be made in terms of the so-called “mechanical royalties” claimed by SAMPRA,\(^{777}\) and if so, from when is payment due. “Mechanical royalties” refers to a tariff that is to be paid if a broadcaster elects to make a hard copy of a sound recording on a hard drive device and to keep the copy in order to broadcast the sound recording. SAMPRA claim that broadcasters should pay an additional amount of 2,5% of their annual net advertising revenue in terms of this royalty,\(^{778}\) a claim that is disputed by the NAB.\(^{779}\)

The application has not yet been heard due to procedural disputes.\(^{780}\)

It is submitted that the introduction of needletime for performers into South African law was inevitable. Although a relatively established infrastructure exists for the remuneration of

\(^{772}\) Regulation 7(5).
\(^{773}\) A list of sound recordings for broadcast or performance.
\(^{775}\) \textit{Ibid.}
\(^{776}\) Affidavit 17.
\(^{777}\) \textit{Ibid.}
\(^{779}\) Affidavit 17.
\(^{780}\) Alan Johnston (Manager of Business and Information Systems at SAMPRA) as per telephonic conversation dated 4 November 2010.
songwriters for the use of their works within broadcasting, “the notion of paying performers for the use of their neighbouring rights on recordings is practically unheard of in most of Africa.” As previously mentioned, the absence of needletime from South African legislation has been seen to be anomalous and its implementation “absolutely critical to the survival of the [music] industry.”

On 18 November 2010, the Minister of Trade and Industry appointed the Copyright Review Commission, tasked with investigating the various problems faced by artists in South Africa. This arose out of sweeping allegations from artists that royalties owed to them in terms of their needletime right have not been paid to them. The Commission will investigate the effectiveness of the model whereby collecting societies collect these royalties, and whether any collected royalties have been distributed to artists. This development will shine the spotlight firmly on the current needletime dispute and, it is hoped, will assist in bringing the dispute to a speedy resolution in favour of South African artists.

572 The Protection of Traditional Performances

The protection of traditional knowledge has received considerable attention both locally and internationally in the past few years and a special intellectual property law dispensation specifically suited for the developing world that focuses on the creation of new rights and new protection mechanisms is required. On 13 September 2007 the Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly of the United Nations and provides that:

“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They

782 Coetzee Billboard (30-08-2008).
783 Chaired by Judge Ian Farlam and consisting of Professor Musa Xulu, Jean Swanson-Jacobs, Nala Mhlongo, Professor Tana Pistorius and Oupa Leboga.
785 Ibid.
787 Harms 2009 THRHR 182.
also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.

In conjunction with indigenous peoples, states shall take effective measures to recognise and protect the exercise of these rights."\(^{788}\)

When dealing with the protection of traditional knowledge, one of the biggest obstacles is that there is no generally accepted definition.\(^{789}\) Traditional knowledge can be seen to be traditional works consisting of indigenous art works such as bushman paintings, tribal legend and songs.\(^{790}\) It can also be referred to as “knowledge and skills that people in a given community or society developed over time and continue to develop and practice.”\(^{791}\) However, WIPO have advanced the most workable definition to date:

“The term traditional knowledge refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources”\(^{792}\)

Another obstacle facing the protection of traditional knowledge is that there is no consensus on the means of protection.\(^{793}\) Some of the indigenous communities favour positive protection of their traditional knowledge in that they want to benefit financially from the commercialisation of this knowledge. However, others prefer a more defensive protection of their cultural expressions through concern of the social, cultural and psychological damage that unauthorised uses of their traditional knowledge can bring.\(^{794}\)

The TRIPs Agreement provides that member states must consider the protection of traditional knowledge through existing intellectual property law systems, geographical indications, community-based rights and sui generis forms of protection.\(^{795}\) Currently,

\(^{788}\) Article 31.
\(^{790}\) Dean “Red card” Without Prejudice (09-2009) 17.
\(^{792}\) Rengecas & van Harmelen De Rebus (10-2008).
\(^{793}\) Manyathi De Rebus (05-2010) 13.
\(^{794}\) Visser “Some thoughts on making intellectual property work for traditional knowledge” 2002 South African Mercantile Law Journal 656 660.
\(^{795}\) Article 27(3)(b).
there are several pieces of legislation in South Africa that provides for the protection of traditional knowledge in some way. These include the National Heritage Resources Act, the Heraldry Act, the National Environmental Management Biodiversity Act and the Traditional Health Practitioners Act. However, these Acts do not sufficiently protect all the intellectual property elements of traditional knowledge.

Despite objections to the contrary, the DTI opted to provide for the protection of traditional knowledge by amending existing intellectual property laws, rather than by creating new law. The reason advanced for this decision was that protection of traditional knowledge could be achieved in terms of existing laws which already adhered to or respected international agreements, understandings, codes and practices already in force.

In December 2007, a policy framework entitled The Protection of Traditional Knowledge through the Intellectual Property System was approved by Cabinet and resulted in the drafting of a Bill to amend existing intellectual property laws to provide for the protection of traditional knowledge. This Bill was published for public comment on 5 May 2008 but was vigorously opposed by conventional intellectual property lawyers which resulted in it being withdrawn. This was followed by inter-departmental consultations and a revised Bill, entitled the Intellectual Property Laws Amendment Bill, was tabled on 21 April 2010.

The Bill aims to uplift indigenous communities by improving their livelihoods, preventing “bio-piracy” and providing a legal framework for the protection and empowerment of local communities. The Bill attempts to protect traditional knowledge, and the holders of this knowledge, from exploitation. It also aims to ensure that indigenous communities receive recognition as well as financial remuneration for the uses of their knowledge.

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797 18 of 1962.
798 10 of 2004.
800 Ntuli “Trade and Industry to Strengthen Protection of Indigenous Knowledge” DTI.
802 Ntuli “Indigenous Knowledge: Amend Existing Laws” DTI.
803 N 552 in GG 31026 of 5 May 2008.
804 Rengecas & van Harmelen De Rebus (09-2008).
807 Ntuli “Trade and Industry to Strengthen Protection of Indigenous Knowledge” DTI.
808 Harms 2009 THRHR 183.
Furthermore, the Bill aims to facilitate the recording, documenting and categorisation of traditional knowledge for later retrieval.\(^{809}\)

The Bill provides that the Performers’ Protection Act, the Copyright Act, the Trade Marks Act,\(^{810}\) and the Designs Act\(^ {811}\) are to be amended in ways that accord protection to traditional knowledge. The more pertinent proposed amendments to the Performers’ Protection Act will be concentrated on for the purposes of this discussion.

With regard to definitions, the Bill provides for the establishment of the National Council for Traditional Knowledge to oversee traditional knowledge;\(^ {812}\) a national database which shall keep all information regarding, inter alia, traditional performances;\(^ {813}\) and the National Trust Fund for Traditional Intellectual Property. This will consist of separate subfunds which shall vest in and be administered by the registrars of patents, copyright, trademarks and designs into which all income derived from the use of traditional knowledge, including royalties, are to be paid. This fund is to be used for the benefit of indigenous communities.\(^ {814}\)

In terms of the Bill, “indigenous community” is defined to mean any community of people living within the borders of the Republic; or which historically lived in the geographic area located within the borders of the Republic.\(^ {815}\)

The definition of “literary and artistic works” will be amended to include traditional knowledge as one of the species of works to be protected.\(^ {816}\) In addition, a definition of “performance” will be included to mean “any mode of visual or acoustic presentation of a literary, musical, artistic or traditional work, including acting, singing, delivering, declaiming, playing or otherwise performing such work, and includes any such presentation by the operation of a loudspeaker, but excludes such performance by the use of a phonogram, a radio or television broadcast, or by the exhibition of a film, and ‘perform’ has a corresponding meaning.”\(^ {817}\) “Performer” is defined as “an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise performs,

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\(^{809}\) Ntuli “Trade and Industry to Strengthen Protection of Indigenous Knowledge” DTI.

\(^{810}\) 194 of 1993.

\(^{811}\) 195 of 1993.

\(^{812}\) s1(a) & s40A(1).

\(^{813}\) s1(a) & s40C(1); (2).

\(^{814}\) s1(c) & s40D(1); (2); (4).

\(^{815}\) s1(c) & s5(d).

\(^{816}\) s1(d).

\(^{817}\) s1(e).
literary, musical, artistic or traditional works\textsuperscript{818} and “traditional performance” is defined as “a performance which is recognised by an indigenous community as a performance having an indigenous origin and a traditional character”.\textsuperscript{819}

The Performers’ Protection Act will be further amended to allow for the payment of a royalty into the fund by any person who has used a traditional performance for commercial benefit.\textsuperscript{820} The amount to be paid shall be determined by agreement between the performer or the user and the fund.\textsuperscript{821} In the absence of an agreement, the amount of the royalty shall be determined by the representative collecting societies of the parties, the Copyright Tribunal or through arbitration.\textsuperscript{822}

Lastly, the Bill makes allowances for reciprocity by providing that the Minister may enter into an agreement with another state which shall be accorded reciprocity in matters relating to traditional performances for the commercial benefit of indigenous communities. “Reciprocity”, in terms of the Bill, refers to “mutual exchange of favours and benefits between foreign states”.\textsuperscript{823}

Proponents of the Bill claim that by protecting traditional knowledge, economic benefits will be brought to the national economy as well as the agricultural, chemical and health sectors. By using the current intellectual property system to protect traditional knowledge, Africa can benefit from the billions of American dollars that international trade in traditional products generates each year.\textsuperscript{824} In addition, placing traditional knowledge within the domain of intellectual property would enable it to play an important role in the social development of poor communities and would prevent it from being “poached” for financial gain.

However, the Bill has been severely criticised with some being of the view that the Bill is an “abomination that deserves to be thrown on the legal scrapheap”.\textsuperscript{825} Indigenous people all over the world have difficulties asserting property claims in terms of traditional knowledge as national legislation and the judiciary do not recognise collective rights in

\begin{itemize}
\item \textsuperscript{818} S1(f).
\item \textsuperscript{819} S1(g).
\item \textsuperscript{820} S2(3)(a).
\item \textsuperscript{821} S2(3)(b).
\item \textsuperscript{822} S2(3)(c).
\item \textsuperscript{823} S4.
\item \textsuperscript{825} Owen Dean quoted in Karrim Mail & Guardian Online (30-07-2009).
\end{itemize}
traditional property. Existing intellectual property systems do not suit the protection of traditional knowledge as these are individualistic systems, while traditional knowledge is held by communities. Furthermore, protection provided by existing intellectual property systems lasts for a limited period of time while traditional knowledge is held in perpetuity.\textsuperscript{826} Intellectual property law allows the holder of the right to have a monopoly over the uses of the work for a limited time period after which it enters the public domain. However, the Bill attempts to take something out of the public domain and bring it within the realm of protection for the benefit of indigenous communities. “In other words, the purport of protecting traditional knowledge is precisely the antithesis of the system for protecting intellectual property.”\textsuperscript{827}

Criticism has also been levelled at the structure of the Bill with dissenters claiming that the policy document on which the Bill is based “does not provide any factual basis for its proposals; only factoids.”\textsuperscript{828} Dean observes that the Bill requires that these new forms of intellectual property must have an “indigenous origin” and a “traditional culture” but fails to define these terms. Indigenous communities are themselves allowed to determine whether a piece of traditional knowledge possesses the traits of indigenous origin and a traditional culture. This is subjective and could result in legal uncertainty.\textsuperscript{829} In addition, the Bill provides for “traditional intellectual property” which implies that intellectual property has an “indigenous origin” and can be owned by an indigenous community designated as such by the Registrar.\textsuperscript{830} The Bill provides for the establishment of a national council, a national database and a national trust fund but does not specify who will represent the communities in these bodies or how the collected royalties are to be distributed. Furthermore, the Bill constantly alludes to “traditional knowledge” without defining it\textsuperscript{831} and as such, according to Dean:

“[B]y trying to mix oil with water, it (the Bill) will contaminate or undermine long established and internationally recognised principles of intellectual property law. Rather like a parasitical growth on a tree, it will end up destroying the health of the tree.”\textsuperscript{832}

Harms shares this view by stating that the proposals the Bill is based on are fundamentally flawed and will not result in any material benefit for indigenous communities in South

\textsuperscript{826} Rengecas & van Harmelen \textit{De Rebus} (09-2008).
\textsuperscript{827} Dean \textit{Without Prejudice} (09-2009) 17.
\textsuperscript{828} Harms 2009 \textit{THRHR} 183.
\textsuperscript{829} Karrim \textit{Mail & Guardian Online} (30-07-2009).
\textsuperscript{830} Harms 2009 \textit{THRHR} 184.
\textsuperscript{831} Karrim \textit{Mail & Guardian Online} (30-07-2009).
\textsuperscript{832} Dean \textit{Without Prejudice} (09-2009).
Africa. Very little traditional knowledge will actually be protected and South Africa will not be made technologically or otherwise richer. 833

The protection of traditional knowledge is a laudable objective but forward thinkers are of the view that for the protection of traditional knowledge the creation of a separate and customised set of legal rules, namely *sui generis* legislation, is more desirable. 834 The grounds for this argument are that indigenous knowledge does not meet the novelty and originality requirement stipulated by South African intellectual property laws and cannot be attached to an individual creator as required. 835 However, these arguments have been dismissed by the DTI as delaying tactics by saying that insofar as the commercialisation of intellectual property is concerned, indigenous knowledge can be treated in the same manner as other forms of intellectual property. 836

The raging debate concerning the protection of traditional knowledge has led to the DTI moving to bring in experts on intellectual property in order to amend the Bill for reconsideration in February 2011 as per concerns raised at the public hearings. 837 The chairwoman of the DTI conceded that the Bill requires “far-reaching and serious amendment” after a lengthy investigation into how to protect the commercialisation of traditional knowledge which involved visits to the WTO and the WIPO in Geneva. 838 This development suggests that the proposal to draft *sui generis* legislation has been rejected.

It is submitted that this view is incorrect. The construction of traditional knowledge is too far removed from that of traditional forms of intellectual property and cannot easily be reconciled. A *sui generis* piece of legislation can be tailor-made to accommodate the peculiarities of traditional knowledge and to meet the needs of the communities that possess it. To modify existing intellectual property laws to include traditional knowledge is tantamount to fitting a square peg into a round hole and would ultimately do traditional knowledge, and the people it aims to benefit, a disservice.

833 Harms 2009 *THRHR* 175.
836 Ibid.
838 Ibid.
CONCLUSION

From a South African perspective, the development of performers’ rights has been slow when compared to its British counterparts. Performers were only accorded rights in 1967 with the enactment of the Performers’ Protection Act which followed the Rome Convention.

The TRIPS Agreement resulted in significant changes to the Performers’ Protection Act brought about by the Intellectual Property Laws Amendment Act in 1997 which increased the term of protection accorded to performers from 20 to 50 years. More noteworthy changes were brought about following the approval of the WPPT. Although South Africa is yet to accede to the Treaty, the Performers’ Protection Amendment Act was passed in 2002 with a view to enabling South Africa to accede to the WPPT at some point in the future. This Act amended the Performers’ Protection Act in several significant ways, namely the inclusion of “expressions of folklore” within the ambit of works to be protected and the re-introduction of needletime into South African law. As a result, performers are accorded not only rights of a non-proprietary nature with regard to uses of their performances, but also an enforceable right of an economic nature.

The emergence of needletime has necessitated the establishment of collecting societies to administer royalties collected. These are to be regulated in terms of the Regulations on the Establishment of Collecting Societies in the Music Industry, 2006.

Currently, the law relating to the enforcement of royalties is uncertain, resulting in a dispute worth millions of rands between the NAB and various accredited collecting societies which has yet to be resolved.

Lastly, the most recent development has been the proposal of a Bill to bring traditional knowledge within the ambit of intellectual property law, namely the Intellectual Property Laws Amendment Bill, 2010. Despite its positive aims, intellectual property practitioners have condemned the Bill, preferring that protection of traditional knowledge be brought about through sui generis legislation.

The next Chapter will look at the content of performers’ rights in the jurisdictions of the United Kingdom and South Africa respectively with the intention of identifying comparable areas in order to recognise ways in which the protection accorded to performers in South Africa can be improved.
CHAPTER SIX: COMPARATIVE ANALYSIS OF CURRENT PERFORMERS’ RIGHTS AS BETWEEN THE UNITED KINGDOM AND SOUTH AFRICA

6.1 INTRODUCTION

While copyright protects the creator of the work, performers’ rights protect the individual performing an interpretation of the work. Owing to the fact that a performance is generally of a work already protected by copyright and therefore dependent upon copyright in order to subsist, performers’ rights are commonly known as “neighbouring” or “related” rights. The main purpose of related rights is to grant legal protection to persons who contribute to making these works available (to the public) which contain enough creativity to justify the recognition of a copyright-like right.  

As a form of related rights, performers’ rights are often viewed as inferior to copyright. This is evident in the lower level of protection that is accorded performers to that granted to copyright owners. However, although it is true that a song can exist without a singer and a singer cannot perform without a song, the “unperformed song has little value either to the composer or to society at large.” The simple truth is that it is the performer who gives life to a composer’s work and who is ultimately responsible for whether or not the work is commercially successful. 

The extent of the protection that is accorded to performers in the jurisdictions of the United Kingdom and South Africa respectively will be looked at and compared. Special attention will be paid to the definition of a “performer”; the of a “performance”; the nature of performers’ rights; exceptions to infringement; the term of protection; the retroactivity of the legislation; and the enforcement measures in place.

In the United Kingdom, the Copyright, Designs and Patents Act, 1988 is divided into seven parts. Part I deals specifically with copyright while Part II provides for the protection of performers and their performances. Therefore, in order to deal with the above-

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842 S1-179.
843 S180-Schedule 2A.
mentioned aspects, Part II of this Act will be concentrated on with reference to Part I where necessary.

In order to analyse the position of performers’ rights in South Africa, the Performers’ Protection Act 11 of 1967 as amended will be focussed on with reference to the Copyright Act 98 of 1978 where necessary.

Comparable areas will be identified in order to ascertain whether there are any improvements that can be made to the level of protection granted to performers in South Africa.

6 2 DEFINITION OF A PERFORMER

6 2 1 General

The beneficiary of protection in terms of any regime of performers’ rights is the individual giving a rendition of a created work such as the singer of a composed song; an actor in a written play; or a dancer performing a choreographed dance. This individual is commonly known as a “performer”.

6 2 2 United Kingdom

Although “performer” is defined in all the international instruments designed to protect the rights of performers, the Copyright, Designs and Patents Act does not define “performer” but provides that performers are given rights in respect of their performances.844

Generally, performers are regarded as those individuals who participate in actions defined as being part of various categories of the verb “to perform” but a certain flexibility is left to national legislatures to define the scope of a “performance”.845

“Performance” is defined in the Act as a dramatic performance which includes dance and mime; a musical performance; the reading or recitation of a literary work; and a variety act or similar presentation.846 By implication, the classes of performers in the United Kingdom are actors, dancers, mime artists, musicians as well as story tellers. Since the Act does not define “variety act”, performers that fall within this category are potentially large. This

844 S180(1)(a).
846 S180(2).
means that jugglers, acrobats, clowns, puppeteers, stuntmen and catwalk models could all be accorded protection.\textsuperscript{847} Performers of certain expressions of folklore, such as a witchdoctor performing his charms, could also be protected within this category.\textsuperscript{848}

Essentially, the English Act does not only accord protection to scripted works. The width of the definition means that performers of improvised works of every description, with the exception of performers of literary works, are also granted protection.\textsuperscript{849}

\section*{6 2 3 South Africa}

Although South Africa has yet to accede to the WPPT, the Performers' Protection Act has adapted the definition provided for by this Treaty and defines a “performer” as:

“an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise performs, literary or artistic works”.\textsuperscript{850}

This definition must be read together with the definition of “literary and artistic works” which includes musical, dramatic, dramatico-musical works, as well as expressions of folklore.\textsuperscript{851}

As was stated in \textit{Pollecutt}, the Act only protects performances of “works”. Although the Performers' Protection Act does not define “works”, the meaning of the Copyright Act should be followed.\textsuperscript{852} This Act provides that a “work” is the result of original creative activity that has been reduced to a material form.\textsuperscript{853} Essentially, this means that only performers of scripted works qualify for protection in South Africa, unlike in the United Kingdom where improvised works are also protected. Therefore, jugglers, acrobats, and similar variety artists are not protected in terms of South African law.\textsuperscript{854}

As previously mentioned, the inclusion of “expressions of folklore” within the ambit of protection is cause for some concern owing to the fact that many of these are not reduced

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{847} Arnold \textit{Performers' Rights} 64-65.
\item\textsuperscript{848} Ibid.
\item\textsuperscript{849} 66.
\item\textsuperscript{850} S1(1).
\item\textsuperscript{851} Ibid.
\item\textsuperscript{852} Dean “Performers’ Protection” in \textit{Handbook of South African Copyright Law} 1-112.
\item\textsuperscript{853} S2(2).
\item\textsuperscript{854} Dean “Performers’ Protection” in \textit{Handbook of South African Copyright Law} 1-112.
\end{enumerate}
\end{footnotesize}
to a material form. Dean submits that in order for performers of traditional expressions to qualify for protection in terms of the Act, the performance must be of a scripted work.  

6.2.4 Analysis

With the inclusion of “variety act or similar presentation”, the amount of genres of performers protected in the United Kingdom is greater than those accorded to performers in South Africa.

In addition, the English Act seems to extend protection to performers of improvised performances whereas the South African Act only extends protection to performers of scripted works, namely those that have previously been reduced to a material form.

6.3 DEFINITION OF A PERFORMANCE

6.3.1 General

The subject matter of protection under a regime of performers’ rights is a “performance”. A “performance” is not defined in any of the international instruments. However, as the subject matter of protection, a definition serves the purpose of identifying the activities that fall within the demarcated boundaries and by implication, those activities that fall outside them.

WIPO describes “performance of a work” as:

“[G]enerally understood as meaning the presentation of a work to a group of listeners by means of such technical devices as microphones, radio or television receiving sets, record players, or projecting. [sic] Performance of expressions of folklore is consistent with the common understanding of the term ‘performances of literary and artistic works’ as used in the Rome Convention. Performance, however, may also consist of presentations other than performing such works, for example in the case of performances of variety artists.”

855 Ibid.
856 Should the Intellectual Property Laws Amendment Bill, 2010 be enacted in its current form, the definition of “performer” will be expanded to also include any individual who performs traditional works.
857 Morgan International Protection 13.
858 WIPO Glossary of Terms of the Law of Copyright and Neighbouring Rights as referred to in Morgan International Protection 16.
A definition of a “performance” should involve more than just differentiating between which performances should be protected from those which should not. A legal definition based on principle is therefore preferred.

Morgan proposes that:

“A performance is the transitory activity of a human individual that can be perceived without the aid of technology and that is intended as a form of communication to others for the purpose of entertainment, education or ritual.”

From this definition, the following characteristics are apparent:

a) A natural person must perform the activity;

b) The activity must be a performative activity;

c) The presence of other individuals is essential; and

d) The performer must have the intention to have an effect on other individuals.

6 3 2 United Kingdom

A “performance” is defined in the Copyright, Designs and Patents Act as a dramatic performance which includes mime and dance; a musical performance; a reading or recitation of a literary work; and a performance of a variety act or similar presentation.

“Dramatic performance” is not defined in the Act except to provide that it includes dance or mime. The same definition is advanced for “dramatic work” and does not extend beyond this.

In Norowzian v Arks Ltd a “dramatic work” was defined as:

“a work of action, with or without words or music, which is capable of being performed before an audience.”

In essence, the departure from a “dramatic work” to a “dramatic performance” means that performers’ rights can subsist in a dramatic piece that is improvised provided it consists of two aspects, namely movement and speech. Movement is regarded as the use of facial

859 Morgan International Protection 16.
860 Ibid.
861 27.
862 24.
863 S180(2).
864 S3(1).
866 73.
and bodily gestures to convey meaning to an audience, while speech refers to the use of
the voice to convey similar meaning to an audience. 867

“Musical performance” is similarly not defined in the Act but a “musical work” is:

“a work consisting of music, exclusive of any words or action intended to be
sung, spoken or performed with the music.” 868

“Music” is also not defined, but should be wide enough to include any sound capable of
being understood as music even if some people would consider it noise. 869 Again, this
implies that a “musical performance” need not be of a “work”. Therefore, an improvised
musical performance falls within the ambit of protection. 870

The Act defines a “literary work” as any work which is written, spoken or sung not including
a dramatic or musical work. 871 Therefore, in order to qualify for protection, the work must
already exist in order for it to be recited. 872

The term “variety act” is not defined in the Act. It appears that the use of this term stems
from the Report of the Whitford Committee which used the term “variety artistes” to
describe magicians, clowns, jugglers, acrobats and other similar performers. 873 As
previously mentioned, certain expressions of folklore could also be included within this
definition.

The performance of “artistic works” is not accorded protection in terms of Part II of the
English Act.

Arnold submits that sporting performances fall outside the ambit of protection of the
English Act. However, it could be argued that certain forms of sports, such as ballroom
dancing and figure skating, could be regarded as forms of dance. Similarly, if protection is
extended to circus acts, gymnastics could then be categorised as a form of variety act.
Since sporting performances are usually improvisations by performers within the limits of
the rules imposed by their particular sport; and their performances are just as susceptible

867 Arnold Performers’ Rights 60.
868 S3(1).
869 Arnold Performers’ Rights 61.
870 Ibid.
871 S3(1).
872 Arnold Performers’ Rights 62.
873 64.
to commercial exploitation as ordinary performers, the economic considerations should be
the same. However, the presence of competition seems to be a distinguishing factor.\textsuperscript{874} 875

The current position is that there is “no persistent lobby claiming that sports presentations
cannot be adequately ‘commodified’ under present contractual and associated
arrangements.”\textsuperscript{876} Therefore, sport is not a “performance” in terms of the Act.

The Act’s definition of a “performance” includes the condition that the performance must
be live and given by one or more individuals in order to qualify for protection.\textsuperscript{877} The use
of the word “individual” without a corresponding requirement that the performance be
professional implies that no specific skill on the part of the performer is required in order to
qualify for protection.\textsuperscript{878} The Act does not define “live” but two possible meanings are
apparent. Firstly, it refers to a performance that is not pre-recorded; and secondly, a
performance given in the presence of an audience.\textsuperscript{879} In other words, the use of a
recorded performance during another live performance is not protected by the Act.\textsuperscript{880} The
stipulation that the performance must be made by one or more individuals implies natural
persons. Furthermore, as was decided in \textit{Experience Hendrix}, where one performance is
tendered by many performers, such as a concert given by an orchestra, each individual

\textsuperscript{874} 65.
\textsuperscript{875} A discussion paper issued by the Economic Development Ministry in New Zealand has
suggested that sporting performances could be subject to performers’ rights. With its focus
primarily on the game of rugby, the paper identifies that watching a sporting activity, live or on
television, has become a phenomenally popular activity world-wide and it has become
increasingly easy to copy and disseminate these performances. However, to extend protection
to sportsmen and sportswomen could lead to unnecessary legal complications. Granting
performers’ rights to rugby players, for example, means that the permission of every player
would be needed before a game could be broadcasted on television. Similarly, each player
would then also be entitled to a royalty every time the game he played in is broadcasted
anywhere in the world. Furthermore, should performers’ rights be extended to sportspeople
such as gymnasts, they would have the right to prevent certain uses of their performances. The
development of a sport like gymnastics is dependent on gymnasts who develop and perform, in
competition, movements and routines more daring that what has previously been performed.
Granting these performers the right to prevent the use of their performances in the nature of
copyright would mean that no gymnast would be allowed to perform a movement developed by
another gymnast without the permission of the original gymnast. The development of the sport
would subsequently be stunted. See Matangi “Performer rights could cover rugby” \textit{The
in this regard.

\textsuperscript{876} Cornish & Llewelyn \textit{Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights}

\textsuperscript{877} S180(2).

\textsuperscript{878} Arnold \textit{Performers’ Rights} 70.

\textsuperscript{879} 68.

\textsuperscript{880} Cornish & Llewelyn \textit{Intellectual Property} 525.
performer acquires his own performer’s right in relation to his contribution to the overall collective performance.  

The Act extends the reach of protection by providing that in order to qualify for protection; the performance must be given by a qualifying individual, or must take place in a qualifying country. A “qualifying country” is defined in the Act to mean the United Kingdom; another member of the European Economic Community; or a country designated by an Order in Council as enjoying reciprocal protection. A “qualifying individual” means a citizen or resident of a qualifying country.

As was held in *Experience Hendrix*, when deciding whether a performance is a qualifying performance in terms of the Act, the date of the performance must be considered. This means that a performance does not become a qualifying performance simply because the performer in question has become resident in a qualifying country. A performance will become a qualifying performance if the country in question subsequently becomes a qualifying country.

Reciprocal protection can be granted to a convention country, or a country that provides adequate protection for British performances in terms of its domestic laws. The expression “convention country” refers to any country which is a party to an international instrument protecting performers’ rights that the United Kingdom is also a party to. Currently, these include the Rome Convention, the TRIPs Agreement and the WPPT.

According to the Act, “British performances” includes any performance given by a British citizen or resident of the United Kingdom; and any performance taking place anywhere in the United Kingdom. Included within the geographical boundaries of the United Kingdom for the purposes of the Act are the territorial waters and encompasses acts done on structures or vessels in the United Kingdom sector of the continental shelf.

882 S181.
883 S206.
884 Arnold *Performers’ Rights* 73.
885 S208(1).
886 S208(2).
887 S209.
888 The extent to which protection is granted to convention countries as well as non-convention countries that are granted reciprocal protection are contained in the sixth column of the table contained in the Schedule to the Copyright and Performances (Application to Other Countries) Order 2009 which was discussed in Chapter Four.
889 S208(3).
Protection is also extended to performances taking place on British ships, aircraft and hovercrafts.  

6.3.3 South Africa

The Performers’ Protection Act does not define a “performance”. The definitions of “performer” and “literary and artistic works” must be read together in order to determine which activities qualify as performances in terms of the Performers’ Protection Act. Therefore, performances of literary, dramatic, musical, dramatico-musical, artistic works and expressions of folklore are protected. As was previously stated, the Act does not protect performances which are not of “works” within the meaning of the Copyright Act. Therefore, although the Act does not supply definitions for the above-mentioned classes of performances, the definitions provided for by the Copyright Act will suffice.

A “literary work” is defined as novels, stories and poetical works; dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts; textbooks, treatises, histories, biographies, essays and articles; encyclopaedias and dictionaries; letters, reports and memoranda; lectures, speeches and sermons; and tables and compilations. According to Dean, the term “literary work” is regarded as a misnomer since it includes dramatic works which are defined separately in the Act. The term “written works” would have been a more accurate description.

The Copyright Act defines a “dramatic work” as including:

“a choreographic work or entertainment in dumb show, if reduced to the material form in which the work or entertainment is to be presented”.

It is submitted that the word “dumb” implies that a dramatic work includes those without speech or sound, such as mime. This definition also indicates that if the choreography of the movement was written down or verbally recorded, the requirement that the work be reduced to a material form would be satisfied.

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890 S210.
891 Although a “performance” is defined in s(1)(1) of the Copyright Act, it is used in a different context from performers’ rights and refers mainly to the act of communicating a work to the public by mechanical or digital means.
892 Dean “Performers’ Protection” in Handbook of South African Copyright Law 1-112.
893 Ibid.
895 Ibid.
Before 1992, there existed no definition of the term “musical work”. The Act now defines “musical work” as:

“a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music”.

The Act does not define “dramatico-musical work” but it is submitted that this refers to works that are the combination of a dramatic work and a musical work, such as a musical.

An “artistic work” is defined as meaning paintings, sculptures, drawings, engravings and photographs; works of architecture; and certain works of craftsmanship. Unlike the English Act, the Performers’ Protection Act includes performances of “artistic works” within the ambit of the Act. It is unclear how these works can translate into performances.

The term “expressions of folklore” is not defined in any of the international instruments, the Copyright Act or the Performers’ Protection Act. The most workable definition to date can be found in the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions which provides that expressions of folklore are “productions of the characteristic elements of a community’s artistic heritage”.

Since many “expressions of folklore” are not scripted, this category seems to be the exception to the general rule that performances are only protected if they are of “works” within the meaning of the Copyright Act. However, as previously mentioned, Dean submits that protection should only be extended to scripted forms of expressions of folklore.

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896 Inserted by the Copyright Amendment Act 125 of 1992.
898 S1(1).
899 S1(1) of the Copyright Act.
901 Morgan International Protection 41.
902 Should the Intellectual Property Laws Amendment Bill, 2010 be enacted, a definition of “performance” will be inserted into the Performers’ Protection Act to mean: “any mode of visual or acoustic presentation of a literary, musical, artistic or traditional work, including acting, singing, delivering, declaiming, playing or otherwise performing such work, and includes any such presentation by the operation of a loudspeaker, but excludes such performance by the use of a phonogram, a radio or television broadcast, or by the exhibition of a film”. Furthermore, a definition of “traditional performance” will similarly be inserted to mean a performance recognised by an indigenous community to have an indigenous origin and a traditional character.
The South African Act provides for certain requirements that must be met before performances are granted protection. Protection will only be accorded to performers if their performance takes place; is broadcasted without fixation; or is first fixed in South Africa. Furthermore, protection is extended to foreign performances that takes place; is broadcasted without fixation; or is first fixed in a country which is a member of the WTO. In this regard, the application of the needletime right conferred on performers in terms of section 5(1)(b) of the Performers’ Protection Act is strictly reciprocal.

Owing to the requirement that performances are only worthy of protection if based on scripted works, sports performances are, as in the United Kingdom, currently not protected in South Africa. Therefore, sportspeople seeking protection in South Africa should seek relief on the basis of unlawful competition, infringement of the right to privacy, or infringement of personality traits.

6.3.4 Analysis

With the exception of “expressions of folklore”, “dramatico-musical works” and “artistic works” (as provided for by the South African Act); and “variety acts” (as provided for by the English Act), both jurisdictions include the same categories of performances within the ambit of protection. These are “literary works”, “dramatic works” and “musical works”.

“A literary work” is generally defined the same way in both jurisdictions with it being anything written. However, the South African definition also includes “dramatic works” which is defined separately elsewhere in the Act. The reason for its inclusion within the definition of “literary works” is unclear. In the United Kingdom, the definition of “literary works” provides that dramatic works and musical works are specifically excluded.

With regard to “dramatic works” the definition provided for by South African legislation is more comprehensive and detailed than that provided for by the English Act. The English Act defines it only as including dance or mime while in South Africa it is a choreographed work or entertainment with or without sound.

The definitions of a “musical work” in both jurisdictions are identical being:

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903 S3.
904 S4.
“a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.”

The most salient difference between the United Kingdom and South Africa regarding performances is that the United Kingdom protects performances of unscripted or improvised works, while South Africa only protects performances of scripted works.

6.4 TYPES OF PERFORMERS’ RIGHTS

6.4.1 General

The first owner of the rights to a performance is the performer. In both the United Kingdom and South Africa, performers are given exclusive rights to prevent certain acts from being committed in relation to their performances without their consent.

In the United Kingdom, the Copyright, Designs and Patents Act provides that four types of rights are accorded performers. These are non-property rights, property rights, rights to remuneration and moral rights.

In South Africa, the Performers’ Protection Act does not provide for specific types of rights. However, the rights provided for are in the nature of non-property rights and economic rights. The former are rights aimed at preventing the act of illegal recording, also known as bootlegging. The latter refers to the right to receive a royalty every time a performance, which is incorporated in a recording, is communicated to the public.

6.4.2 United Kingdom

6.4.2.1 Non-property rights

In terms of the Copyright, Designs and Patents Act a performer has the right to prevent anyone from committing certain acts without his consent.

The performer has the right to prevent anyone from making a recording of the whole or a substantial part of a performance directly from a live performance. This right is sometimes regarded as a fixation right. The Act defines a “recording” as a film or sound recording that is made directly from a live performance, a broadcast of a performance, or

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907 S182(1)(a).
908 134.
directly or indirectly from another recording of a live performance. As mentioned above, the word “live” is not defined in the Act but should mean that which is not pre-recorded.

The second way in which a performer’s non-property rights can be infringed is if anyone broadcasts live the whole or a substantial part of a performance without the consent of the performer. For the purposes of the Act, “broadcast” is broadly defined as an electronic transmission of visual images, sounds or other information which is transmitted simultaneously to the public.

A performer’s non-property rights are also infringed if a recording of the whole or a substantial part of a performance is made directly from a broadcast of a live performance without his consent. This refers to the practice of recording a live concert that is being broadcasted on radio or television, by means of a recording device.

The fourth way in which these rights can be infringed is if someone shows or plays in public the whole or a substantial part of a performance by means of a recording which the exhibitor knows, or has reason to believe, was made without a performer’s consent. The requirement that the infringer must know or have reason to believe implies knowledge of all the relevant issues and imports some actual knowledge on the part of the person committing the offence. “In public” is not defined in the Act but the decisive factor is the nature of the audience, not the size. Therefore, a public performance is one for an audience that is not domestic or quasi-domestic in nature.

The performer also has the right to prevent the communicating to the public of the whole or a substantial part of a performance by means of a recording which the communicator knows, or has reason to believe, was made without a performer’s consent. “Communication to the public” is defined in the Act as transmitting a performance to the

909 S180(2).
910 S182(1)(b).
911 S6(1).
912 S182(1)(c).
913 S183(a).
914 See Gaumont British Distributors Ltd v Henry [1939] 2 KB 711, [1939] 2 All ER 808 DC; R v Bannen (1844) 1 Car & Kir 295 CCR; R v Chainey [1914] 1 KB 137 CCA; R v Hallam [1957] 1 QB 569, [1957] 1 All ER 665 CCA.
915 Arnold Performers’ Rights 147.
916 See Jennings v Stephens [1936] 1 Ch 469.
917 S183(b).
public by means of electronic transmission in such a way that the public can access it from a place and at a time individually chosen by them.\textsuperscript{918}

A performer’s non-property rights are also infringed if someone imports into the United Kingdom a recording which the importer knows, or has reason to believe, is an illicit recording for purposes other than private and domestic use.\textsuperscript{919} The word “import” refers to the act of bringing something into the country.\textsuperscript{920} Furthermore, the use must be commercial in order for it to be an infringement.\textsuperscript{921} The term “illicit recording” refers to a recording of the whole or a substantial part of a performance, made without the performers’ consent, for uses other than for private purposes.\textsuperscript{922} Therefore, by implication, a recording of a performance made for private purposes, without the performers consent, is not infringement.

The last form of non-property rights that can be infringed is the act of possessing, selling, letting for hire, offering for sale or hire, or distributing illicit recordings as a business concern.\textsuperscript{923} The obvious interpretation of this provision is that in order for there to be infringement, the dealing in illicit recordings must be done in the course of business.\textsuperscript{924} This means that if the dealing is not done in the course of business, then there will be no infringement of this right. Therefore, the meaning of the phrase “in the course of business” is important. The Act defines “business” to include a trade or profession but does not extend beyond this.\textsuperscript{925} In order to qualify as a business for the purposes of infringement, two elements must be present. The first is that transactions must be carried out for the purpose of making money; and the second is that there must be transactions that have some degree of regularity which forms part of the normal business practice.\textsuperscript{926}

The above-mentioned rights are also referred to as “rights against bootlegging.”\textsuperscript{927} Bootlegging is commonly known as the unauthorised recording of a performer’s live performance that has not been previously released.\textsuperscript{928} The most accessible source of material for a bootlegger involves the surreptitious recording of a live concert by either

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{918} S20(2).
\item \textsuperscript{919} S184(1)(a).
\item \textsuperscript{920} See Infabrics Ltd v Jaytex Shirt Co. Ltd [1980] 1 Ch 282 CA; [1982] AC 1; [1984] RPC 403.
\item \textsuperscript{921} S184(1)(a).
\item \textsuperscript{922} S197(2).
\item \textsuperscript{923} S184(1)(b).
\item \textsuperscript{924} Bainbridge \textit{Intellectual Property} 153.
\item \textsuperscript{925} S178.
\item \textsuperscript{926} Arnold \textit{Performers’ Rights} 153-154.
\item \textsuperscript{927} Cornish \& Llewelyn \textit{Intellectual Property} 523.
\item \textsuperscript{928} Maynor “Just let the music play: How classic bootlegging can buoy the drowning music industry” \textit{2002 Journal of Intellectual Property Law} 173 175.
\end{itemize}
\end{footnotesize}
recording the show with a small microphone from the audience; or generating a recording directly through the sound desk, usually with the unauthorised collusion of the sound engineer.  

These forms of infringement can further be divided into primary and secondary infringements. Primary infringement refers to the making of an article that can be dealt with in ways that amounts to secondary infringement. Therefore, in terms of performers’ rights, primary infringement concerns the actual recording of a live performance; the broadcasting of a live performance; or the recording a broadcast of a live performance. In order to qualify as primary infringement there must be access to the original.

Secondary infringement refers to dealing in an article that was made through the act of primary infringement. In other words, it involves the dealing with or the facilitating of making copies of recordings of live performances. In terms of performers’ rights, secondary infringement concerns showing, playing or communicating to the public the whole or a substantial part of a live performance recorded without the performer’s consent; as well as importing, possessing, selling, letting for hire, offering for sale, or distributing a recording which the dealer knows, or has reason to believe, is an illicit recording of a live performance.

The Act does not provide clarity on what constitutes a “substantial part” of a performance. The courts decide substantiality from the viewpoint of copyright which can be approached in two ways. The first approach entails the “rule of thumb” maxim expressed in University of London Press Ltd v University Tutorial Press Ltd as “what is worth copying is prima facie worth protecting”. The second approach is contained in several dicta which support the view that substantiality is an issue of impression with Lord Hoffman stating in Designers Guild Ltd v Russell Williams (Textiles) Ltd that “the more abstract

929 176.
930 Arnold Performers’ Rights 131-132.
932 Arnold Performers’ Rights 131.
933 Day “Primary and secondary copyright infringement” Lawdit.
934 Arnold Performers’ Rights 132.
935 [1916] 2 Ch 601.
936 610.
937 See Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 WLR 273.
938 [2001] 1 WLR 2416.
and simple the copied idea, the less likely it is to constitute a substantial part.” The quality of what has been used or copied is taken into account as well as the quantity.\textsuperscript{939}

A performer’s non-property rights are generally not assignable.\textsuperscript{940} However, the performer may provide for these rights to pass through testamentary disposition.\textsuperscript{941} Should he not have named anyone to receive these rights, they will fall into his deceased estate.\textsuperscript{942}

\section*{6 4 2 2 Property rights}

In the United Kingdom, performer’s property rights correspond to those accorded to copyright owners.\textsuperscript{943}

A performer’s “reproduction right”\textsuperscript{944} is infringed if a copy of a recording is made of the whole or a substantial part of a performance without the performer’s consent.\textsuperscript{945} This includes the making of copies that are transient or incidental,\textsuperscript{946} made directly or indirectly.\textsuperscript{947} Therefore, uploading a recording of a performance onto a computer is an infringement\textsuperscript{948} as is displaying a recording on a television screen.\textsuperscript{949}

A performer’s “distribution right”\textsuperscript{950} is infringed if anyone issues copies of a recording of the whole or a substantial part of a performance to the public without the performer’s consent.\textsuperscript{951} In this context, the term “issue to the public” is defined as circulating copies in and outside of the European Union that had not previously been circulated without the permission of the performer.\textsuperscript{952} The act of putting copies into circulation refers to any act of distribution, sale, hiring or lending of infringing copies to the public.\textsuperscript{953}

\begin{flushright}
\textsuperscript{939} Arnold Performers’ Rights 132.
\textsuperscript{940} Unlike property rights, the Act does not provide for non-property rights to be transmissible by operation of law. Therefore, it is submitted that should a performer be declared insolvent, these rights will not form part of his insolvent estate.
\textsuperscript{941} S192A(2)(a).
\textsuperscript{942} S192A(2)(b).
\textsuperscript{943} Bently & Sherman Intellectual Property Law 297.
\textsuperscript{944} Bainbridge Intellectual Property 292.
\textsuperscript{945} S182A(1).
\textsuperscript{946} S182A(1A).
\textsuperscript{947} S182A(2).
\textsuperscript{948} Bainbridge Intellectual Property 292.
\textsuperscript{949} See Football Association Premier League Ltd v QC Leisure [2008] EWHC 1411 Ch.
\textsuperscript{950} See Bainbridge Intellectual Property 292.
\textsuperscript{951} S182B(1).
\textsuperscript{952} S182B(2).
\textsuperscript{953} Arnold Performers’ Rights 140.
\end{flushright}
The “rental and lending right”\textsuperscript{954} is infringed when a person rents or lends copies of a recording of a performance to the public without a performer’s consent.\textsuperscript{955} The Act defines “rental” as the making a copy of a recording available for use on the condition that it may be returned, for direct or indirect commercial gain.\textsuperscript{956} “Lending” means the making a copy of a recording available for use on the condition that it may be returned, for direct or indirect commercial gain, through an establishment that is accessible to the public.\textsuperscript{957}

The “making available right”,\textsuperscript{958} is infringed when a recording of a performance is made available to the public without a performer’s consent by means of electronic transmission in such a manner that the public are able to access it from a place and at a time of their choosing.\textsuperscript{959} The act of uploading recordings of performances onto the Internet so that members of the public can download them is covered by this prohibition.\textsuperscript{960}

Infringement of property rights are forms of primary infringement.\textsuperscript{961}

Unlike non-property rights, a performer’s property rights are transmissible through assignment, testamentary disposition or by operation of law as personal or moveable property.\textsuperscript{962} These assignments must be in writing and must be signed by or on behalf of the assignor.\textsuperscript{963} An assignment of these rights under the Act can be partial so as to apply to one or more, but not all of the aspects requiring the owner’s consent; or to only a part of the time period for which the rights apply.\textsuperscript{964} However, it was held in \textit{Wilden Pump Engineering Co v Fusfeld}\textsuperscript{965} that the right to institute legal proceedings and to claim damages for past infringements is not included in an assignment unless expressly provided for.\textsuperscript{966}

\begin{thebibliography}{966}
\footnotesize
\item Bainbridge \textit{Intellectual Property} 292.
\item S182C(1).
\item S182C(2)(a).
\item S182C(2)(b).
\item Bainbridge \textit{Intellectual Property} 292.
\item S182CA(1).
\item Arnold \textit{Performers’ Rights} 145.
\item 131.
\item S191B(1).
\item S191B(3).
\item S191B(2).
\item (1985-7) 8 IPR 250.
\item Arnold \textit{Performers’ Rights} 96.
\end{thebibliography}
6423 Rights to remuneration

The Copyright, Designs and Patents Act provides for two rights to equitable remuneration to be paid to performers for the uses of their performances. These rights are neither property rights nor non-property rights but are analogous to the latter.\footnote{110.}

The first is a right to receive remuneration from the owner of the copyright in a commercially published sound recording if it is played or broadcasted in public.\footnote{S182D(1).} This refers to the right that performers have to receive a royalty whenever their performances are broadcasted in public. This includes remuneration for broadcasts on radio and television as well as those taking place in eateries, shopping centres and places of work.\footnote{PPL “Why do I need a license? A guide for business” http://content.yudu.com/Library/A1lx1f/WHYDOINEEDAMUSICLICE/resources/index.htm?referrerUrl=http%3A%2F%2Fwww.ppluk.com%2Fen%2Fmusic-users%2FWhy-you-need-a-licence%2F 5 (accessed 04-01-2011).}

In the context of the Act, “published” refers to the issuing of copies of the recording to the public.\footnote{Lambert “Copyright and Passing off” 1999 IP/IT-Update http://www.ipit-update.com/copy53.htm (accessed 20-12-2010).} In Infabrics the House of Lords held that whether in terms of the common law or statute, “publishing” and “publication” are fundamental expressions which mean “making available to the public”. Therefore, “publishing” refers to the making available to the public of copies that had previously not been published in the United Kingdom.\footnote{Arnold Performers’ Rights 113.}

The term “owner of the copyright” is construed to mean “the person who has the exclusive right to authorise the user”.\footnote{Claiming royalties from places of employment has caused an outcry in the United Kingdom in recent years with Kwik-Fit being sued for £200,000 in unpaid license fees for music that gets played by radios on their premises. See BBC “Kwik-Fit sued over staff radios” BBC News (05-10-2007) http://news.bbc.co.uk/1/hi/scotland/edinburgh_and_east/7029892.stm (accessed 15-09-2008) in this regard. Also in the United Kingdom, action was instituted against Chief Constable Steve Finnigan in the High Court for unlicensed music being played in 34 police stations in his county of Lancashire. See Enigmax “Police chief faces high court anti-piracy action” Torrentfreak (12-06-2008) http://torrentfreak.com/police-chief-faces-high-court-anti-piracy-action-120608/ (accessed 15-09-2008) in this regard. In 1996, the American Society of Composers, Authors & Publishers (ASCAP) informed the Girl Scouts of the United States of America that they must pay license fees to use any of the four million songs belonging to their members. The demand covered not only the broadcasting of those songs but also the singing of any of those songs around the campfire. See Bumiller “Ascap asks royalties from Girl Scouts, and regrets it” The New York Times (17-12-1996) http://www.nytimes.com/1996/12/17/nyregion/ascap-asks-royalties-from-girl-scouts-and-regrets-it.html (accessed 15-09-2008) in this regard.}

Recording companies generally own the copyright in sound
recordings, while performers own the rights to the performances incorporated in the sound recordings.

In the United Kingdom, this royalty must be claimed from the collecting society that administers these rights on behalf of rights owners. The Act defines a “collecting society” as any organisation whose main objective is the exercise of the right to equitable remuneration on behalf of more than one performer. A collecting society is a non-profit organisation with four main functions:

a) They license works in which copyright has been assigned to them or for which they act as agent on behalf of their members;
b) They monitor the use of their members performances and collect revenues;
c) They distribute collected royalties to members; and
d) They enter into reciprocal arrangements with foreign collecting societies in order to collect and distribute royalties earned nationally, and to receive and distribute royalties earned abroad.

In the United Kingdom, these functions are mainly executed by the PPL. Currently, copyright owners and performers each receive 50% of the net revenue collected and distributed by the PPL which is in accordance with the WIPO Model Law Concerning the Protection of Performers, Producers of Phonograms and the Broadcasting Organisations. Therefore, a single licence fee is paid by the user to the PPL who then shares it equally between the performer and the copyright owner.

The second remuneration right provides that where a performer has transferred his rental right in a sound recording or film to a producer, the performer retains his right to receive remuneration. A “producer” is defined in Part I of the Act to mean “the person by whom the arrangements necessary for the making of the sound recording or film are undertaken”. Although the rental right can be transferred, the right to receive remuneration cannot.

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974 S182D(8).
975 Towse “Copyright and economic incentives: An application to performers’ rights in the music industry” 1999 Kyklos 369.
976 Arnold Performers’ Rights 114.
977 S191G(1).
978 S178.
The rights to remuneration are unwaivable. Any agreement which aims to exclude or restrict these rights are consequently of no effect.\textsuperscript{979} Therefore, copyright owners or producers cannot force performers to contract out of them,\textsuperscript{980} but they can be assigned to a collecting society for the sole purpose of enforcing these rights on behalf of the performer.\textsuperscript{981} Rights to remuneration are transmissible through testamentary disposition or by operation of law as personal or moveable property. Any person who inherits these rights in one of these ways may assign or transmit the right to another individual.\textsuperscript{982}

The amount to be paid is determined by agreement between the user and the person to whom it is payable.\textsuperscript{983} Should there be a dispute as to the amount payable, either of the parties can refer the matter to the Copyright Tribunal.\textsuperscript{984} Upon such application the Tribunal shall determine the method for calculating and paying equitable remuneration as it deems reasonable in the circumstances, taking into account the importance of the contribution made by the performer in question.\textsuperscript{985} By implication, this means that featured artists should, therefore, receive more than backing musicians.\textsuperscript{986} However, this section could also be interpreted to mean that a performer should receive a similar rate to that which is received by other comparable performers.\textsuperscript{987}

6 4 2 4 Moral rights

In the United Kingdom, copyright owners have traditionally been the recipients of moral rights since their ratification of the Berne Convention. However, performers were only accorded moral rights in 2006.

The Act provides for two moral rights to be conferred on performers. The first is the right to be identified as the performer\textsuperscript{988} (the “paternity” right),\textsuperscript{989} and the second is the right to object to derogatory treatment\textsuperscript{990} (the “integrity” right).\textsuperscript{991}

\textsuperscript{979} S182D(7)(a) and s191G(5) both provide that “An agreement is of no effect in so far as it purports to exclude or restrict the right to equitable remuneration.”
\textsuperscript{980} Arnold Performers’ Rights 116.
\textsuperscript{981} S182D(2) and 191G(2).
\textsuperscript{982} Ibid.
\textsuperscript{983} S182D(3) and 191G(4).
\textsuperscript{984} S182D(4) and 191H(1).
\textsuperscript{985} S182D(6) and 191H(3).
\textsuperscript{986} Arnold Performers’ Rights 117.
\textsuperscript{987} Bently & Sherman Intellectual Property Law 298.
\textsuperscript{988} S205C.
\textsuperscript{989} Arnold Performers’ Rights 227.
\textsuperscript{990} S205F.
\textsuperscript{991} Arnold Performers’ Rights 227.
With regard to the “paternity” right, performers have the right to be identified as the performer whenever a person produces a performance that is given to the public; broadcasts a performance live; communicates a sound recording of a performance to the public; or issues copies of such a recording to the public.  The performer must be identified in his capacity as performer, not in any other capacity and the manner of identification must be in such a way as to bring the identity of the performer to the attention of the person hearing or seeing the performance. Where the performance is given by a group performing under a name for which they are collectively identified, such as the name of a rock band, the right to be identified is not infringed if only the group name is given. The Act provides that the right must be asserted in order to bind the person who produces, broadcasts, communicates or issues the performance. If the right is not asserted, there is no infringement. The act of assertion involves an instrument in writing signed by or on behalf of the performer.

The second moral right accorded performers, the “integrity” right, is infringed whenever someone broadcasts live; or plays or communicates to the public a sound recording of a performance with a distortion, mutilation or modification that is deemed to be prejudicial to the reputation of the performer. The question arises whether it is enough for the performer to prove that his performance has been distorted or mutilated, or must he also prove that this distortion or mutilation was prejudicial to his reputation? It could be argued that the mere acts of distortion or mutilation are objectionable in itself. However, it appears that a conjunctive reading is necessary. In Confetti Records v Warner Music UK Ltd it was decided that superimposing a rap on a song did not amount to mutilation or distortion where the author objected to the supposed innuendos in the lyrics, but not to the actual modification of his musical work or the damage to his reputation.

992 S205C(1).
994 Bainbridge Intellectual Property 296.
995 S205C(3).
996 S205D(1).
997 S205D(2)(a).
998 S205F(1).
999 Arnold Performers’ Rights 234.
1000 Ibid.
1001 227.
1002 [2003] EWHC Ch 1274.
1003 Arnold Performers’ Rights 236.
The “integrity” right is also infringed if any person possesses in the course of business;\textsuperscript{1004} sells or lets for hire;\textsuperscript{1005} or distributes an article which he knows or has reason to believe is an infringing article.\textsuperscript{1006} An “infringing article” in this context is defined as a sound recording of a performance containing a distortion, mutilation or modification of the performance which is prejudicial to the performer’s reputation.\textsuperscript{1007}

In contrast to the “paternity” right, the “integrity” right does not require that the right be asserted.\textsuperscript{1008}

The Act provides that a performer’s moral rights are not assignable,\textsuperscript{1009} but they can be waived\textsuperscript{1010} and are transmissible upon death.\textsuperscript{1011} This can happen in one of three ways. Firstly, the rights can pass to a person so directed by testamentary disposition.\textsuperscript{1012} Secondly, where no testamentary direction was given, the rights can pass to the person to whom property rights pass where the moral rights form part of the deceased performer’s estate.\textsuperscript{1013} Lastly, if the rights are not the subject of a testamentary disposition, and do not form part of the deceased’s estate, the rights will be exercisable by the deceased’s personal representatives.\textsuperscript{1014}

\section*{6.4.3 South Africa}

\subsection*{6.4.3.1 Rights of a non-proprietary nature}

The Performers’ Protection Act does not specifically provide for “non-property” rights. However, the nature of the restricted acts contained in section 5(1)(a) lends itself to this interpretation as the performer’s consent is needed in order use the performances but the rights are not assignable.

The Act provides that a performer has the right to prevent anyone from broadcasting or communicating to the public his unfixed performance\textsuperscript{1015} and from making a fixation of his

\begin{thebibliography}{1007}
\bibitem{1004} S205H(1)(a).
\bibitem{1005} S205H(1)(b).
\bibitem{1006} S205H(1)(c).
\bibitem{1007} S205H(2).
\bibitem{1008} Arnold Performers’ Rights 236.
\bibitem{1009} S205L.
\bibitem{1010} S205J(1).
\bibitem{1011} S205M(1).
\bibitem{1012} S205M(1)(a).
\bibitem{1013} S205M(1)(b).
\bibitem{1014} S205M(1)(c).
\bibitem{1015} SS(1)(a)(l).
\end{thebibliography}
unfixed performance.\textsuperscript{1016} Furthermore, a performer’s rights are also infringed if anyone, without the performer’s consent, makes a reproduction of a fixation of a performance if the original fixation was made without the performer’s consent;\textsuperscript{1017} the reproduction was made for purposes other than those for which the performer gave his consent originally;\textsuperscript{1018} or the original fixation was made in accordance with the so-called “fair use” provisions and the reproduction thereof is made for purposes not included within these provisions.\textsuperscript{1019}

“Broadcast” is not defined in the Act; however, the definition provided for by the Copyright Act can be relied upon. This Act defines “broadcast” as a telecommunication service of transmissions consisting of sounds, images, signs or signals which occurs by means of electromagnetic waves of frequencies less than 3000 Gigahertz (GHz) transmitted in space without an artificial conductor;\textsuperscript{1020} and is intended for public reception.\textsuperscript{1021} The Copyright Act further provides that “broadcast” includes the emitting of programme-carrying signals to a satellite.\textsuperscript{1022}

The term “fixation” refers to the storage of sounds and/or images or data or signals representing sounds and/or images.\textsuperscript{1023} Essentially this involves the recording of a performance.\textsuperscript{1024} The reference to an “unfixed performance” refers to a live performance.\textsuperscript{1025}

The term “reproduction” refers to the act of copying a recording of a live performance.\textsuperscript{1026}

Therefore, this section prohibits anyone from broadcasting to the public a performer’s live performance; making a recording of a performer’s live performance; and making a copy of the recording of a performer’s live performance without his consent. As with the United Kingdom, these rights refer to the performer’s rights to prevent the practise of bootlegging which can be viewed as forms of primary infringement. The Act does not provide for any forms of secondary infringement.

\textsuperscript{1016} S5(1)(a)(ii).
\textsuperscript{1017} S5(1)(a)(iii)(aa).
\textsuperscript{1018} S5(1)(a)(iii)(bb).
\textsuperscript{1019} S5(1)(a)(iii)(cc).
\textsuperscript{1020} S1(1)(a).
\textsuperscript{1021} S1(1)(b).
\textsuperscript{1022} S1(1)(b).
\textsuperscript{1023} S1(1).
\textsuperscript{1024} Dean “Performers’ Protection” in Handbook of South African Copyright Law (2003) 1-114.
\textsuperscript{1025} 1-113 – 1-114.
\textsuperscript{1026} S1(1).
The question of what amounts to a reproduction of a recording, or a fixation of a performance was dealt with in Pollecutt where a fixation of a performance in an audio-visual format was reprocessed into an audio format. The court held that the audio version was not a reproduction of the original recording since the reprocessing involved editing and revising the original recording. Dean submits that this decision is “dubious” since the audio version was essentially a derivative of the original recording.

In terms of the Act, a performer’s consent to the broadcasting of his live performance is then deemed to include his consent to the re-broadcasting of the performance; the recording or fixation of the performance for broadcasting purposes; as well as the reproduction of the recording for broadcasting purposes. However, this “implied” consent can be excluded by agreement.

In the event of several individuals performing as a group, the consent required in terms of the Act shall be sufficient if given by the manager or any other person in a position of authority in terms of the group, such as the leader of the group. The person misrepresenting that he had authority by giving consent shall be guilty of an offence but the performers will be bound as if the offender had authority if the person who made the fixation, reproduction or broadcast had no reason to believe the offender did not have authority.

The Act is silent on the transmissibility of the rights contained in section 5(1)(a). However, since the effect of the Act is to grant performers with a monopoly regarding certain uses of their performances, it is averred that these rights are waivable but not assignable. A performer can, nevertheless, license the uses of his performance thereby allowing a person to exercise rights that fall within his monopoly. In this regard, the Act provides that “any performer may enter into any contract with any user or prospective user of his performance in respect of the use of his performance, but such contract shall be enforceable only in the Republic.” This section was interpreted in Pollecutt as

1028 548F.
1030 S5(2).
1031 S6(1).
1032 S12(2)(b).
1033 S12(1).
1035 118.
1036 Ibid.
1037 S13.
reinforcing the “supremacy of the freedom to contract”.

It is unclear whether these rights are transmissible upon death to successors in title. However, if the English view is to be followed, these rights can be transmissible through testamentary disposition but not by operation of law.

6.4.3.2 Rights of an economic nature

Section 5(1)(b) of the Performers’ Protection Act also provides that no person may broadcast; cause to be transmitted in a diffusion service; or cause to be communicated to the public a recording of a performance published for commercial purposes without payment of a royalty to the performer concerned. A “diffusion service” is defined in 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”.

This right is commonly known as the “needletime” right and corresponds with a similar right accorded to copyright owners in terms of the Copyright Act. In essence, this right entitles performers and copyright owners of sound recordings, such as recording companies, to receive a single royalty every time their recording is used by inter alia broadcasters, restaurants, sport stadiums, shopping centres, gyms, hair salons and retail outlets. This royalty is then to be shared between the copyright owner and the performer.

Unlike the needletime right accorded copyright owners, the right accorded performers is not an absolutely restricted right as it does not allow a performer to do any more than prevent the use of his performance without the payment of the royalty. The performer’s consent is not required which means the performer does not have the unencumbered right to prevent his performance from being used in the manner described. As long as the royalty is paid, the user can broadcast; cause to be transmitted in a diffusion service; or communicate to the public recordings of a performance published for commercial purposes without needing the consent of the performer concerned.

1039 S1(1).
1040 S9A.
1041 Du Plessis “Compliance, Copyright Act and Performers’ Protection Act: Part I” Accountancy SA.
1042 S9A(2)(a).
The amount to be paid is determined by agreement between the performer and the user of the sound recording, or between their respective collecting societies. The Copyright Act, however, includes the copyright owner as part of this requirement by providing that the amount payable is to be determined by agreement between the user, performer and the owner of the copyright, or between their respective collecting societies. It is unclear why the copyright owner was excluded from this provision in the Performers’ Protection Act.

In the absence of an agreement regarding the amount payable, the matter can be referred to the Copyright Tribunal by any of the relevant parties or the parties may, by agreement, refer the matter to arbitration.

As soon as the performer authorises the fixation of his performance, he shall be deemed to have granted the person who arranges for this fixation the exclusive right to receive this royalty subject to the condition that the performer’s share be paid over to him. Any payment made in terms of this provision shall discharge any obligation by the user to pay a royalty to the copyright owner of the sound recording. This is in line with a similar provision in the Copyright Act that any payment made by the user of the sound recording to the copyright owner shall discharge any obligation the user may have to pay a royalty to the performer. Should this royalty be paid to the copyright owner, the obligation is then on the copyright owner to pay the performer’s share over to him.

The administration of royalties as contemplated in both the Copyright Act and the Performers’ Protection Act is subject to collective management. This means that generally, royalties are collected from users by collecting societies and then distributed to the relevant parties. In order to ensure fair administration, Regulations governing the establishment, accreditation and operation of these societies have been promulgated. In terms of these Regulations, SAMRO, SAMPRA and SARRAL were granted accreditation to collect needletime royalties on behalf of both copyright owners and performers in South Africa.

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1044 S5(3)(a).  
1045 S9A(1)(b).  
1046 S5(3)(b).  
1047 S5(4)(a).  
1048 S5(5).  
1049 S9A(2)(d).  
1050 S9A(2)(a).  
1051 SARRAL has since been liquidated under suspicion of misusing collected royalties.
The Act provides that the needletime right can be assigned through a contractual agreement, by operation of law or through testamentary disposition.¹⁰⁵² Unlike the English Act which provides that this right can only be assigned to a collecting society for administration purposes, there is no similar restriction on the transmissibility of the right in South Africa.

Although performers have been granted this right since 2002, performers have yet to be paid any royalties. This is mainly due to the ongoing dispute between the NAB and SAMPRA regarding the amount to be paid, as well as the date from when payment became due.

### 6 4 3 3 Moral rights

Unlike South African copyright owners, performers are not accorded any moral rights to their performances. However, should South Africa ratify the WPPT, the Performers’ Protection Act will have to be amended to allow for this right to be granted to performers.

#### 6 4 3 4 Performers’ rights as a fundamental right?

Article 27(2) of the Universal Declaration of Human Rights (UDHR) adopted at Paris on 10 December 1948 states that:

> “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

This gave rise to the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1996 which repeats the above-mentioned Article.¹⁰⁵³ In addition, member states are required to take the necessary steps for the conservation, the development and the diffusion of science and culture;¹⁰⁵⁴ to respect the freedom indispensable for scientific research and creative activity;¹⁰⁵⁵ and to recognise the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.¹⁰⁵⁶

¹⁰⁵² S5(6).
¹⁰⁵³ Article 15(1)(c).
¹⁰⁵⁴ Article 15(2).
¹⁰⁵⁵ Article 15(3).
¹⁰⁵⁶ Article 15(4).
Given the wide acceptance of these Instruments as the embodiment of fundamental human rights, one can then argue that the right to intellectual property should be a universally accepted fundamental right.\textsuperscript{1057} Since there is no doubt that performers’ rights are, by their very nature, a form of intellectual property; it can therefore also be argued that performers’ rights are a fundamental right worthy of constitutional protection.

Currently, intellectual property is not specifically provided for by the Constitution of the Republic of South Africa, 1996 despite South Africa’s ratification of the UDHR and the ICESCR. It is submitted that a derivative form of protection should be provided in the form of section 25 which accords the right to own property.

In 1995, several proposals were advanced to lobby for the inclusion of intellectual property as a fundamental human right in the Constitution.\textsuperscript{1058} The following points were forwarded for consideration:

a) Intellectual property should not be considered to be part of property, hence it deserves special treatment in the Constitution;

b) Intellectual property has international rights attached thereto through several international agreements South Africa is a party to;

c) As a result of these international agreements, South Africa is required to protect the intellectual property rights of international citizens as well as South Africans;

d) The protection of intellectual property allows a country to develop industrially and economically;

e) Intellectual property attracts foreign investment and provides employment through the expansion of commerce and industry;

f) South Africa currently has a well-developed legal system that is capable of protecting intellectual property; and

g) The current system of intellectual property law in South Africa is internationally respected but needs to be entrenched and protected in a special manner.\textsuperscript{1059}

Despite these arguments, when called upon to adjudicate upon the validity of the Constitution, the Constitutional Court held in \textit{Certification of the Constitution of the Republic of South Africa, 1996}.\textsuperscript{1057}

\textsuperscript{1057}Dean “Perspective of intellectual property” \textit{Brands and Branding} http://www.brandsandbranding-online.co.za/a-perspective-of-intellectual-property-dr-owen-dean/ (accessed 19-12-2010).

\textsuperscript{1058}Van der Merwe “Proposal for inclusion in the new constitution – protection of intellectual property of persons and the intellectual property law system” 1995 \textit{Constitutionnet} http://lawspace2.lib.uct.ac.za/dspace/bitstream/2165/228/52/OTH54.PDF (accessed 19-12-2010).

\textsuperscript{1059}Ibid.
Republic of South Africa\textsuperscript{1060} that intellectual property was not universally accepted as a fundamental right and was therefore not required to be recognised in the Bill of Rights.\textsuperscript{1061} The court stated that although intellectual property is recognised in certain international instruments protecting human rights, “it is much more rarely recognised in regional conventions protecting human rights and in the constitutions of acknowledged democracies.”\textsuperscript{1062} This view was severely criticized with claims that should a conflict arise between an intellectual property right and a constitutionally recognized right, the former will be regarded as inferior and subservient to the fundamental right.\textsuperscript{1063}

However, the judgement handed down in \textit{Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)}\textsuperscript{1064} mitigated this decision of the Constitutional Court.\textsuperscript{1065}

The court was called upon to decide whether Sabmark International had shown that Laugh It Off had infringed their trade mark causing detriment to the mark’s reputation through dilution. In answering this question, the court was required to weigh up intellectual property rights against the right to freedom of expression, not only in the particular case, but in general as well.\textsuperscript{1066}

Dean avers that by ruling that Laugh It Off was exercising legitimate freedom of expression, the Constitutional Court gave equal status to a statutory trade mark right as it did to the right of freedom of expression.\textsuperscript{1067}

However, this view has been criticised. Badenhorst writes that:

\begin{quote}
“Apart from the commendation being presumptuous, the deduction that the Constitutional Court raised the status of intellectual property rights to the level mentioned above, has no substance whatsoever.”\textsuperscript{1068}
\end{quote}

It is submitted that performers’ rights are as important as any other form of intellectual property rights and should be protected by section 25 of the Constitution which accords

\begin{footnotes}
\item[1060] 1996 10 BCLR 1253 (CC).
\item[1061] Dean “Perspective of intellectual property” \textit{Brands and Branding}.
\item[1062] 1996 10 BCLR 1253 (CC) paragraph 75.
\item[1064] 2006 (1) SA 144 (CC).
\item[1065] Dean “Perspective of intellectual property” \textit{Brands and Branding}.
\item[1066] Dean “Trade-mark dilution laughed off” \textit{Derebus}.
\item[1067] Dean “Perspective of intellectual property” \textit{Brands and Branding}.
\end{footnotes}
the right to own property. Performers should, therefore, be accorded rights of a proprietary nature which grant performers the exclusive right to prohibit the uses of their performances and that are fully assignable. However, the Performers’ Protection Act only provides performers with rights of a non-proprietary and economic nature which appears to have created a lacuna.

6.4.4 Analysis

Performers in the United Kingdom are entitled to four types of rights, namely non-property rights, property rights, rights to remuneration and moral rights; while South African performers are entitled to rights of a non-proprietary nature and rights of an economic nature.

The English Act provides that infringement can be both primary and secondary while the South African Act only provides for forms of primary infringement.

Both jurisdictions provide for rights in the nature of non-property rights aimed at preventing bootlegging. However, the United Kingdom’s protection in this regard is more extensive in that it provides for more rights of a non-proprietary nature than the South African Act does.

The English Act also provides for property rights which are concerned with the ways in which performances are dealt with, such as the reproduction, distribution, renting and lending, and making available of performances. The South African Act does not provide for these rights which appear to be an anomaly considering that performers’ rights, as a form of intellectual property rights, should be protected constitutionally by section 25 which provides for the right to own property.

The English Act provides for two remuneration rights. These entail, firstly, that a royalty be paid to a performer when a sound recording is broadcasted in public; and, secondly, that a performer continues to receive a royalty when he has transferred his rental right to a producer. The South African Act provides for the needletime right which is akin to the first of the English remuneration rights, thereby allowing a performer to receive a royalty whenever a performance incorporating a sound recording is broadcasted to the public. Both jurisdictions provide for these rights to be administered by collecting societies. However, the English Act expressly provides that this right can only be assigned to a collecting society in order for the right to be administered on the performer’s behalf. The South African Act provides that the needletime right is fully assignable and, unlike in the United Kingdom, there is no restriction on the ability to assign this right. This means that a
naive performer can be coerced into signing all his royalties away to an unscrupulous recording company.

Unlike the United Kingdom, performers in South Africa have yet to receive royalty payments for the uses of their performances. This is owing to the ongoing dispute between SAMPRA and the NAB regarding the amount to be paid, as well as the date from when payment became due.

Performers in the United Kingdom are entitled to two moral rights, namely the right to be identified and the right to object to derogatory treatment. South African performers are not currently the recipients of moral rights.

6.5 EXCEPTIONS TO INFRINGEMENT

6.5.1 General

Exceptions to infringement refer to those acts which can be committed in relation to a performer’s performance that does not amount to actionable infringement.

The Copyright, Designs and Patents Act provides for several permitted acts, also known as “fair-dealing” or “fair use” provisions. These are contained in Schedule 2 of the Act.

The Performers’ Protection Act provides for exceptions to infringement, also referred to as “fair-dealing” provisions that are based on those provided for in the Copyright Act.

6.5.2 United Kingdom

6.5.2.1 Fair dealing provisions

Although the majority of the permitted acts or fair-dealing provisions provided for in Part II of the Act correspond to those accorded copyright as expressed in Part I, there is an interesting exception. Part II does not provide for an exception to infringement on the basis of research or private study as is found in copyright law.\(^{1069}\) It is probable that this is owing to the fact that infringement of performers’ rights generally occurs when a performance is shown, played or broadcasted in public. Should a student view or listen to a recording of a performance in private, there is generally no infringement.\(^{1070}\) However,

\(^{1069}\) S29. Arnold Performers’ Rights 171.
this absence prevents copying in circumstances which would otherwise qualify as fair-dealing for these purposes. 1071 Therefore, a performer will be in a weaker position than copyright owners in circumstances where performances are reproduced for commercial research. 1072

Herewith follows a brief discussion of all the fair-dealing provisions provided in Part II of the Act.

a) Making of temporary copies

A performer’s rights are not infringed “by the making of a temporary copy of a recording of a performance which is transient or incidental; which is an integral part of a technological process and the sole purpose of which is to enable- (a) a transmission of the recording in a network between third parties by an intermediary; or (b) a lawful use of the recording; and which has no independent economic significance.” 1073 This provision is intended to protect Internet service providers from unknowingly infringing performers’ rights. 1074

b) Criticism, reviews and news reporting of current events

A performer’s rights are not infringed if the recorded performance is used for criticism, review or news reporting, provided that in the case of criticism and review, the recording is made available to the public. 1075

In this context, “criticism” is not restricted to comments relating to the quality of the performance but includes ideas or doctrines embodied in the performance and its suitability for public display. 1076 It is necessary to consider the true purpose of the work by asking if it is a genuine piece of criticism or review, or an attempt to disguise the infringement of another’s copyright as criticism, and so doing profit unfairly from the other’s work. 1077 It was held in Fraser v Evans 1078 that the criticism may be hostile and defamatory, yet still qualify as fair dealing. 1079

1071 Ibid.
1073 Schedule 2 paragraph 1A.
1074 Arnolds Performers’ Rights 173.
1075 Schedule 2 paragraph 2(1).
1076 Arnolds Performers’ Rights 174.
1079 Arnold Performers’ Rights 174.
The use of the term “current events” extends beyond news and current affairs\textsuperscript{1080} and can, as was held in \textit{British Broadcasting Corp v British Satellite Broadcasting Ltd},\textsuperscript{1081} include excerpts from sports news bulletins.\textsuperscript{1082} In addition, the events in question need not be recent, only of current concern to the public to qualify as “current events”.\textsuperscript{1083}

c) Incidental inclusion of performance or recording

The rights conferred by the Copyright, Designs and Patents Act are not infringed if a performance is incidentally included in a sound recording or film.\textsuperscript{1084}

“Incidental” in this regard refers to an inclusion that is “casual, of secondary importance, subordinate.”\textsuperscript{1085} Therefore, if a performance is deliberately included, the inclusion shall not be regarded as incidental.\textsuperscript{1086} In \textit{Football Association Premier League Ltd v Panini UK Ltd}\textsuperscript{1087} it was held that in determining whether inclusion is incidental, one must consider whether the performance has been included from an aesthetic or commercial perspective.\textsuperscript{1088}

d) Things done for purposes of instruction or examination

Performers’ rights are not infringed if a recording of a performance is used in the course of instruction or copied for the purposes of setting, answering or communicating examination questions to students.\textsuperscript{1089}

e) Playing or showing sound recording, film or broadcast at educational establishment

If a recording of a performance is shown at an educational establishment to an audience consisting of teachers and pupils for the purposes of instruction, the performers’ rights to

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\textsuperscript{1080} 175.  
\textsuperscript{1081} [1991] 3 All ER 833.  
\textsuperscript{1083} Arnold \textit{Performers’ Rights} 175.  
\textsuperscript{1084} Schedule 2 paragraph 3(1).  
\textsuperscript{1085} Arnold \textit{Performers’ Rights} 176.  
\textsuperscript{1086} Schedule 2 paragraph 3(3).  
\textsuperscript{1087} [2004] EWCA Civ 995.  
\textsuperscript{1088} Arnold \textit{Performers’ Rights} 176.  
\textsuperscript{1089} Schedule 2 paragraph 4(2).
the performance are not infringed.\textsuperscript{1090} Parents of pupils are not included within the meaning of “audience” in this provision.\textsuperscript{1091}

f) Recording of broadcasts by educational establishments

A recording of a broadcast or a copy of such a recording may be made by an educational establishment for the educational purposes of that establishment on condition that the educational purposes not be commercial.\textsuperscript{1092}

g) Lending of copies by educational establishments

Performers’ rights are not infringed if copies of a recording of a performance are lent by an educational establishment.\textsuperscript{1093}

h) Lending of copies by libraries or archives

Similarly, a performer’s rights are not infringed if copies of recordings of his performance are lent by libraries or archives provided this is not done for commercial profit.\textsuperscript{1094}

i) Copy of work required to be made as condition of export

It is not an infringement of any right conferred by the act if a copy is made of an article of cultural or historical significance that cannot lawfully be exported from the United Kingdom unless a copy is made.\textsuperscript{1095}

j) Parliamentary and judicial proceedings

A performer’s rights shall not be infringed through anything that is done for the purposes of parliamentary or judicial proceedings, or for the purposes of reporting such proceedings.\textsuperscript{1096}

In the context of this provision, “judicial proceedings” refers to any proceeding before any court, tribunal, or any person with the authority to decide a person’s rights or duties.\textsuperscript{1097}

\textsuperscript{1090} Schedule 2 paragraph 5(1).
\textsuperscript{1091} Schedule 2 paragraph 5(2).
\textsuperscript{1092} Schedule 2 paragraph 6(1).
\textsuperscript{1093} Schedule 2 paragraph 6A(1).
\textsuperscript{1094} Schedule 2 paragraph 6B(1).
\textsuperscript{1095} Schedule 2 paragraph 7(1).
\textsuperscript{1096} Schedule 2 paragraph 8(1).
k) Royal Commissions and statutory inquiries

Performers’ rights are not infringed by anything done for the purposes of the proceedings of the Royal Commission and for statutory inquiry, or for the purpose of reporting such proceedings that are held in public.\textsuperscript{1098}

l) Public records

Performers’ rights are not infringed if material, which is considered to be of public record and which is open to public inspection, is copied and supplied to any person.\textsuperscript{1099}

m) Acts done under statutory authority

It is not an infringement of performers’ rights to do any activity specifically authorised by an act of Parliament unless the act provides otherwise and applies regardless of when the act was passed.\textsuperscript{1100}

n) Transfer of copies of works in electronic form

In the event where a recording of a performance in electronic form has been purchased on terms which allow the buyer to make further recordings from it and the buyer transfers the recording to another person, the transferee may do anything with the recording that the original buyer was entitled to do without infringing the performer’s rights.\textsuperscript{1101}

However, should there be express terms which either prohibit transfer of the recording or which stipulate the terms on which the transferee may do the things the buyer was allowed to do, performers’ rights will be infringed if the transferee exceeds these terms.\textsuperscript{1102}

Should the original buyer make a copy of the recording (if allowed by the terms of purchase), such a copy must be transferred together with the original recording, failing which the copy will be regarded as an illicit recording.\textsuperscript{1103} This means that a buyer cannot

\textsuperscript{1097} Arnold Performers’ Rights 181.
\textsuperscript{1098} Schedule 2 paragraph 9(1).
\textsuperscript{1099} Schedule 2 paragraph 10(1).
\textsuperscript{1100} Schedule 2 paragraph 11(1).
\textsuperscript{1101} Schedule 2 paragraph 12(1).
\textsuperscript{1102} Schedule 2 paragraph 12(2).
\textsuperscript{1103} Ibid.
buy a recording, make a back-up copy and then sell the original recording so as to get free use of the back-up copy.1104

   o) Use of recordings of spoken works in certain cases

A recording of the reading or recitation of a literary work is not an infringement of performers' rights if made for the purposes of reporting current events or communicating to the public the whole or part of the reading or recitation.1105

However, this is subject to certain conditions being met, namely that the recording is a direct recording of the reading or recitation and is not taken from a previous recording or from a broadcast;1106 the making of the recording was not prohibited by the person giving the reading or recitation;1107 the use made of the recording was not prohibited by the person before the recording was made;1108 and the use is made with the authority of a person who is lawfully in possession of the recording.1109

This section caters for public statements and interviews.1110 The first condition appears to ensure that a broadcaster who wants to use a public statement or interview must make his own recording, not use that of another person or broadcaster. The next two conditions imply that the reader knew he was being recorded which creates a loophole if he is recorded without his knowledge. Since a person cannot prohibit something he doesn’t know is happening, it seems that the solution would be for the person to issue a prohibition, even if this seems unnecessary, should he not wish to be recorded.1111

   p) Recordings of folksongs

A recording of a performance of a song may be made in order to include it in an archive maintained by a designated body without infringing any performers' rights1112 provided the words are unpublished and of unknown authorship at the time the recording was made;1113

1104 Arnold Performers' Rights 183.
1105 Schedule 2 paragraph 131.
1106 Schedule 2 paragraph 13(2)(a).
1107 Schedule 2 paragraph 13(2)(b).
1108 Schedule 2 paragraph 13(2)(c).
1109 Schedule 2 paragraph 13(2)(d).
1110 Arnold Performers' Rights 184.
1111 Ibid.
1112 Schedule 2 paragraph 14(1).
1113 Schedule 2 paragraph 14(2)(a).
the making of the recording does not infringe any copyright;\textsuperscript{1114} and the making of the recording is not prohibited by the performer.\textsuperscript{1115}

A copy of this archived performance may be made and supplied to a person on condition that the person requiring a copy satisfies the archivist that he requires it for non-commercial research or private study and that he will not use it for any other purpose; and that no person is furnished with more than one copy of the recording.\textsuperscript{1116}

q) Lending of certain recordings

The Act provides that where the Secretary of State has made an appropriate order, performers’ rights are not infringed if copies of films or sound recordings are lent to the public provided that a reasonable royalty or other form of remuneration is made.\textsuperscript{1117}

r) Playing of sound recordings for purposes of club, society, or other organisation

Performers’ rights are not infringed if a sound recording is played as part of activities of a club, society or other organisation\textsuperscript{1118} provided that the organisation is not conducted for profit and its main objects are charitable or concerned with the advancement of religion, education or social welfare;\textsuperscript{1119} that the sound recording is played by a person who is acting primarily for the benefit of the organisation without a view to gain;\textsuperscript{1120} that the proceeds of any admission charge to the place where the recordings is to be heard are for the purposes of the organisation;\textsuperscript{1121} and that the proceeds of any goods or services sold when the sound recording is heard is for the benefit of the organisation.\textsuperscript{1122}

The requirement that the organisation not be conducted for profit does not mean that profits cannot be made, only that they cannot be made with the purpose of distributing them in the usual commercial manner.\textsuperscript{1123} It was held in \textit{Guinness Trust v West Ham Corp}\textsuperscript{1124} that if profits are incidental and subsidiary, not an end in themselves, the

\begin{footnotes}
\footnotetext[1114]{Schedule 2 paragraph 14(2)(b).}
\footnotetext[1115]{Schedule 2 paragraph 14(2)(c).}
\footnotetext[1116]{Arnold \textit{Performers’ Rights} 185.}
\footnotetext[1117]{Schedule 2 paragraph 14A(1).}
\footnotetext[1118]{Schedule 2 paragraph 15(1).}
\footnotetext[1119]{Schedule 2 paragraph 15(2)(a).}
\footnotetext[1120]{Schedule 2 paragraph 15(2)(b).}
\footnotetext[1121]{Schedule 2 paragraph 15(2)(c).}
\footnotetext[1122]{Schedule 2 paragraph 15(2)(d).}
\footnotetext[1123]{Arnold \textit{Performers’ Rights} 187.}
\footnotetext[1124]{[1959] 1 WLR 233.}
\end{footnotes}
organisation is not established or conducted for profit. The charity’s objects must be to advance the charitable purposes in terms of which it is established. Furthermore, when deciding whether an organisation is carried on “for profit”, the court must look at the objects for which the organisation has been established as contained in its constitution, not by assessing their budgeting policy.

s) Incidental recording for purposes of broadcast

In the event of a person being able to broadcast a recording of a performance without infringing performers’ rights, the performer is deemed to have consented to the making of a further recording for the purposes of the broadcast. This exception is, however, subject to the following conditions. Firstly, the further recording may not be used for any other purposes; and secondly, the further recording must be destroyed within 28 days from when it was first broadcasted.

This provision allows broadcasters to make temporary recordings in circumstances where there would otherwise be a technical infringement since they are licensed to broadcast but not to copy the recording.

t) Recordings for purposes of supervision and control of broadcasts

Performers’ rights are not infringed by the British Broadcasting Corporation (BBC) making recordings of programmes in order to maintain supervision and control over those programmes broadcasted by them.

u) Recording for the purposes of time-shifting

Where somebody records a broadcast of a performance in their domestic premises for the purpose of allowing them to view it at a more convenient time, performers’ rights will not

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1125 Arnold Performers’ Rights 187.
1127 See Customs and Excise Commissioners v Bell Concord Educational Trust Ltd [1989] 2 All ER 217.
1128 Schedule 2 paragraph 16(1).
1129 Schedule 2 paragraph 16(2)(a).
1130 Schedule 2 paragraph 16(2)(b).
1131 Arnold Performers’ Rights 188.
1132 Schedule 2 paragraph 17(1).
be infringed. Should the recording subsequently be “dealt with”, it shall be regarded as an illicit recording.

In terms of the Act, “dealt with” means to be sold or let for hire; offered or exposed for sale or hire; or communicated to the public.

The Act does not provide that the recording be destroyed after any period of time. Therefore, this recording can be kept and viewed repeatedly for an indefinite period.

v) Photographs of broadcasts

Should a person take a photograph of an image forming part of a broadcast, or make a copy of this image in domestic premises for private or domestic use, performers’ rights will not be infringed.

However, should such a photograph be taken of an image forming part of an illicit recording and the photograph is subsequently “dealt with”, the photograph shall be treated as illicit.

w) Free public showing or playing of broadcast

Performers’ rights will not be infringed if a performance, sound recording or film is included in a broadcast which is played or showed to an audience who has not paid for admission to the place where the broadcast is to be seen or heard.

An audience will be treated as having paid admission if they have paid a fee to enter a place where the broadcast is to be seen or heard; or goods and services are sold which are attributable to the facilities for seeing or hearing the broadcast. An example of the latter is when clothing is sold which is branded with the details of the event in question.

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1133 Schedule 2 paragraph 17A(1).
1134 Schedule 2 paragraph 17A(2).
1135 Schedule 2 paragraph 17A(3).
1136 Arnold Performers’ Rights 189.
1137 Schedule 2 paragraph 17B(1).
1138 Schedule 2 paragraph 17B(2).
1139 Schedule 2 paragraph 18(1).
1140 Schedule 2 paragraph 18(2)(a).
1141 Schedule 2 paragraph 18(2)(b).
In contrast, an audience will not be treated as having paid admission if they are residents or inmates of the place in question; or they are members of a club or society where the payment is for membership and the provision of facilities for seeing or hearing the broadcast is incidental to the main objective of the club or society.

x) Reception and re-transmission of wireless broadcast by cable

Rights provided for in the Act will not be infringed where a wireless broadcast made from a place in the United Kingdom is received and immediately re-transmitted by cable if the broadcast is made for reception in the area in which it is re-transmitted by cable.

y) Provision of sub-titled copies of broadcast

Recordings of broadcasts, and copies of these recordings, may be made, issued, or lent to the public by a designated body for the purpose of providing people who are deaf or otherwise disabled with subtitled copies or copies that are otherwise modified to meet their special needs, without infringing performers’ rights.

In terms of the Act, a “designated body” refers to the Secretary of State who must be satisfied that this service is not conducted for profit.

z) Recording of broadcast for archival purposes

A recording of a broadcast of a designated class, or a copy of such a recording, may be made for the purpose of being placed in an archive maintained by a designated body without infringing any rights conferred by the Act.

A “designated body” again refers to the Secretary of State while a “designated class” refers to the British Film Institute, the British Library, the British Medical Association, the British Music Information Centre, the Imperial War Museum, the Music Performance Research Centre, the National Library of Wales and the Scottish Film Council.

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1142 Schedule 2 paragraph 18(3)(a).
1143 Schedule 2 paragraph 18(3)(b).
1144 Schedule 2 paragraph 19(1).
1145 Schedule 2 paragraph 20(1).
1146 Arnold Performers’ Rights 192.
1147 Schedule 2 paragraph 21(1).
1148 Arnold Performers’ Rights 192.
### 6522 Defences

In addition to the above-mentioned permitted acts or fair-dealing provisions, the Act also provides certain defences that can be availed against a claim of infringement. Furthermore, general defences to delicts (torts) can also be relied upon.\(^{1149}\)

**a) Consent**

The first of the defences is the claim that consent in relation to a specific performance was given.\(^{1150}\) Should a non-property right pass to another person, any consent binding on the previous person binds the person to whom the right has passed as if the consent had been given by him.\(^{1151}\)

Consent can be given by several individuals, namely the performer’s agent, the performer’s assignee, the performer’s estate, a person misrepresenting that he has authority to consent on behalf of the performer, or the Copyright Tribunal.\(^{1152}\)

**b) Free circulation within the European Economic Area**

If a recording is in free circulation, meaning that it has been sold in any other European Economic Area state with the consent of the owner of a performer’s property rights, it may be imported into the United Kingdom and dealt with without infringing performers’ rights.\(^{1153}\) In this context, “deal with” does not include the acts of rental or lending\(^ {1154}\) but includes selling or offering for sale, as well as communication to the public.

**c) Innocence**

The Act does not contain a specific defence of innocence to a claim of infringement of performers’ rights. However, innocence will be a defence to allegations of secondary infringement on the grounds that the infringer did not know or have reason to believe he was guilty of infringement\(^{1155}\) which implies that fault is a requirement for liability.

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\(^{1149}\) Ibid.
\(^{1150}\) S193(1).
\(^{1151}\) S193(3).
\(^{1152}\) Arnold *Performers’ Rights* 193-194.
\(^{1153}\) 196.
\(^{1154}\) Ibid.
\(^{1155}\) Ibid.
d) Private purposes

Although the Act provides that to make a recording of a performer’s performance without his consent is an infringement, the Act also provides that if a recording is made of a performance without consent for private purposes, it is not an illicit recording.\textsuperscript{1156} Therefore, the importation and dealing in the recording, which would otherwise be an illicit recording, does not constitute secondary infringement and is a valid defence to such a claim.\textsuperscript{1157}

e) General defences to delicts

These include acquiescence and estoppels,\textsuperscript{1158} expiry of the limitation period and certain “Euro-defences” created in terms of the European Community Treaty.\textsuperscript{1159} In terms of the Limitation Act, 1980 the limitation period is six years\textsuperscript{1160} and applies to infringements of property rights as well as breaches of statutory duty.\textsuperscript{1161}

In order to succeed with such a claim there must be a sufficient causal nexus between the alleged infringement and conduct.\textsuperscript{1162}

6 5 2 3 Moral rights

The Copyright, Designs and Patents Act also provides for exceptions to the infringement of moral rights.

The right to be identified as the performer is not infringed if it is not reasonably practical to identify the performer\textsuperscript{1163} or if the performance was given for the purposes of reporting on current events;\textsuperscript{1164} the advertising of goods or services;\textsuperscript{1165} news reporting;\textsuperscript{1166} examination;\textsuperscript{1167} parliamentary or judicial proceedings;\textsuperscript{1168} Royal Commissions and

\textsuperscript{1156} S197(2) provides that “[f]or the purposes of a performer’s rights, a recording of the whole or any substantial part of a performance of his is an illicit recording if it is made, otherwise than for private purposes, without his consent.”
\textsuperscript{1157} Ibid.
\textsuperscript{1159} Arnold Performers’ Rights 192-193.
\textsuperscript{1160} S2.
\textsuperscript{1161} Ibid.
\textsuperscript{1162} Ibid.
\textsuperscript{1163} S205E(2).
\textsuperscript{1164} S205E(3).
\textsuperscript{1165} S205E(4).
\textsuperscript{1166} S205E(5)(a).
\textsuperscript{1167} S205E(5)(c).
statutory obligations; or the incidental inclusion of a performance, the user will not be liable for infringement of this right.

Similarly, there is no infringement of the right to object to derogatory treatment if the performance is given for the purpose of reporting current events; modifications made to a performance are consistent with normal editorial or production practice; or the purpose of the infringement is to avoid the commission of an offence, to comply with a duty imposed by an enactment or, in the case of the British Broadcasting Corporation (BBC), to avoid the inclusion in a programme broadcast of anything which offends against good taste or morals, is likely to incite or encourage crime or lead to a disorder.

This right will not be infringed in the above-mentioned circumstances provided the performer is identified in a manner likely to bring his identity to the attention of the people seeing or hearing the performance; or the performer has previously been identified in copies of a sound recording issued to the public.

6 5 3 South Africa

In terms of the Performers’ Protection Act a performance, a fixation of a performance or a reproduction of such a fixation used without the performer’s consent is not an infringement in the following circumstances:

a) If it is for the purposes of private study or for personal and private use;

b) If it is for the purposes of criticism or review of for the purpose of reporting on current events, on condition that only short excerpts from the performance are used and the performer’s name is acknowledge where possible;

c) If it is for the purposes of teaching or scientific research;

d) If it is for the purpose of legal proceedings, or

\[\text{S205E(5)(d).} \]
\[\text{S205E(5)(e).} \]
\[\text{S205E(5)(b).} \]
\[\text{S205F(2).} \]
\[\text{S205F(3).} \]
\[\text{S205F(4)(a).} \]
\[\text{S205F(4)(b).} \]
\[\text{S205F(4)(c).} \]
\[\text{S205F(4)(d).} \]
\[\text{S8(2)(a).} \]
\[\text{S8(2)(b).} \]
\[\text{S8(2)(c).} \]
\[\text{S8(2)(d).} \]
e) If it is for the demonstration of recording, amplifying or similar apparatus, provided that the demonstration is made by a licensed dealer on his premises to a specific client.\textsuperscript{1182}

These exceptions are the same as those provided for by copyright with the exception of infringement for the purposes of teaching or scientific research. No such allowance is provided for by the Copyright Act.

In addition, a broadcaster is permitted to make a fixation of a performance and reproductions of such a fixation without the performer’s consent provided that the fixation or reproduction thereof is intended exclusively for broadcasts to which the performer has consented;\textsuperscript{1183} and are destroyed before the end of six months from when the fixation was first made. This period can be extended by agreement between the performer and the broadcaster.\textsuperscript{1184} However, the fixation or the reproduction thereof may be preserved in the archives of the broadcaster if it is of exceptional documentary character, but may not be used any further without the permission of the performer.\textsuperscript{1185}

\textbf{6.5.4 Analysis}

The vast range of exceptions to infringement provided by the English Act is illustrative of the casuistic approach adopted by English law. In South Africa, the nature of the right must be looked at to determine what defences are potentially available to an infringer.

The South African Act provides for only two of the fair dealing provisions that the English Act provides for, namely when performances are used for purposes of criticism or review, and when performances are used for the purpose of legal proceedings.

The English Act does not include performances used for the purposes of private study, scientific research or the demonstration of recording, amplifying or similar apparatus as exceptions to infringement.

The English act also provides for exceptions to infringements of moral rights. South African performers are not granted moral rights.

\textsuperscript{1182} S8(2)(e).
\textsuperscript{1183} S8(3)(a)(i).
\textsuperscript{1184} S8(3)(a)(ii).
\textsuperscript{1185} S8(3)(b).
66 THE TERM OF PROTECTION

66.1 General

One of the hallmarks of intellectual property law is that it grants the owner a limited time within which to exploit the right. After this time, the article falls into the public domain and can freely be exploited by others.1186

With regard to literary, musical and artistic works, the term of protection accorded copyright in South Africa is the duration of the lifetime of the author plus 50 years beyond his death.1187 The Copyright, Designs and Patents Act provides protection to these works for the lifetime of the author plus 70 years beyond his death.1188 In comparison, performers are protected for a far more limited time period.

66.2 United Kingdom

The English Act provides that a performer will enjoy protection for a time expiring at the end of 50 years from the end of the calendar year in which the performance takes place;1189 or 50 years from the end of the calendar year in which a recording of the performance is released if done so within that time period.1190 The provision that protection be accorded to performances taking place refers to any live performance.

The provision that a recording of the performance is protected from when it is released, in this context, “released” refers to when it is first published, played or shown in public but does not take into account any unauthorised act.1191 As stated, “published” refers to the issuing of copies of the recording to the public. The wording of the provision indicates that protection is not accorded the performance from when it is first incorporated in a phonogram, but from when copies of the phonogram are actually issued to the public. Therefore, should a performer give a performance in 1960, and a record company makes a recording of this performance without releasing it, the protection accorded that performance will expire in 2010. However, should the record company then decide to release the recording for public consumption in 1990, the protection accorded the

1187 S3(2)(a).
1188 S12(2).
1189 S191(2)(a).
1190 S191(2)(b).
1191 S191(3).
recording will only expire in 2040. This will enable both the recording company and the
performer to receive performance royalties for a longer period of time. In principle,
protection can last for 100 years provided that the performance is released almost 50
years after the performance was first performed.

The Copyright, Designs and Patents Act also provides that moral rights accorded
performers subsist for as long as performers’ rights established in terms of Part II
subsist.\textsuperscript{1192}

\section{6.6.3 South Africa}

In South Africa, the term of protection accorded to performers shall commence on the day
the performance first took place; or if incorporated in a phonogram, when it was first fixed
on such phonogram; and shall continue for a period of 50 years calculated from the end of
the year in which the performance took place or was incorporated in a phonogram.\textsuperscript{1193}

Unlike the United Kingdom, the South African Act specifically provides that protection will
commence with immediate effect as soon as the performance takes place, or from when it
is first fixed in a phonogram.\textsuperscript{1194}

Unfortunately, the South African Act does not contain a similar provision to the English Act
with regard to the release of recordings, but provides that protection will commence from
when the performance is incorporated in a phonogram or sound recording. Therefore,
should a South African performer give a performance in 1960 and a recording company
makes a recording of this performance but does not release it, the protection accorded the
performance will expire in 2010. Should the recording company decide to release the
recording to the public in 1990, protection will still expire in 2010.

\section{6.6.4 Analysis}

Despite the recent campaign to increase the term of protection accorded performers in the
United Kingdom, the term duration afforded performers is still the same as that of South
Africa.

Both jurisdictions provide protection of 50 years from when the performance takes place.

\textsuperscript{1192} S205I(1).
\textsuperscript{1193} S7.
The English Act further provides protection to a performance once it is released which refers to when it is first published, played or shown in public. Once copies of the recording have been issued to the public, the performance is regarded as published. The South African Act, however, provides protection from when the performance is first fixed in a sound recording which can only possibly take place at the time the performance is given. Therefore, performers in the United Kingdom are potentially entitled to a longer term of protection should a recording of their performance be released to the public some time after they first gave the performance which is not the case in South Africa.

Moral rights of performers in the United Kingdom are also protected for a period of 50 years. Moral rights are not accorded performers in South Africa.

6 7 RETROSPECTIVITY

6 7 1 General

In terms of performers’ rights, retroactivity or retrospectivity refers to the extent to which an Act applies to performances given before the commencement of the Act. It also determines to what extent legal action can be taken for infringing acts committed before enactment.

6 7 2 United Kingdom

The Copyright, Designs and Patents Act provides that:

“The rights conferred by this Part apply in relation to performances taking place before the commencement of this Part; but no act done before commencement, or in pursuance of arrangements made before commencement, shall be regarded as infringing those rights.” 1195

Therefore, in terms of Part II of the 1988 Act, the provisions are retrospective to a certain extent. All live performances given before commencement of the Act are protected, but no right of action accrues in respect of acts committed before enactment. 1196 In other words, new rights are granted retroactively, but new liabilities have not retroactively been imposed. 1197 This means that, for example, a live performance by a rock band given in 1986 is protected by the Act. However, should a bootleg recording have been made of the performance at the time, the making of the recording has not infringed any rights and no

1195 S180(3).
1196 Bainbridge Intellectual Property 286.
1197 Ibid.
legal action can be taken in respect of it. However, should the bootlegger decide to release copies of his bootleg recording at any time after enactment, legal action can be taken against the infringer.

This provision applies *mutatis mutandis* to moral rights.

### 6 7 3 South Africa

The Performers' Protection Act provides that:

> “This Act shall apply to performances which took place before the commencement of this Act as it applies in relation to performances thereafter.”

This provision is similar to that provided for by the Copyright Act but was enacted without any qualifications to the extent of the retroactivity. For example, performances the

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1198 *ibid.*
1199
1198 This could prove problematic as was shown in the recent recording scandal involving an English concert pianist who, at the age of 77, achieved celebrity status through an uneventful career when details of her monumental fraud came to light. She retired from the concert stage in the 1970’s after publishing a small and unremarkable discography playing pieces her critics thought she was not technically up to. Thirty years later her record producer husband brought out more than 100 of her performances on CD which were greeted by enthusiasm by reputable classical publications such as *Gramaphone*. They reported that she was suffering from cancer which was forwarded as the reason why she never performed live anymore, preferring to only perform in a recording studio. In 2005, a university professor, noticed a strange anomaly in the form of an unusual mistake. The pianist had made the same mistake, playing a chord as if it was written in another clef, that another pianist had made in a previous recording of the same piece of music. He subsequently reported it on an Internet website and some began to question whether she had in fact performed on these recorded works. Interestingly, she did not challenge the interviewer’s assumption that the recordings were, in fact, hers when interviewed on Radio New Zealand in April 2006 and accepted the enthusiastic survey of her work featured in the January 2006 version of *Gramaphone*. Her obituary in the Times hailed her as “one of the most remarkable recording legacies of the 20th century.” However, in February 2007 the truth regarding the origins of her recordings came to light. A listener put one of her CD’s into his computer and his iTunes software identified the performer as someone else. Her husband was questioned and eventually admitted that he had used patches of other pianist’s performances to compensate for his wife’s deficiencies. It has since been revealed that he didn’t just use patches of other performers’ works; in some cases he used entire performances. He disguised the works of several accomplished performers as well as the accompaniment of the Philharmonic Orchestra and the Vienna Philharmonic and passed them off as that of his wife. In terms of the Copyright, Designs and Patents Act, both the rights of “paternity” and of “integrity” were infringed by Barrington-Coupe “on a stupendous scale”. Not only did he falsely attribute the recordings of others as those of his wife, he is said to have sped up some of the recordings while maintaining the correct pitch (which distorts them) and to have used only parts of some recordings (which mutilates them). Owing to the fact that the act does not apply to any acts of infringement committed before commencement of the act, the performers whose recordings were copied or mutilated before enactment will have to seek legal remedies elsewhere, such as in the law of passing off. See Best “Piano Lessons” 2007 *Best & Soames* www.i-law.com/ilaw/doc/view.htm?id=1840&searched=true&queryString= %22performers %27s+rights%22&querySector=ALL&pubTitle= (accessed 10-08-2010) in this regard.

1200 S14(2).
protection of which had expired in terms of the previous duration term of 20 years and had subsequently fallen into the public domain can be brought back into the ambit of protection. This is attributable to the fact that the current term of protection is 50 years. Since the Act is unrestrictedly retrospective, these performances now fall within the 50 year protection term which accords them protection that they had previously lost. No allowances were made to alleviate any hardships caused by granting protection retrospectively.\textsuperscript{1202}

Since there are no qualifications to retrospectivity, it is submitted that protection is granted unconditionally and unequivocally to all performances given before enactment. In addition, any act committed before commencement that is currently regarded as an infringement will be actionable.

6.7.4 Analysis

With regard to retroactivity, there is a substantial difference between that accorded by the United Kingdom and South Africa. The United Kingdom only provides protection to live performances given before commencement of the Act. Any act of infringement committed before enactment is not actionable. South Africa provides unqualified protection to all performances given before enactment and legal action can be taken for any act of infringement regardless of when the infringement occurred, provided infringement took place within the preceding 50 years.

6.8 ENFORCEMENT

6.8.1 General

"[A] right without a remedy turns out to be an expensive fantasy."\textsuperscript{1203}

Performers in the United Kingdom and South Africa are granted civil and criminal remedies for the infringement of their rights. In addition, both jurisdictions provide for alternate remedies originating from common law by which these rights can be protected.

\textsuperscript{1201} Dean “Performers’ Protection” in Handbook of South African Copyright Law 1-119.
\textsuperscript{1202} Ibid.
Newer rights related to the protection of the image of the performer are also relevant to this discussion.

It is dangerous to assume that the laws and practices of these jurisdictions always correspond. The relevant legislation may bear similarities, but the different common law origins of the two systems can give rise to different outcomes in any particular case.  

6 8 2 United Kingdom

6 8 2 1 Civil remedies

In terms of English law, the remedies available for infringement of performers’ rights depend on which type of rights has been infringed. If a property right has been infringed, a performer is entitled to the same remedies as those afforded copyright owners. These are injunctions, damages, account of profits, delivery up, seizure and forfeiture.

The infringement of a non-property right is actionable as a breach of statutory duty. The only remedies provided for infringement of these rights by Part II of the Act are delivery up, seizure and forfeiture of illicit recordings. However, it is apparent that the normal English remedies for breach of statutory duty are available. Therefore, the remedies available for infringement of non-property rights are injunctions, damages, delivery up, seizure and disposal.

a) Injunctions

An injunction is brought to prevent further infringements or threatened infringements by infringers of potential infringers. However, an injunction may be refused on equitable grounds such as delay or unclean hands. Damages may be awarded instead of an injunction if the injunction would be too oppressive, however it was shown in Ludlow Music
Inc V Williams and Others (No. 2)\textsuperscript{1212} that it is fairly difficult for an infringer to establish that an injunction shouldn’t be granted, even if money might be a more appropriate remedy.

The Act provides a defence of “innocence” against an injunction in the event of infringement by importing, possessing or dealing with an illicit recording. The defendant must show that the illicit recording was innocently acquired by him, in which case the injunction won’t be awarded but damages not exceeding a reasonable amount in respect of the act complained of can be ordered.\textsuperscript{1213}

\textbf{b) Damages}

In the case of a performer’s property rights, infringement is actionable without proof of damage.\textsuperscript{1214} However, if a performer’s non-property rights are being infringed, the claimant must establish damage of a sort against which the Act was designed to grant protection.\textsuperscript{1215}

The measure of damages for infringement of property rights is determined on the basis that the claimant’s property has been invaded by the infringer.\textsuperscript{1216} Therefore, the amount to be awarded as damages depends on to what extent the performer exploits his performances. If the performer does not exploit his performances, a reasonable royalty as determined by the court will be awarded.\textsuperscript{1217}

Since performers non-property rights are not proprietary rights, the question of measuring damages for infringement poses difficulties. Therefore, the most just and convenient solution is to assess damages on the same grounds that damages for infringement of property rights are measured.\textsuperscript{1218}

When assessing damages, the Intellectual Property (Enforcement, etc) Regulations\textsuperscript{1219} provides that all appropriate circumstances must be taken into account, including the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1212} [2002] EWHC 638 Ch, [2002] EMLR 29.
\item \textsuperscript{1213} S184(2).
\item \textsuperscript{1214} 206.
\item \textsuperscript{1215} \textit{ibid}.
\item \textsuperscript{1216} \textit{ibid}.
\item \textsuperscript{1217} See General Tire & Rubber Co v Firestone Tyre & Rubber Co [1976] RPC 197.
\item \textsuperscript{1218} Arnold Performers’ Rights 207.
\item \textsuperscript{1219} 2006.
\end{itemize}
\end{footnotesize}
negative economic consequences, such as any lost profits and any unfair profits made by
the infringer; and elements other than economic factors, such as "moral prejudice". 1220

Additional damages may, at the court’s discretion, be awarded in the case of infringement
of property rights if there is evidence of flagrancy on the part of the infringer. 1221
"Flagrancy" amounts to scandalous conduct, deceit as well as deliberate and calculated
infringement. 1222 However, these damages are intended to compensate the plaintiff, not
punish the defendant 1223 and are not available to a performer for infringement of his non-
property rights. 1224

In the case of primary infringement of non-property rights, damages may not be awarded if
the defendant shows that at the time of the infringement he believed on reasonable
grounds that consent had been given. 1225 For primary infringement of a performer’s
property rights, damages may not be awarded against a defendant if he is able to show
that at the time of the infringement he did not know, and had no reason to believe, that the
rights subsisted in the infringing recording. 1226 It has, therefore, been held in Cramp Sons
Ltd v Smythson Ltd 1227 that the defence of innocence is not available to a defendant who
copies material without enquiring as to the source of what he is reproducing. 1228

Where infringement is secondary in nature, the only remedy available against a defendant
who can show that the illicit recording was innocently obtained is an award of damages not
exceeding a reasonable payment in respect of the act complained of. 1229

c) Account of profits

The Act provides that where a claimant has successfully proven his claim, he may elect for
an account of profits instead of an award of damages. 1230

1220 Regulation 3(2)(a).
1221 S191J(2)(a).
1223 See Nottingham Healthcare National Health Service Trust v News Group Newspapers Ltd
1225 S182(3).
1226 See Arnold Performers’ Rights 211.
1227 [1943] 1 Ch 133.
1228 Arnold Performers’ Rights 211.
1229 S184(2).
1230 S191I(2).
This remedy is only available for infringement of property rights and the court has a discretion as to whether to award it. Therefore, if the infringement is trivial; the claimant has delayed; or the defendant was unaware his actions were wrongful; the remedy could be refused.\textsuperscript{1231}

The calculation of an account is based on preventing unjustified enrichment since the defendant is required to hand over any net profits he has made through the infringing activity. Therefore, this involves determining the amount of revenue derived by the infringer.\textsuperscript{1232}

d) Delivery up

The remedy of delivery up is available for the infringement of property rights as “non-statutory” delivery up, and for the infringement of non-property rights as “statutory” delivery up.\textsuperscript{1233} The Act provides that where a person has in his possession, custody or control in the course of a business an illicit recording of a performance, the performer may apply for an order that the recording be delivered to him.\textsuperscript{1234}

In \textit{Ocular Sciences Ltd v Aspect Vision Care Ltd (No. 2)}\textsuperscript{1235} it was held that delivery up will not be ordered where it would cause the defendant greater hardship than is necessary to protect the interests of the claimant.\textsuperscript{1236} In addition, the court may not grant the order unless it also grants a disposal order for forfeiture or destruction of the illicit recording.\textsuperscript{1237}

e) Seizure

The Act also contains “do-it-yourself” search orders\textsuperscript{1238} also known as “self help” provisions.\textsuperscript{1239} In terms of this provision, an illicit recording which is found exposed or otherwise immediately available for sale or hire in respect of which a person would be

\textsuperscript{1231} Arnold Performers’ Rights 212.
\textsuperscript{1232} Ibid.
\textsuperscript{1233} Ibid.
\textsuperscript{1234} S195(1).
\textsuperscript{1235} [1997] RPC 289.
\textsuperscript{1236} S195 (2).
\textsuperscript{1237} Ibid.
\textsuperscript{1238} Arnold Performers’ Rights 216.
\textsuperscript{1239} Skone James, Mummery, Rayner James, Garnett, Nimmer, Silman & Skone James \textit{Copinger and Skone James on Copyright} (1991) 822.
entitled to an order for delivery up may be seized and detained by him, subject to certain conditions.\footnote{S196(1).}

A person exercising this remedy may not use any force.\footnote{S196(3).} This requirement is necessary in order to avoid an invitation to use violence, but it creates two problems. The first is that even if the person exercising the remedy does not resort to violence, the person in possession of the illicit recording may well do so. Secondly, the Act does not appear to provide any sanctions in the event the person in possession of the illicit recording refuses to allow it to be seized.\footnote{Arnold Performers’ Rights 219.}

\textbf{f) Disposal}

If an order for delivery up of an illicit recording has been granted or the illicit recording has been seized, the court may order that the recording be forfeited to the person having performers’ rights\footnote{S204(1)(a).} or destroyed.\footnote{S204(1)(b).} Before granting this disposal order, the court must first consider whether there are other remedies available to compensate the person entitled to the right and to protect their interests.\footnote{S204(2).} In the event that no disposal order is made, the person in whose possession, custody or control the recording was before it was delivered up or seized is entitled to its return.\footnote{S204(5).}

\textbf{6 8 2 2 Criminal liability}

The Copyright, Designs and Patents Act provides that certain infringing acts are an offence and provides penalties to be imposed upon conviction.

A person who, without sufficient consent, makes for sale or hire;\footnote{S198(1)(a).} imports into the United Kingdom otherwise than for private or domestic use;\footnote{S198(1)(b).} possesses in the course of a business with a view to committing any infringing act;\footnote{S198(1)(c).} or in the course of business sells or lets for hire, offers for sale or hire, or distributes\footnote{S198(1)(d).} a recording that he knows or has
reason to believe is an illicit recording is guilty of an offence. In *R v Zaman*¹²⁵¹ it was held that the term “with a view to committing any infringing act” meant that the defendant had the committing of the act in mind as something that realistically might occur, regardless of whether he wanted or intended it to happen.¹²⁵² These offences carry the penalty of imprisonment for a term not exceeding six months or a fine, or both upon summary conviction.¹²⁵³ Upon conviction on indictment, an offender is liable to imprisonment not exceeding ten years or a fine, or both.¹²⁵⁴

An offence is also committed by a person who infringes a performer’s making available right in the course of a business,¹²⁵⁵ or otherwise than in the course of a business to such an extent that the performer’s making available right is prejudicially affected and the offender knows or has reason to believe he is infringing this right.¹²⁵⁶ A person found guilty on summary conviction of any of these offences can be imprisoned for a term not exceeding three months or be ordered to pay a fine, or both.¹²⁵⁷ Upon conviction on indictment he can be imprisoned for a term of no more than two years or a fine, or both.¹²⁵⁸

A person also commits an offence if he causes a recording of a performance made without consent to be shown or played in public;¹²⁵⁹ or communicated to the public if he knows or has reason to believe that performers’ rights are being infringed. The offender does not need to commit the act himself. Therefore, liability is satisfied if he causes the recording to be played or shown by a third party.¹²⁶¹ The penalties for this offence on summary conviction are imprisonment for a term not exceeding six months or a fine, or both.¹²⁶²

It is also an offence for a person to falsely represent that he is authorised to give consent in relation to a performance, unless he reasonably believes that he has authority to

¹²⁵² *Arnold Performers’ Rights* 244.
¹²⁵³ S198(5)(a).
¹²⁵⁴ S198(5)(b).
¹²⁵⁵ S198(1A)(a).
¹²⁵⁶ S198(1A)(b).
¹²⁵⁷ S198(5A)(a).
¹²⁵⁸ S198(5A)(b).
¹²⁵⁹ S198(2)(a).
¹²⁶⁰ S198(2)(b).
¹²⁶¹ See *Russell v Briant* (1849) 8 CB 836.
¹²⁶² S198(6).
A person found guilty of this offence can be imprisoned for a term not exceeding six months or be ordered to pay a fine, or both.\textsuperscript{1264}

No offence is committed by the commission of an act that falls within the ambit of the exceptions to infringement contained in Schedule 2 of the Act.\textsuperscript{1265}

The Act further provides for additional orders that the court can make upon conviction.

The court may, in appropriate circumstances, make an order for delivery up of an illicit recording if satisfied that at the time of the offender’s arrest or charge that he had the recording in his possession, custody or control in the course of a business.\textsuperscript{1266} The court will not make the order if the limitation period of six years has passed;\textsuperscript{1267} or it seems unlikely that a disposal order will be made.\textsuperscript{1268}

In pursuance of a delivery up order, the court may make disposal orders in respect of illicit recordings whereby the recording may be forfeited to such person having performers’ rights\textsuperscript{1269} or destroyed.\textsuperscript{1270} Before granting this order, the court must first consider whether there are alternate remedies available to compensate the person entitled to the right.\textsuperscript{1271}

A Justice of the Peace may issue a search warrant authorising a constable to enter and search the premises where there are reasonable grounds to believe an offence has been, or is about to be committed;\textsuperscript{1272} and where evidence that such an offence has been or is about to be committed can be found.\textsuperscript{1273} However, the power does not extend to authorising a search for certain classes of personal or confidential material.\textsuperscript{1274}

In terms of the Powers of Criminal Courts Act, 1973 the court also has the power to order that an offender pay compensation for any loss or damage caused by his offence.\textsuperscript{1275}

\begin{footnotes}
\item 1263 S201(1).
\item 1264 S201(2).
\item 1265 S198(4).
\item 1266 S199(1).
\item 1267 S199(3)(a).
\item 1268 S199(3)(b).
\item 1269 S204(1)(a).
\item 1270 S204(1)(b).
\item 1271 S204(2).
\item 1272 S200(1)(a).
\item 1273 S200(1)(b).
\item 1274 S200(2).
\item 1275 S35.
\end{footnotes}
was held in R v Vivian,\textsuperscript{1276} compensation will only be ordered if there is no doubt as to the offender's liability or the amount of the liability.\textsuperscript{1277}

\textbf{6 8 2 3 Remedies for infringement of moral rights}

The Act provides remedies for the infringement of moral rights in the nature of non-property rights actionable as a breach of statutory duty.\textsuperscript{1278} Therefore, the same remedies available for infringement of non-property rights should be applicable here.

In proceedings for the infringement of the right to object to derogatory treatment, the court may also, if it deems it an adequate remedy, grant an injunction prohibiting the doing of any act unless a disclaimer is made dissociating the performer from the broadcast or sound recording of the performance.\textsuperscript{1279}

The infringement of moral rights is not an offence in the United Kingdom.\textsuperscript{1280}

\textbf{6 8 2 4 Other forms of enforcement}

In addition to the provisions of Part II of the Copyright, Designs and Patents Act, English law provides alternate forms of protection for performers. This protection can be found in the law of contract, passing off, breach of confidence and defamation.

a) Contract

Although the Copyright, Designs and Patents Act provides comprehensive protection to performers, an important area of law for performers is that of contract.\textsuperscript{1281}

\textquotedblleft It is contract law that regulates performers' relationships with each other, with promoters of performances and with producers of recordings of performances.\textsuperscript{1282}\textquotedblright

\textsuperscript{1276} [1979] 1 WLR 291.
\textsuperscript{1277} Arnold Performers'
 Rights 225.
\textsuperscript{1278} S205N(1).
\textsuperscript{1279} S205N(4).
\textsuperscript{1280} Article 25 of the Related Rights Act (1993) of the Netherlands provides that a person who intentionally and unlawfully makes any alterations to a performance, the title of the performance or the name of the performer; or who damages a performance in such a way as to be prejudicial to the name or reputation of the performer is criminally liable and, upon conviction, can be imprisoned for a term of no more than six months or a fine.
\textsuperscript{1281} Arnold Performers' Rights 257.
\textsuperscript{1282} Ibid.
Regarding contracts, there are generally three problems facing performers. The first involves assignments of performers’ property rights; the second deals with licences of performers’ rights; and the third is enforcement.\textsuperscript{1283}

With regard to assignments of performers’ rights, Arnold avers that there are several reasons why it is not advisable for performers to enter into this type of agreement. Firstly, since an assignment is a transfer of property, it is essential irreversible. Secondly, a consequence of the assignment of rights is that the assignee (producer) may enter into a subsequent assignment agreement with a third party, leaving the performer in a relationship with a different party to the one he agreed to contract with originally. Lastly, entering into such an agreement leaves the performer open to the risk of the producer becoming insolvent and the rights being transferred to a subsequent assignee who may not honour the obligation to pay the performer royalties owed.\textsuperscript{1284}

The reason for the last-mentioned risk is the rule postulated in \textit{Barker v Stickney}.\textsuperscript{1285} Essentially, where an author assigns his copyright in a work to a publisher on the grounds that the publisher pay the author royalties for the exploitation of the work, and the publisher subsequently assigns the rights to a third party without imposing an obligation to pay the author’s royalties on the third party, the third party is not legally obligated to pay these royalties. The original publisher retains the obligation to pay but he may be unable to pay. Therefore, the benefit of a contract can be assigned, but not the burden.\textsuperscript{1286}

Scrutton L.J provided a solution of sorts when he stated:

\begin{quote}
“Otherwise let them keep the copyright themselves, and assign no more than a right to publish conditional upon royalties being paid, and only assignable if they are provided for.”\textsuperscript{1287}
\end{quote}

This means that the third party can be forced to take the burden with the benefit if the assignment is conditional upon the payment of royalties.\textsuperscript{1288}

This rule is the most compelling reason why performers should not enter into agreements assigning their property rights in their performances. The better solution is to grant

\textsuperscript{1283}\textit{Ibid.}
\textsuperscript{1284}258-259.
\textsuperscript{1285}[1919] 1 KB 121.
\textsuperscript{1286}Arnold \textit{Performers’ Rights} 259-260.
\textsuperscript{1287}[1919] 1 KB 121 130-131.
\textsuperscript{1288}Arnold \textit{Performers’ Rights} 262.
exclusive licences where the right to exploit the performance is subject to the payment of royalties.\textsuperscript{1289}

Exclusive licences may be granted in respect of a specific performance, a specific act, or for a specific time period and corresponds to the usage of “consents” applied in the Copyright, Designs and Patents Act.\textsuperscript{1290} The main issue pertaining to the negotiating of a licence agreement lies in the determining of the ambit of the consent to be granted. A producer will attempt to procure the widest possible consent to exploitation while the performer should only offer consent for limited exploitation.\textsuperscript{1291}

Should a producer seek the enforcement of a contract against an unwilling performer, there are several options that can be considered.

Firstly, specific performance will generally not be ordered to enforce such agreements owing to the court’s reluctance to force a continued personal relationship between unwilling parties.\textsuperscript{1292}

Secondly, an injunction can be obtained to restrain the breach of an agreement to the performance of personal services.\textsuperscript{1293} However, where the contractual relationship is long and a substantial mutual trust or confidence is evident, an injunction will not be granted.\textsuperscript{1294}

Thirdly, a restraint of trade is generally regarded as being contrary to public policy and unenforceable.\textsuperscript{1295} However, as was held in \textit{Panayiotou v Sony Music Entertainment (UK) Ltd},\textsuperscript{1296} a restraint can be enforceable if it is reasonable between the parties and not contradictory to public interests.

Lastly, if a performer is successfully able to show that his contract was procured on the basis of undue influence, it can be declared voidable.\textsuperscript{1297} This was successfully alleged in 1991 by Elton John in \textit{John v James}.\textsuperscript{1298} In order to succeed with such a claim, the

\textsuperscript{1289} Ibid. \hfill \textsuperscript{1290} 263. \hfill \textsuperscript{1291} Ibid. \hfill \textsuperscript{1292} 273. \hfill \textsuperscript{1293} Ibid. \hfill \textsuperscript{1294} Arnold Performers’ Rights 274. \hfill \textsuperscript{1295} 275. \hfill \textsuperscript{1296} Ibid. \hfill \textsuperscript{1297} [1994] ECC 395; [1994] EMLR 229; (1994) 13 Tr LR 532 Ch D. \hfill \textsuperscript{1298} Ibid. \hfill \textsuperscript{1299} Arnold Performers’ Rights 276. \hfill \textsuperscript{1300} [1991] FSR 397.
claimant must prove that at the time of the agreement the claimant put his trust and confidence in the defendant which was subsequently abused by the defendant.\footnote{Arnold Performers’ Rights 276.}

b) Passing off

In circumstances where a performance has been imitated without infringement of performers’ rights, legal redress can be found in the doctrine of passing off.\footnote{Ibid.} This most often finds application in cases of personality merchandising and the imitation of performance characteristics.\footnote{[1990] 1 All ER 873.}

The test for passing off as set out in \textit{Reckitt & Colman Ltd v Borden Inc}\footnote{[1947] 64 RPC 113.} involves a three part test on reputation, misrepresentation and damage. First, the plaintiff must establish a goodwill or reputation attached to the goods or services which he supplies present in the minds of the purchasing public by association with the identifying “get-up” which he uses in relation to his goods or services. Second, the plaintiff must show a misrepresentation on the part of the defendant which is misleading or is likely to mislead the public into believing that the goods or services offered by the defendant are the goods or services of the plaintiff. Third, the plaintiff must show that he has, or is likely to suffer damage as a result of the defendant’s actions.\footnote{Arnold Performers’ Rights 294.}

Personality merchandising is the exploitation of a performer’s name, likeness and performance characteristics in relation to \textit{inter alia} the sales of clothing, games and memorabilia.\footnote{880.}

A performer has been able to prevent a rival from performing under the same or a confusingly similar name since 1947 when the court in \textit{Hines v Winnick}\footnote{(1947) 64 RPC 113.} granted a musician an injunction to prevent other performers from performing under the name \textit{Dr Crock and his Crackpots}.\footnote{Arnold Performers’ Rights 295.} However, it was not until recently that performers were able to obtain protection for the use of other aspects of their personal characteristics. In \textit{Irvine v Talksport Ltd}\footnote{[2003] EWCA Civ 423; [2003] EMLR 26.} a well-known Formula 1 racing driver instituted action against the defendant on the basis that the defendant had made a brochure advertising his radio...
station. Included in this brochure was a photograph of the claimant on the cover. The photograph had been manipulated from its original form wherein the claimant was holding a telephone, to what appeared to be him holding a radio with the words “Talk Radio” emblazoned on it. The plaintiff’s claim for passing off was upheld by the court a quo and on appeal.\textsuperscript{1308}

On the grounds of this decision, a performer whose name and/or likeness is used in a commercial activity so as to suggest that he has licensed or endorsed those activities should be successful with a claim for passing off.\textsuperscript{1309} However, the performer must still show that the use of his name or likeness is likely to deceive the public into thinking that he has licensed or endorsed the use in question and that he has suffered damage as a result.\textsuperscript{1310}

c) Breach of confidence

A further way performers can protect their rights is through a claim of breach of confidence based on an invasion of their privacy.

In terms of the Human Rights Act,\textsuperscript{1311} claimants are able to bring such claims in order to protect their privacy.\textsuperscript{1312} In \textit{Campbell v Mirror Group Newspapers Ltd},\textsuperscript{1313} the defendant published photographs of the claimant, a well-known model, attending Narcotics Anonymous meetings in a national newspaper. The claimant acknowledged that, as a well-known personality, the newspaper was entitled to publish the fact that she was a drug addict and that she was the recipient of treatment but she objected to the publishing of information as to where she was receiving treatment and what her treatment entailed. The House of Lords ruled that a duty of confidence exists whenever a recipient of information about another person knows, or should know, that the person has a reasonable expectation of privacy. However, in assessing whether the duty of confidence has been breached, the claimant’s right to privacy must be weighed up against the defendant’s right to freedom of expression. Campbell’s claim was subsequently upheld.\textsuperscript{1314}

\textsuperscript{1308} Arnold \textit{Performers’ Rights} 298.
\textsuperscript{1309} 300.
\textsuperscript{1310} \textit{ibid}.
\textsuperscript{1311} Article 8.
\textsuperscript{1312} Arnold \textit{Performers’ Rights} 303.
\textsuperscript{1314} Arnold \textit{Performers’ Rights} 303.
d) Defamation

There have also been several cases where performers have relied on defamation in order to protect their rights, particularly in response to hostile and uninformed criticism that they consider to be damaging to their professional reputations.\(^\text{1315}\)

In \textit{Berkoff v Burchill},\(^\text{1316}\) a claim of defamation was upheld against the defendant who, through his written reviews, contended that the claimant was hideously ugly.\(^\text{1317}\)

In \textit{Cleese v Clark},\(^\text{1318}\) John Cleese, a well-known British actor, was successful in claiming defamation in respect of an article wherein the defendant stated that Cleese “faced humiliation after his latest flop” and “the hubris of this perma-tanned wannabe Bob Hope has been richly rewarded”.\(^\text{1319}\)

\textbf{6 8.3 South Africa}

\textbf{6 8.3.1 Civil remedies}

A performer whose performers’ rights have been infringed has the following civil remedies at his disposal. He can claim for an interdict and/or damages as well as the disposal of the infringing article.

In addition, he has the usual common law remedies available, of which a claim for infringement of personality rights and for unlawful competition, particularly passing off, is most salient.

a) Damages

The Performers’ Protection Act provides that any person who infringes a performer’s rights may be sued by the performer for an amount in damages not exceeding the amount determined by the Minister as published from time to time in the \textit{Government Gazette}.\(^\text{1316}\)

In addition to conventional damages, the court may also award punitive damages.\(^\text{1320}\) The Act provides that the court can decide to award damages without proof of damage as it

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\(^\text{1315}\) 306.
\(^\text{1316}\) [1997] EMLR 139.
\(^\text{1317}\) Arnold \textit{Performers’ Rights} 306.
\(^\text{1319}\) Arnold \textit{Performers’ Rights} 306.
\(^\text{1320}\) Dean “Performers’ Protection” in \textit{Handbook of South African Copyright Law} 1-117.
may deem in the circumstances of the case to be reasonable. Any award of damages is in addition to an award of costs. 1321

b) Interdict

Together with a claim for damages, the court may also grant an interdict. 1322 This remedy corresponds with the remedy of an injunction available to performers in the United Kingdom.

The Performers’ Protection Act provides that any person who infringes a performer’s rights may be sued by such a performer for an interdict and/or damages. 1323

If only an interdict has been claimed, the applicant must prove a prima facie right; a well-grounded apprehension of irreparable harm if the interdict is not granted; that the balance of convenience is in favour of granting an interdict; and that there is no other remedy available to the applicant. 1324

The court can award an interdict and a claim for damages the amount of which the performer appears to have suffered, or punitive damages subject to a limit as determined by the Minister from time to time in the Government Gazette. 1325

c) Disposal of infringing article

The Performers’ Protection Act provides that the court may, before any legal proceedings are undertaken, order that all fixations, reproductions of fixations or plates in the possession of the defendant that appear to be in contravention of the Act, be destroyed or otherwise dealt with as the court determines. 1326

The word “plate” is not defined in the Act but the Copyright Act defines a “plate” to mean any stereo-type, stone, block, mould, matrix, transfer, negative, record, disc, storage medium or any version of a work of whatsoever nature used to make copies. 1327

1321 S10(a).
1322 S10(b).
1323 Ibid.
1324 Harms “The role of the judiciary in enforcement of intellectual property rights: Intellectual property litigation under the common law system with special emphasis on the experience in South Africa” 18.
1325 S10(b).
1326 S11.
1327 S1.
The South African provision corresponds to a similar provision in the Copyright Act.\(^\text{1328}\) However, these provisions differ slightly in that the Copyright Act specifically provides for the delivery of the infringing article. The Performers’ Protection Act only provides that the infringing articles be destroyed or otherwise dealt with. The actual delivery of the item by the infringer to the claimant is not specifically provided for or required by the Performers’ Protection Act. Therefore, it is submitted that comparing this remedy to the English remedy of “delivery up” is incorrect.\(^\text{1329}\) This remedy is comparable to the disposal remedy provided for by the English Act.

\section*{6832 Criminal liability}

In terms of the Act, any person who knowingly contravenes any of the rights contained in the Act;\(^\text{1330}\) who knowingly sells or lets for hire, any fixation of a performance or a reproduction of such a fixation that infringes any of the rights contained in the Act;\(^\text{1331}\) or who makes, or has in his possession, a plate or similar contrivance for the purpose of making fixations of a performance or reproduction of such fixations in contravention of the Act\(^\text{1332}\) commits an offence.

In terms of the Act, it is also an offence for a person to misrepresent that he has authority to grant consent on behalf of a group of performers.\(^\text{1333}\) Upon conviction, the offender will be liable to a fine not exceeding two hundred rand, or to imprisonment for a period not exceeding one year, or to both.\(^\text{1334}\) Since the Act refers to “performers” and not to “performer”, it appears that it is only an offence to falsely or negligently misrepresent authority when acting on behalf of a group of performers.

Should an accused be guilty of knowingly contravening any of the rights contained in the Act, he can be imprisoned for a period not exceeding three months or be ordered to pay a fine. In addition, the court may, upon application by the performer, order the defendant to pay the performer “penalty” damages.\(^\text{1335}\) Such an order for the payment of damages may be executed as if it were a civil judgement made in favour of the performer.\(^\text{1336}\)

\begin{footnotesize}
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\begin{itemize}
  \item \(^{1328}\) S24(1).
  \item \(^{1329}\) Dean “Performers’ Protection” in \textit{Handbook of South African Copyright Law} 1-117.
  \item \(^{1330}\) S9(1)(a).
  \item \(^{1331}\) S9(1)(b).
  \item \(^{1332}\) S9(1)(c).
  \item \(^{1333}\) S12(2)(b).
  \item \(^{1334}\) \textit{Ibid}.
  \item \(^{1335}\) S9(1)(i).
  \item \(^{1336}\) S9(2).
\end{itemize}
\end{footnotesize}
Upon conviction for knowingly selling or letting for hire a fixation of a performance or a reproduction of a fixation, the defendant can be ordered to pay a fine not exceeding an amount determined by the Minister from time to time by notice in the Government Gazette in respect of each fixation or reproduction thereof.\textsuperscript{1337}

Should a defendant be guilty of making or having in his possession a plate used to make reproductions of fixations of a performance, he can be liable upon conviction to imprisonment for a term not exceeding six months or a fine, or both.\textsuperscript{1338}

The use of the word “knowingly” implies that the defendant must be aware that his actions are an infringement of performers’ rights. Therefore, fault is a requirement for liability.

The court can also order that any infringing articles be destroyed or otherwise dealt with in the case of criminal offences.\textsuperscript{1339} This is comparable to the English remedy of disposal.

6 8 3 3 Other forms of enforcement

The Performers’ Protection Act gives a performer the right to enter into contracts regarding the uses of his performance. Therefore, the law of contract can also be enlisted to protect performers.

The Act further provides that the rights acquired by any performer prior to the commencement of this Act shall not be prejudiced by the Act.\textsuperscript{1340} Since the Act has no predecessor, these rights can only mean common law rights which subsisted before enactment and which still exist alongside the Act today.\textsuperscript{1341} These are personality rights and passing off as a form of unlawful competition.

In addition, there are strong arguments in favour of recognising the right to identity as a separate and independent personality right in South Africa.\textsuperscript{1342}

\textsuperscript{1337} S9(1)(ii).
\textsuperscript{1338} S9(1)(iii).
\textsuperscript{1339} S11.
\textsuperscript{1340} S14(1).
\textsuperscript{1341} Dean “Performers’ Protection” in Handbook of South African Copyright Law 1-120.
\textsuperscript{1342} Also referred to as image rights.
a) Contract

The Performers’ Protection Act provides that any performer may enter into any contract with any user or prospective user of his performance in respect of the use of his performance.\(^{1343}\)

This contractual provision refers to the right of the performer to assign his rights or to license the use of his rights. Since the rights contained in section 5(1)(a) are non-proprietary in nature, they are not assignable. Only the right to use a performance can be transferred to a user, not the ownership thereof.\(^{1344}\) A licence agreement does not divest the performer of the right but allows the licensee to exercise the right.\(^{1345}\)

Unlike the above-mentioned rights, the right to receive a royalty, as contained in section 5(1)(b), can be assigned either contractually, by operation of law or through testamentary disposition. However, because a performer’s consent is not required for uses of his performances provided the royalty is paid, this right is not by its nature proprietary, but economic. Generally, a performer assigns his right to receive the royalty to a collecting society in order for the right to be administered on his behalf, but this right can be assigned to a party other than a collecting society which is contrary to the position in the United Kingdom. Therefore, it is possible that a performer, in exchange for a lucrative recording contract, could assign his right to receive future needletime royalties to an unscrupulous recording company.

Should a performer enter into either an assignment agreement or an exclusive licensing agreement, the traditional forms of protection in terms of the law of contract will be available to him.

a) Personality rights

Traditionally, there are three classic personality interests, namely the right to bodily integrity (\textit{corpus}), the right to dignity (\textit{dignitas}) and the right to reputation (\textit{fama}).\(^{1346}\) Infringement of any of these rights would constitute an \textit{iniuria} actionable under the \textit{actio iniuriarum}.\(^{1347}\)

\(^{1343}\) S13.
\(^{1344}\) Dean “Performers’ Protection” in \textit{Handbook of South African Copyright Law} 1-118.
\(^{1345}\) 119.
\(^{1347}\) \textit{Ibid.}
Of these three rights, the right to dignity and reputation are relevant to a discussion on the protection of performers’ rights.

*Dignity*

Dignity embraces both common law and constitutional elements. Dignity is an entrenched constitutional right\(^\text{1348}\) as well as a recognised personality right at common law. The notion of dignity as a common law right will receive attention here.

Although privacy is also a self-standing constitutional right, it is included within the ambit of dignity as actionable at common law in terms of the *actio iniuriarum*.\(^\text{1349}\) In order for there to be liability, there must be a factual violation of the right that was both wrongful and intentional.\(^\text{1350}\) Factual violation occurs when outsiders become familiar with an individual’s personal affairs through either a direct intrusion or by the unauthorised disclosure of these affairs to another person.\(^\text{1351}\) To qualify as wrongful and intentional the act must involve “the direction of the defendant’s will towards infringing the plaintiff’s privacy, and the defendant’s knowledge that such infringement is wrong in the circumstances.”\(^\text{1352}\) Therefore, fault is a requirement for liability. In establishing fault in such cases, it was held in *NM v Smith*\(^\text{1353}\) that it must be established whether publication is reasonable in the circumstances (which will refute an allegation of wrongfulness), or whether they have acted negligently in the circumstances (which will rebut an allegation of intention).\(^\text{1354}\)

Upon application to performers’ rights, should private information or photographs of a performer unlawfully obtained be published, the performer could institute action for invasion of privacy in terms of the *actio iniuriarum*.

A second aspect of dignity which deserves attention is the right to identity. It is the right to a person’s image and aspects associated with it, such as *inter alia* the person’s name, voice or likeness.\(^\text{1355}\) A factual violation occurs when aspects of a person’s image are used outside the scope of that image\(^\text{1356}\) in a way that is wrongful and intentional.\(^\text{1357}\) It is

\(^{1348}\) S10.
\(^{1349}\) Loubser et al *The Law of Delict* 316.
\(^{1350}\) *Ibid.*
\(^{1351}\) 317.
\(^{1352}\) 320.
\(^{1353}\) 2007 (5) SA 250 (CC).
\(^{1354}\) 2007 (5) SA 250 (CC) paragraph 179.
\(^{1355}\) Louw 2007 *South African Mercantile Law Journal* 55.
\(^{1356}\) Loubser et al *The Law of Delict* 55-56.
that which makes an individual unique and identifies him as a person different from others.\textsuperscript{1358}

The issue of an actionable right to identity first came before the South African courts in 1931 in Van Zyl v African Theatres Ltd\textsuperscript{1359} when damages were claimed on the basis that the defendant wrongly advertised in a newspaper that the plaintiff, a famous singer, would be appearing at the defendant’s theatre. The plaintiff’s claim was not upheld as he could not prove \textit{animus iniuriandi} or damage, but the decision is nonetheless significant as the court did not question the basis of the claim, namely the unauthorised use of a person’s name.\textsuperscript{1360} Although actionable as an infringement of dignity, it has been recognised as an independent right under the umbrella of dignity since 1977 as a result of Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk.\textsuperscript{1361}

In O’Keeffe v Argus Printing and Publishing Co Ltd\textsuperscript{1362} the plaintiff allowed a newspaper to publish her photograph as part of a news article. However, the newspaper subsequently used the photograph as part of an advertisement for a gun manufacturer. The court held that the use of the plaintiff’s photograph and name without consent for advertising purposes, constituted a violation of her personality interests, in particular her right to dignity.\textsuperscript{1363} The decision in this case is particularly interesting since the court concluded that the presence of insult or derision was not needed to found liability for infringement of dignity in terms of the \textit{actio iniuriarum}.\textsuperscript{1364} This symbolises “a true beacon in the development of the right to identity”.\textsuperscript{1365}

Therefore, the authorities seem to indicate that the right to identity can be violated in two ways. The first involves the use of attributes of a person without his permission in a way which cannot be reconciled with his true image. This corresponds with “putting the person in a false light” and entails some form of misrepresentation concerning the person, such as

\begin{enumerate}
\item \textsuperscript{1357} 326.
\item \textsuperscript{1358} Wheeldon “Personality rights: Where the person is the brand” 2010 International Law Office http://www.internationallawoffice.com/newsletters/detail.aspx?g=a40dc262-173f-4e43-a8ec-fe837e942ea (accessed 18-12-2010).
\item \textsuperscript{1359} 1931 CPD 61.
\item \textsuperscript{1360} Cornelius “Image Rights in South Africa” The Free Online Library http://www.thefreelibrary.com/Image+rights+in+South+Africa.-a0212546227 (accessed 18-12-2010).
\item \textsuperscript{1361} 1977 (4) SA 376 (T).
\item \textsuperscript{1362} 1954 (3) SA 244 (E).
\item \textsuperscript{1363} Loubser et al The Law of Delict 326.
\item \textsuperscript{1364} Cornelius "Image Rights in South Africa" The Free Online Library.
\item \textsuperscript{1365} Ibid.
\end{enumerate}
that the person endorses a certain product when he does, in fact, not. The unlawfulness is
founded in the misrepresentation and the subsequent violation of the right to dignity.\textsuperscript{1366}

The second approach involves using the attributes of a person without permission for
commercial gain. This corresponds to appropriating the right and entails a commercial
objective aimed at promoting goods or services so as to solicit customers. Here,
unlawfulness is founded in the infringement of the right to freedom of association and
commercial exploitation of the person.\textsuperscript{1367}

There have been arguments advanced that the right to identity, also known as “image
rights”, should be a stand-alone right in the nature of property rights, similar to publicity
rights accorded celebrities (such as performers) in the United States of America.\textsuperscript{1368} The
aim of granting famous personalities these rights would enable them to prevent
unauthorised uses of aspects of their images or their likeness for the purposes of
commercial gain, such as celebrity merchandising.\textsuperscript{1369} This would be in line with the view
that damages using the \textit{actio legis Aquiliae} could be claimed for patrimonial loss caused
by an \textit{iniuria}.\textsuperscript{1370} Therefore, the motivation for such a right is evident when aspects of a
performer’s image or likeness is used without his consent for the promoting of goods or
services, and the performer is deprived of the capacity to earn revenue through the
licensing of these aspects for the merchandising of other goods or services.\textsuperscript{1371} Should
this loss be \textit{contra bonos mores}, the patrimonial damages should give rise to Aquilian
liability.\textsuperscript{1372}

The right to identity in South African law is not dependent on the level of fame of the
plaintiff. Therefore, the not-so-famous have as much right to institute a claim based on the
infringement of the right to identity as the famous do.\textsuperscript{1373} However, the level of fame a
person has acquired will most likely play a role in calculating the amount of satisfaction or
damages that will be awarded to an injured plaintiff.\textsuperscript{1374} A performer’s earning capacity is

\textsuperscript{1366} ibid.
\textsuperscript{1367} ibid.
\textsuperscript{1369} 272-273.
\textsuperscript{1370} Cornelius “Image Rights in South Africa” \textit{The Free Online Library}.
\textsuperscript{1371} Louw 2007 \textit{South African Mercantile Law Journal} 296.
\textsuperscript{1372} 297.
\textsuperscript{1373} Cornelius “Image Rights in South Africa” \textit{The Free Online Library}.
\textsuperscript{1374} ibid.
greatly enhanced by his level of fame. The more famous the performer, the more commercially viable and marketable his persona is.\textsuperscript{1375} In fact:

"A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics is the fruit of his labours and is a type of property."\textsuperscript{1376}

Although in theory, the infringement of the right to identity also constitutes the infringement of dignity as well as the violation of a private aspect of a person’s identity, it is likely that in practice, only one action for infringement of identity can be brought.\textsuperscript{1377} The subsequent existence of contumelious conduct or invasion of privacy are factors that are relevant when quantifying damages.\textsuperscript{1378}

\textit{Reputation}

A person’s reputation relates to the good name that a person benefits from as a result of the estimation of others or what others think of the person.\textsuperscript{1379} The law of defamation is primarily concerned with protecting a person’s good name (\textit{fama}) from an unjust attack.\textsuperscript{1380}

Defamation refers to the publication of defamatory material relating to the plaintiff that is both wrongful and intentional. Therefore, in order for there to be liability, there must be a factual violation of the right which is wrongful and intentional. Factual violation occurs when defamatory material that refers to the person is published.\textsuperscript{1381}

Publication involves two elements. The first is the act of making the material known to others; and the second is the understanding and appreciation on the part of the recipients as to the content of the communication.\textsuperscript{1382} The requirement that the defamatory material be published is crucial. Without publication there can be no liability.\textsuperscript{1383} Publication can occur through oral or written communication in \textit{inter alia} books, newspapers, magazines, emails and cartoons.\textsuperscript{1384} The second requirement of understanding is satisfied if the

\begin{verbatim}
\textsuperscript{1375} Louw 2007 South African Mercantile Law Journal 296.
\textsuperscript{1376} Ibid.
\textsuperscript{1377} Ibid.
\textsuperscript{1378} Loubser et al The Law of Delict 327.
\textsuperscript{1379} Ibid.
\textsuperscript{1380} Ibid.
\textsuperscript{1381} Loubser et al The Law of Delict 328.
\textsuperscript{1382} 329.
\textsuperscript{1383} Ibid.
\textsuperscript{1384} 332.
\end{verbatim}
reader does not grasp the meaning immediately. Therefore, publication is complete only once the recipient grasps the meaning of the communication.\textsuperscript{1385}

In order for liability to subsist, the material must be defamatory so as to satisfy the harm aspect of the infringement.\textsuperscript{1386} In determining whether material is defamatory, the courts must first determine the meaning of the words used in the material, and then whether the meaning is defamatory.\textsuperscript{1387} Once it is shown that the published material is defamatory in nature, two rebuttable presumptions arise, namely that of wrongfulness and intention. Should a person publish defamatory material regarding a performer wrongfully and intentionally, the performer will have a right of action for damages in terms of the \textit{actio iniuriarum}.

However, in all \textit{actio iniuriarum} cases, there exists common grounds of justification that can refute a plaintiff's claim. These are truth for public benefit; fair comment; and privileged occasion.\textsuperscript{1388}

\begin{itemize}
\item[b)] Unlawful Competition
\end{itemize}

In the United Kingdom the right to control one's image is actionable in terms of the doctrine of passing off. The English tort of passing off is not the same as the wrong of passing off in terms of South African law. In South African law it is a species of the delict of unlawful competition while in the United Kingdom it is a separate well-defined specific tort.\textsuperscript{1389}

Passing off occurs when a person negligently or intentionally misrepresents that his goods or services are those of, or are associated with, another person and that the public is likely to be deceived into believing that the goods or services are those of, or are associated with, the plaintiff.\textsuperscript{1390} Infringement in the form of passing off is actionable in terms of the \textit{actio legis Aquiliae}.\textsuperscript{1391}

\begin{flushright}
\textsuperscript{1385} 334.
\textsuperscript{1386} \textit{ibid}.
\textsuperscript{1387} \textit{ibid}.
\textsuperscript{1388} 346.
\textsuperscript{1390} Adams & Adams "Trade mark infringement, passing off and unlawful competition proceedings" \url{http://www.adamsadams.com/index.php/expertise/trademarks/trade-mark-infringement/} (accessed 18-12-2010).
\textsuperscript{1391} \textit{ibid}.
\end{flushright}
In order to succeed with a claim based on passing off, the plaintiff must prove that the following elements are present. Firstly, he must show an existing goodwill or reputation in the name, mark or get-up which is associated with the plaintiff in the minds of the public. Secondly, he must prove that the defendant has made representation which is likely to deceive the public. Lastly, he must show that the deception has caused or is likely to cause damage to his goodwill.  

In terms of performers’ rights, an action for passing off would be available to a performer whose image has been used to endorse goods or services without his permission. He would have to show that he has established a goodwill or reputation that the public associate with him. The more famous or well-known the performer, the greater the goodwill. He would also have to prove that the defendant made an untrue representation that is likely to mislead the public. If a performer’s image has been used to endorse goods or services so as to deceive the public into thinking that the performer is associated with those goods or services (or the business in question) when he never consented to the use of his image for the endorsement, the second requirement would be satisfied. Lastly, the performer must successfully show that the deception has, or is likely to cause, damage to his goodwill or reputation. If the performer is able to show that the defendant’s deception has lost him a commercial opportunity to exploit his own image or character, the last requirement would then also be satisfied.

Since passing off is only actionable in instances of negligent or intentional misrepresentation, a claim that the misrepresentation was made innocently is a defence to an allegation of passing off.  

6 8 4 Analysis

6 8 4 1 Civil remedies

With regard to civil remedies, the Copyright, Designs and Patents Act provides for injunctions, damages, account of profits, delivery up, seizure and disposal. The Performers’ Protection Act provides for interdicts, damages and disposal of any infringing articles.

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1392 Ibid.
The English Act provides that in order for there to be an actionable infringement, the infringer must know or have reason to believe that his actions are an infringement of performers’ rights. Therefore, a defendant in an English court has the defence of innocence at his disposal. The South African Act only provides that any person who infringes the rights of a performer may be sued. Therefore, the wording of the Act seems to indicate that fault is not a requirement for liability.

The United Kingdom’s injunction is very similar to the South African interdict. Both are aimed at the prevention of an ongoing or threatened action which amounts to infringement of performers’ rights.

With regard to the remedy of damages, the English Act provides that damages can only be awarded if the defendant knew or should reasonably have known that his actions amounted to infringement. In South Africa, fault is not a requirement for liability to subsist.

When calculating the amount to be awarded, the Performers’ Protection Act provides that the amount may not exceed an amount as stipulated by the Minister published in the Government Gazette. This means that regardless of the amount of damages actually suffered by the claimant, the amount awarded is subject to a limit. There is no such limit on the amount of damages that can be awarded in terms of the English Act.

The amount an English court can award is influenced by the presence and level of flagrancy on the part of the infringer. Therefore, the more scandalous and deceitful the infringing conduct, the more the court is likely to award in damages. The South African Act does not make provision for such an influence on the calculation of damages.

As an alternative to damages, the English court provides for an account of profits remedy. Therefore, should a performer be successful in his claim, he can elect for this remedy instead of damages. Essentially, all the profits made by the infringer must then be paid over to the claimant. The South African performer does not have this remedy at his disposal.

The United Kingdom provides that the court can order the delivery up of any infringing articles to the claimant. Actual delivery of infringing articles is not required by the South African Act.

The English Act provides for a disposal remedy to deal with infringing articles that have been delivered up. Should the infringer be found liable, the court can order that the
infringing articles be forfeited to the claimant or destroyed. The South African Act provides that that the court may, before any legal proceedings are undertaken, order that all fixations, reproductions of fixations or plates in the possession of the defendant that appear to be in contravention of the Act, be destroyed or otherwise dealt with as the court determines. The remedy provided for by this provision is akin to the English disposal remedy.

The English Act further provides for the remedy of seizure which allows a claimant to seize and detain any infringing article that is in an infringer’s possession subject to certain conditions. There is no corresponding provision in the Performers’ Protection Act and it is submitted that this is owing to a reluctance to allow people to “take the law into their own hands”.

6 8 4 2 Criminal liability

The English Act provides that the selling, letting for hire and distribution of an infringing article is an offence which the South African Act does not. However, the South African Act provides that is an offence to make, or to be in possession of, a device used to make recordings of a performance in contravention of the Act. This is not an offence in terms of the English Act.

The English Act also provides that it is an offence to infringe the making available right of a performer. This right concerns the making available of a recording of a performance without a performer’s consent to the public by means of electronic transmission in such a manner that the public are able to access it from a place and at a time of their choosing. Since this is not a right in terms of South African law, it is not criminally actionable.

In the United Kingdom, it is also an offence to falsely represent that authorisation to grant the necessary consent to use a performance was given by a performer. In South Africa, this misrepresentation of authority is only an offence if consent is falsely given on behalf of a group of performers.

Both jurisdictions provide that in order for there to be actionable liability, the offender must know that his actions amount to infringement of performers’ rights. Therefore, innocence is a defence to a claim of infringement in the United Kingdom. In South Africa, fault must be present in order for criminal liability to subsist.
With regard to penalties imposed, the imprisonment terms prescribed by the English Act are far harsher than those prescribed by the South African Act. The imprisonment terms in the United Kingdom range from 6 months to ten years for infringement of performers' rights while in South Africa penalties range from three to six months. Both jurisdictions provide for fines to be paid, either separately or in conjunction with a prison term, which are limited. In the United Kingdom this limit is determined in terms of legislation while in South Africa it is determined by the Minister from time to time, the notice of which is published in the *Government Gazette*.

English courts are entitled to make further orders relating to how infringing articles are to be dealt with. Delivery up orders, disposal orders and search warrants are provided for. In South Africa, only the disposal of infringing articles can be order in cases of criminal infringements of performers' rights.

Courts in the United Kingdom also have the power to order that an offender pay compensation for any loss or damage caused by his offence. This is comparable to the provision in South African law that, upon conviction, an offender can be ordered to pay damages to a performer.

### 6843 Remedies for infringement of moral rights

Since the Copyright, Designs and Patents Act also provides protection for a performer's moral rights actionable as a breach of statutory duty, the same civil remedies for the infringement of non-property rights are applicable. South Africa does not provide for moral rights to be accorded performers.

### 6844 Other forms of enforcement

Both jurisdictions provide contractual means for a performer to deal with their performers' rights. This can take either the form of assignment of rights or the granting of licences in respect of certain uses of a performance. The law relating to contracts in both jurisdictions is applicable here.

In the United Kingdom, the doctrine of passing off is a tort on its own while in South Africa it is actionable under the delict of unlawful competition. The requirements for passing off in both jurisdictions are the same.

Passing off is used in English law to protect the performer's right to control his image. In South Africa, the law of passing off can also be used to protect these image rights but the
performer can further enforce these same rights under the umbrella of the personality right dignity. In this context, the right is referred to as the right to identity.

Breach of confidence is another stand-alone tort which exists in English law and refers to an action based on the invasion of privacy. In South African law, breach of the right to privacy is actionable as a constitutional right as well as an infringement of the right to dignity as a personality right.

Lastly, defamation is also protected separately in terms of English law. In South Africa, defamation is actionable as an infringement of the personality right of reputation.

6 9 CONCLUSION

The United Kingdom provides protection to a wider group of performers than South Africa does through its inclusion of “variety act or similar presentation” into the definition of “performances” provided for by the Copyright, Designs and Patents Act. Furthermore, The United Kingdom provides protection to improvised performances while the South African Act only provides protection to scripted works, namely those that have been reduced to a material form.

In the United Kingdom, the different classes of performers that are protected must be derived from an analysis of its definition of “performance”. Both jurisdictions provide protection to “literary”, “dramatic” and “musical” works or performances, while South Africa also extends protection to “expressions of folklore”, “dramatico-musical works” and “artistic works”. As previously stated, the United Kingdom also provides protection to “variety acts” which can be construed to include “expressions of folklore”. However, unlike the South African Act, the English Act excludes “artistic works” from the ambit of protection.

With regard to accorded rights, performers in the United Kingdom are entitled to more extensive rights than South African performers are. English law provides for property rights, non-property rights, rights to remuneration and moral rights while South African performers are only entitled to rights in the nature of non-proprietary rights and economic rights. It is submitted that intellectual property should be protected by section 25 of the Constitution. Therefore, in line with this submission, performers should be accorded proprietary rights.

In the United Kingdom, performers are the recipients of royalties paid in terms of their rights to remuneration. In South Africa, however, despite the legislative provision to that
effect, South African performers have yet to be paid as a result of the ongoing dispute between the NAB and collecting societies, such as SAMPRA.

Infringement in the United Kingdom can be either primary or secondary. However, only forms of primary infringement are catered for by the South African Act.

The term of protection in both the United Kingdom and South Africa is 50 years. However, the English Act provides that protection commences from the end of the year that the performance took place in; or from the end of the year the recording was released. The South African Act provides that protection is provided from when the performance was first performed or from when it was first fixed. Essentially, this means that performers in the United Kingdom are potentially entitled to a longer term of protection than their South African counterparts.

The English Act is retrospective with qualifications. Only live performances given before enactment are protected. Infringing acts committed before enactment are not actionable. The South African Act provides protection retrospectively to all performances and infringing acts that occurred before enactment without qualifications. There is no mitigation for the hardships this may cause.

The English Act provides for a wider range of civil remedies than the South African Act does. Injunctions, damages, account of profits, delivery up, seizure and disposal are available to English performers while South African performers benefit from interdicts, damages and for the disposal of any infringing articles.

The English Act provides that in order for there to be infringement, the infringer must know or have reason to believe that his actions amount to infringement of performers’ rights. This means that a defence of innocence or ignorance is available to the English infringer. The South African Act only provides that any person who infringes the rights of a performer may be sued. Knowledge of the nature of his actions is not a requirement for the South African infringer. Therefore, fault is not required for civil liability.

Again, the English Act provides for a wider range of offences than the South African Act. Both jurisdictions provide that in order for there to be liability, the offender must know that his actions amount to infringement of performers’ rights. Therefore, a defence of innocence is available to offenders in the United Kingdom; and fault is required for criminal liability in South Africa.
The English Act imposes far harsher imprisonment terms than the South African Act, ranging from six months to ten years as opposed to three to six months imposed on South African offenders. Both nations impose fines payable upon conviction subject to a statutory limit.

Upon conviction for an offence, English courts are entitled to make further orders relating to how infringing articles are to be dealt with. These are delivery up orders, disposal orders and search warrants. The South African Act only allows for an order whereby infringing articles can be disposed of upon conviction.

Since the English Act provides performers with moral rights, it follows that infringement of this right is actionable as a breach of statutory duty. Therefore, all the civil remedies available for the infringement of non-property rights are applicable here.

As with any personality right, there exist forms of enforcement independent of legislation.

Contractual assignment of rights is available in certain circumstances, as well as the exclusive licensing of certain uses of a performance. Therefore, the usual remedies for breach of contract are available to an aggrieved performer in both jurisdictions.

Control of a performer’s image is actionable in the United Kingdom under the tort of passing-off. In South Africa, this type of right is actionable as a delict under the personality right of dignity (as the right to identity) or in terms of the doctrine of passing off under the umbrella of the delict of unlawful competition.

Invasion of privacy is protected by the stand-alone tort of breach of confidence in the United Kingdom. In South Africa, the right to privacy is actionable in terms of constitutional law or through the personality right of dignity.

Lastly, defamation is another independent tort in English law that allows performers to protect their reputations from being brought into disrepute. In South Africa, defamation is actionable in terms of the personality right of reputation.

The next Chapter contains the conclusion and focuses on recommendations that can be made to improve the level of protection accorded performers in South Africa.
CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS

7.1 GENERAL

Although performers’ rights are generally regarded as a related right to copyright, performers are no less deserving of protection than copyright owners. Arguments advanced in favour of granting performers with rights in the nature of copyright are similar to those advanced in the justification of copyright. When viewed from the perspective that performers are as deserving as copyright owners, the counter-arguments are easily refuted.  

Initially, performers were not in need of protection owing to the fact that their performances were transitory in nature, lacking in material form. With the development of technology came a necessity to grant performers with the means to control the uses of their performances. Various international instruments have developed a regime of performers’ rights that has affected the development of performers’ rights in the United Kingdom and South Africa.

Copyright was born in the United Kingdom in the form of the Statute of Anne, 1709. The need to provide protection to foreign works led to the enactment of the International Copyright Act, 1838 and the British Literary Copyright Act, 1842 which followed a system of material reciprocity. This system was replaced by the principle of national treatment which ultimately led to the establishment of the Berne Convention aimed at the protection of copyright owners. Although performers attempted to gain recognition in terms of this Convention, it became clear that they would only be able to achieve protection outside the ambit of the Convention.

Performers in the United Kingdom were officially accorded protection in 1925 with the enactment of the Dramatic and Musical Performers’ Protection Act. This was followed by the Dramatic and Musical Performers’ Protection Act, 1958. Initially, performers were not accorded any civil remedies for infringement with legislation only providing criminal remedies.

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1394 Chapter Two: The Rationale of Performers’ Rights.
1395 Chapter Three: General Background.
The Rome Convention, which was the first international instrument aimed at the protection of performers and gave rise to the concept of related rights, was acceded to by the United Kingdom on 30 October 1963 and was given effect by the Performers' Protection Act, 1963.

The position that performers were not to be accorded civil remedies for infringement prevailed. After a series of judicial decisions that alternated between the granting of and the denying of civil remedies, the debate was settled when the court held in *Rickless* that performers were to be granted civil remedies. The Copyright, Designs and Patents Act was passed in 1988 which endorsed the decision in *Rickless* and legislatively granted performers with civil rights of action.

In Europe, several Council directives were issued in order to ensure uniform protection of related rights owners. As a member state, the United Kingdom are expected to bring into force the laws, regulations and administrative provisions necessary to give effect to these directives. Examples of the directives relevant to the protection of performers’ rights are the Rental and Lending Rights Directive; the Satellite Broadcasting Directive and the Term Directive.

The TRIPs Agreement, which is regarded as the most important step forwards in the development of an effective regime of performers’ rights, was ratified by the United Kingdom on 1 January 1995. For performers, the Agreement is particularly important as performers’ rights moved from a mainly European concern to one that affected nearly all developed nations.

The inadequacies of the Rome Convention and the TRIPs Agreement ultimately led to the approval of the WPPT in 1996. The Treaty granted performers the exclusive right to authorise certain uses of their performances; the right to receive royalties whenever their performances are broadcasted or communicated to the public; as well as moral rights. The European Union issued the Directive on Harmonising of Certain Aspects of Copyright and Related Rights in the Information Society in 2001 in response to the WPPT. The United Kingdom passed the Copyright and Related Rights Regulations in 2003 to give effect to this Directive. Moral rights were granted to performers in 2006 with the passing of the Performances (Moral Rights, Etc.) Regulations.

For the past five years, performers in the United Kingdom have been lobbying for an increase in the term of protection from 50 years. A proposed directive was issued in 2009.
and if approved, will effectively increase the term of protection accorded performers to 70 years.¹³⁹⁶

South African intellectual property law has strong English roots. South Africa’s first comprehensive intellectual property statute of 1916 incorporated the then-prevailing world-leading British laws which means that South African intellectual property has developed from a good and sound foundation.¹³⁹⁷ Fast-paced technological developments mean that it is vital that copyright law should be flexible in keeping abreast of these changes. As a related right to copyright, this ethic applies to performers’ rights as well. Unfortunately, this has not happened and the current level of protection accorded performers in South Africa is somewhat lacking when compared to that accorded performers in the United Kingdom.

The development of performers’ rights in South Africa has been slow when compared to the United Kingdom. Performers were only accorded protection in 1967 with the enactment of the Performers’ Protection Act.

After South Africa’s ratification of the TRIPs Agreement in April 1994, the Intellectual Property Laws Amendment Act, 1997 was passed which increased the term of protection accorded performers from 20 to 50 years.

Following the WPPT, more noteworthy changes were made to the Performers’ Protection Act even though South Africa has yet to accede to it. The Performers’ Protection Amendment Act, 2002 brought “expressions of folklore” within the ambit of protection and performers were granted the right to receive royalties for the broadcasting of their performances.

The right to receive royalties, known as “needletime”, necessitated the establishment of collecting societies to administer the collection of royalties on behalf of rights holders. These societies are to be regulated in terms of the Regulations on the Establishment of Collecting Societies in the Music Industry, 2006.

The introduction of needletime into South African law has fueled a fierce dispute worth millions of rands between the NAB and the collecting societies charged with collecting royalties from broadcasters represented by the NAB. The High Court application regarding this dispute is ongoing.

¹³⁹⁶ Chapter Four: The Law in the United Kingdom.
¹³⁹⁷ Dean “Perspective of intellectual property” Brands and Branding.
Recently, the legislature has proposed the Intellectual Property Laws Amendment Bill, 2010 which aims to bring traditional knowledge within the ambit of *inter alia* the Performers’ Protection Act. However, strong opposition to the Bill has resulted in it being postponed for reconsideration in February 2011.\(^{1398}\)

The level of protection granted to performers in the United Kingdom is far more extensive than that provided for in South Africa.

Both the United Kingdom and South Africa provides protection to “literary”, “dramatic” and “musical” works or performances. However, South Africa also extends protection to “expressions of folklore”, “dramatico-musical” and “artistic” works while the United Kingdom has opted to provide protection to “variety acts” which could include “expressions of folklore” as protectable performances. In addition, English law provides protection to performances of unscripted or improvised performances which South African law does not.

Performers in the United Kingdom are accorded property rights, non-property rights, rights to remuneration and moral rights. The South African Act does not provide for specific types of rights but the rights accorded are in the nature of non-property rights and economic rights. Unlike English performers, South African performers are not granted proprietary or moral rights.

Infringement in the United Kingdom is either primary or secondary. The South African Act only provides for forms of primary infringement.

Both jurisdictions provide for a term of protection of 50 years. However, the English Act provides for protection to commence from the end of the year that the performance took place in; or from the end of the year the recording was released. The South African Act provides that protection commences when the performance is first performed or from when it was first fixed. Essentially, this means that performers in the United Kingdom could be entitled to a longer term of protection (and royalties) than South African performers are should the performance be released anytime after it is first performed.

With regard to retroactivity, the English Act only applies to performances given before enactment, not to infringing acts. The South African Act applies retrospectively without any limitations or qualifications. No provision is made for the hardship this may cause.

\(^{1398}\) Chapter Five: The Law in South Africa.
In order for infringement to amount to civil liability, the English infringer must know or have reason to believe that his actions amount to infringement of performers’ rights. Therefore, fault is a requirement for liability in English law. The South African Act only provides that any person who infringes the rights of a performer may be sued. Knowledge of the nature of his actions is not a requirement for civil liability. Therefore, fault is not a requirement for civil liability in South Africa.

Although the United Kingdom provides for a greater range of punishable offences than South Africa, both jurisdictions provide that the offender must have knowledge that his actions have infringed performers’ rights. Therefore, fault is a requirement for criminal liability in both the United Kingdom and South Africa.

The English Act provides for more severe forms of punishment upon conviction than the South African Act does. In the United Kingdom, terms of imprisonment from six months to ten years are imposed while the South African Act only provides imprisonment terms ranging from three to six months. Both jurisdictions provide for fines payable upon conviction.

Since the English Act provides performers with moral rights, infringement of this right is actionable as a breach of statutory duty. Therefore, all the civil remedies available to performers for the breach of their non-property rights are available to them in the event of their moral rights being infringed. Performers in South Africa are not accorded with moral rights.

In certain circumstances, rights can be assigned or licensed contractually. Therefore, aggrieved performers in both jurisdictions are entitled to the usual remedies for breach of contract.

A performer’s image is protected in English law by doctrine of passing-off. Other aspects of his personality are protected by the English law of torts and include the torts of invasion of privacy and defamation. In South Africa, the right to identity is actionable as infringement of the personality right of dignity. It is also actionable in terms of the doctrine of passing-off as a form of unlawful competition. Furthermore, a performer can enforce his
right to privacy as an infringement of dignity as a personality right. Defamation is actionable as an infringement of reputation.\textsuperscript{1399}

\section*{7.2 Recommendations}

In light of the above, the following recommendations for improvement in the level of protection granted performers in terms of South African law can be made.

It is submitted that the range of performers that are protected in South African law are satisfactory. By extending protection to variety acts and improvised performances, the protection provided by English law is too broad.

It is unfortunate that South African law does not define what a “performance” is. As the subject matter of protection, a workable definition of a performance is recommended. The English Act only provides a definition of “performance” as classes of the verb “to perform”. It is submitted that the definition advanced by Morgan is more acceptable which reads:

\begin{quote}
"[A] performance is the transitory activity of a human individual that can be perceived without the aid of technology and that is intended as a form of communication to others for the purpose of entertainment, education or ritual."\textsuperscript{1400}
\end{quote}

It is regrettable that there is no clarity on whether or not intellectual property is protected by section 25 of the Constitution. It is submitted that intellectual property should be protected by the Constitution in terms of the right to own property. Therefore, as a form of intellectual property, performers’ rights should similarly be protected. However, with the exception of the needletime right, the Performers’ Protection Act only provides for exclusive rights which cannot be assigned. Although the needletime right can be assigned, performers are not granted exclusive rights to prohibit the uses of their performances. Therefore, it is submitted that in order for South African performers to truly own their performances, they should be granted rights that are both assignable and the uses of which can be prohibited in the nature of proprietary rights.

English law provides for the rights of a performer to receive royalties for certain uses of his performances which is similar to the needletime right accorded South African performers. Known as the rights to remuneration, these rights cannot be assigned to anyone except to

\textsuperscript{1399} Chapter Six: Comparative Analysis of Current Performers’ Rights as Between the United Kingdom and South Africa.

\textsuperscript{1400} Morgan \textit{International Protection} 27.
a collecting society for the exclusive purpose of administering the collection of these royalties on behalf of the performer. The South African Act, however, provides that these rights can be assigned to anyone by contractual arrangement, operation of law, testamentary disposition or otherwise. It is submitted that protection accorded performers in South Africa would be enhanced if the assignability of the needletime right could be limited. By making it impossible to “sign away” their rights to receive royalties, an income for performers is ensured. It is therefore, recommended that a provision similar to the English provision should be incorporated into South African law.

A right is of no use if the benefit it is designed to create is non-existent. South African performers have generally not received any royalty payments as a result of the ongoing dispute between the NAB and accredited collecting societies, such as SAMPRA. It is submitted that the provisions of the South African Act are clear regarding the legal mechanisms in place to resolve a dispute of this nature. Since the parties have already dismissed arbitration as an option, this dispute should be decided by the Copyright Tribunal. Furthermore, it is submitted that should the tariff be decided, royalties must be paid to performers as from 2002. The Act provides that a performance cannot be broadcasted without payment of a royalty to the performer concerned. This provision is not qualified by a stipulation that the royalty must first be determined in order for payment to become due, only that if there is no agreement regarding the amount of the royalty, the matter should be referred to arbitration or the Copyright Tribunal for determination. It is hoped that the newly-appointed Copyright Review Commission will assist in bringing this dispute to a conclusion.

Unlike the United Kingdom, the South African legislature has thus far declined to provide performers with moral rights. Therefore, it is recommended that performers in South Africa should be granted moral rights similar to those accorded copyright owners.

In order for performers in South Africa to be more in line with copyright owners, it is recommended that the term of protection be extended from 50 years.

With regard to the civil remedy of damages, the South African Act provides that regardless of the amount of damages suffered by the rights holder, the amount to be awarded by the court is subject to a limit which is determined by the Minister from time to time published in the Government Gazette. However, in the United Kingdom, there is no such limit on the amount to be awarded. Therefore, it is submitted that the level of protection granted performers in South Africa would be increased if they were able to claim damages subject only to the extent of damage they have suffered and are able to prove.
One of the purposes of enforcement measures is to dissuade infringement. The more severe the criminal penalties imposed for infringement, the less likely the infringement. The forms of punishment provided by in English law are far more extensive than those imposed by the South African Act. The Performers’ Protection Act should be amended to provide for offenders to be imprisoned for longer periods of time upon conviction which will assist in preventing infringement and giving performers’ rights a degree of legal integrity.

7.3 CONCLUSION

In addressing the questions identified in Chapter One of this work, it is submitted that the level of protection accorded performers in South Africa in terms of the Performers’ Protection Act is weaker than that accorded to performers in the United Kingdom and is substantially weaker than that granted to copyright owners. Significant amendments will have to be made to the Performers’ Protection Act to bring protection accorded performers in line with that granted to performers in the United Kingdom as well as with their copyright counterparts.
REFERENCES

BOOKS


**JOURNAL ARTICLES**


Dean O “Red card” *Without Prejudice* (09-2009) 17

Gruenberger M “A duty to protect the rights of performers? Constitutional foundations of an intellectual property right” 2006 *Cardoza Arts & Entertainment Law Journal* 617

Harms L T C “A few negative trends in the field of intellectual property rights” 2009 *THRHR* 175

Helberger N, Dufft N, Van Gompel S & Hugenholtz B “Never, Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea” 2008 *EIPR* 174


Kettle J “Dancing to the Beat of a Different Drummer: Global Harmonization – And the Need for Congress to Get in Step with a Full Public Performance Right for Sound
Kretschmer M “Creativity Stifled? A joined Academic Statement on the Proposed Copyright Term Extension for Sound Recordings” 2008 *EIPR* 341


LoVoi J “Competing interests: Anti-piracy efforts triumph under TRIPs but new copying technology undermines the success” 1999 *Brooklyn Journal of International Law* 445

Maynor D “Just let the music play: How classic bootlegging can buoy the drowning music industry” 2002 *Journal of Intellectual Property Law* 173

Sen S “The denial of a general performance right in sound recordings: A policy that facilitates our democratic civil society?” 2007 *Harvard Journal of Law & Technology* 233


Towse R “Copyright and economic incentives: An application to performers’ rights in the music industry” 1999 *Kyklos* 369

Towse R “The Singer or the Song? Developments in Performers’ Rights from the Perspective of a Cultural Economist” 2007 *Review of Law & Economics* 745

Visser C “Some thoughts on making intellectual property work for traditional knowledge” 2002 *South African Mercantile Law Journal* 656

Visser C “Copyright and performers’ rights: Their interplay illustrated” 1996 *Juta’s Business Law* 81.

TABLE OF CASES

United Kingdom

Apple Corps Ltd v Lingasong Ltd [1977] FSR 345

Barker v Stickney [1919] 1 KB 121

Barrett v Universal-Island Records Ltd [2006] EWHC 1009 Ch, [2006] EMLR 21

Berkoff v Burchill [1997] EMLR 139


British Broadcasting Corp v British Satellite Broadcasting Ltd [1991] 3 All ER 833

Burnett v Chetwood (1720) 35 Eng Rep 1008 (Ch)


Cleese v Clark [2003] EWHC 137 QB; [2004] EMLR 3

Confetti Records v Warner Music UK Ltd [2003] EWHC Ch 1274

Cramp Sons Ltd v Smythson Ltd [1943] 1 Ch 133

Customs and Excise Commissioners v Bell Concord Educational Trust Ltd [1989] 2 All ER 217

Designers Guild Ltd v Russell Williams (Textiles) Ltd [2001] 1 WLR 2416

Donaldson v Beckett 2 Brown's Parl Cases 129 1 Eng Rep 837; 4 Burr 2408 98 Eng Rep 257 (1774); 17 Cobbett's Parl Hist 953 (1813)

Ekland v Scripglow Ltd [1982] FSR 431

Ex parte Island Records Ltd [1978] Ch 122

Experience Hendrix LLC v Purple Haze Records Ltd [2005] EWHC 249 (Ch); [2007] EWCA Civ 501


Football Association Premier League Ltd v Panini UK Ltd 2004] EWCA Civ 995

Football Association Premier League Ltd v QC Leisure [2008] EWHC 1411 Ch

Fraser v Evans [1969] 1 QB 349

Gaumont British Distributors Ltd v Henry [1939] 2 KB 711, [1939] 2 All ER 808 DC

General Tire & Rubber Co v Firestone Tyre & Rubber Co [1976] RPC 197

Gilbert v Boosey and Co 87 LT 355 (1889)

Gramophone Co Ltd. V Stephen Cawardine & Co (1934) Ch 450

Guinness Trust v West Ham Corp [1959] 1 WLR 233

Gyles v Wilcox (1740) 26 Eng Rep 489 (Ch)

Hines v Winnick (1947) 64 RPC 113

Infabrics Ltd v Jaytex Shirt Co. Ltd [1980] 1 Ch 282 CA; [1982] AC 1; [1984] RPC 403

Irvine v Talksport Ltd [2003] EWCA Civ 423; [2003] EMLR 26

Jennings v Stephens [1936] 1 Ch 469

John v James [1991] FSR 397

Joseph v National Magazine Co 1 LR Ch 14 (1959); 3 All ER 52 (1958)

Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 WLR 273

Lonrho Ltd v Shell Petroleum Co Ltd (No. 2) [1982] AC 173

Ludlow Music Inc V Williams and Others (No. 2) [2002] EWHC 638 Ch, [2002] EMLR 29
Musical Performers’ Protection Association Ltd v British International Pictures Ltd (1930) 46 TLR 485

Norowzian v Arks Ltd [2000] EMLR 67


Ocular Sciences Ltd v Aspect Vision Care Ltd (No. 2) [1997] RPC 289


R v Bannen (1844) 1 Car & Kir 295 CCR

R v Chainey [1914] 1 KB 137 CCA

R v Hallam [1957] 1 QB 569, [1957] 1 All ER 665 CCA

R v Vivian [1979] 1 WLR 291

R v Zaman [2002] EWCA Crim 1862, FSR 13

RCA Corp v Pollard [1982] 3 All ER 771; [1983] 1 Ch 135

Reckitt & Colman Ltd v Borden Inc [1990] 1 All ER 873


Russell v Briant (1849) 8 CB 836


Shelley v Cunane [1983] FSR 390

Silly Wizard Ltd v Shaughnessy [1984] FSR 163

Springsteen v Flute International Ltd [199] EMLR 180

Time Warner Entertainments Co LP v Channel Four Television Corp plc [1994] EMLR 1
Trustees of the National Deposit Friendly Society v Skegness Urban District Council [1958] 2 All ER 601

University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601

Warner Bros Records Inc v Parr [1982] FSR 383

Wilden Pump Engineering Co v Fusfeld (1985-7) 8 IPR 250

South Africa

Certification of the Constitution of the Republic of South Africa 1996 10 BCLR 1253 (CC)


Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae) 2006 (1) SA 144 (CC)


NM v Smith 2007 (5) SA 250 (CC)

O’Keeffe v Argus Printing and Publishing Co Ltd 1954 (3) SA 244 (E)

South African Broadcasting Corporation v Pollecutt 1996 1 SA 546 (A) 558

Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T)

Van Zyl v African Theatres Ltd 1931 CPD 61

United States of America

Fonotipia Ltd v Bradley 171 F 1909 (CCEDNY) 951
France

*Eden v Whistler* CA Paris 1898 DP II 465 aff’d 1900 DP I 497

*Marquand v Lehuby* Tribunal de commerce [Trib De Com] Paris Aug 22 1945 S Jur II 1845 459

*Masson de Puitneuf v Musard* Cour d’appeal [CA] [regional court of appeal] Paris le ch Aug 8 1836

*Widow Vergne v Creditors of Mr Vergne* Cour d’appel [CA] [regional court of appeal] Paris le ch Jan 11 1828 S Jur II 1828 5

European Court of Justice

*Hermes International v FHT Marketing Choice BV* Case C-53/96) [1998] ECR I-3603

*Phil Collins v Imtrag Handelsgesellschaft mbH; Patricia Im- und Export Verwaltungsgesellschaft mbH and Another v EMI Electrola GmbH* Joined cases C-92/92 and C-326/92 ECR I-5145, [1993] 68 CMLR 773 (1993)

**TABLE OF LEGISLATION**

United Kingdom

**Bills**

Copyright in Sound Recordings and Performers’ Rights (Term Extension) Bill, 2008

**Statutes**

Articles of Capitulation, 1806

British Literary Copyright Act, 1842

Copyright Act, 1709 (Statute of Anne)

Copyright Act, 1911

Copyright Act, 1956

223
Copyright, Designs and Patents Act, 1988
Dramatic and Musical Performers’ Protection Act, 1925
Dramatic and Musical Performers’ Protection Act, 1958
International Copyright Act, 1838
International Copyright Act, 1886
Musical (Summary Proceedings) Act, 1902
Performers’ Protection Act, 1963
Performers’ Protection Act, 1972
Registered Designs Act, 1949

**Regulations**

Copyright and Related Rights Regulations, 1996 SI 1996/2967
Copyright and Related Rights Regulations, 2003 SI 2003/2498
Duration of Copyright and Rights in Performances Regulations, 1995 SI 1995/3297
Intellectual Property (Enforcement, etc.) Regulations, 2006 SI 2006/1028
Performances (Moral Rights, etc.) Regulations SI 2006/18

**Orders in Council**

Copyright and Performances (Application to Other Countries) (Amendment) Order, 2009 SI 2009/2745
Copyright and Performances (Application to Other Countries) Order, 2005 SI 2005/852
Copyright and Performances (Application to Other Countries) Order, 2008 SI 2008/677
Performances (Reciprocal Protection) Convention Countries Order, 1999 SI 1999/1752
South Africa

Bills

Intellectual Property Laws Amendment Bill, 2010

Statutes

Act to Amend the Playwrights Act 18 of 1899

Authorising the Importation of Foreign Reprints of Books Act 4 of 1854


Copyright Act 63 of 1965

Copyright Act 98 of 1978

Copyright Amendment Act 125 of 1992

Copyright Law 2 of 1887

Copyright Resolution 1895

Designs Act 195 of 1993

Heraldry Act 18 of 1962

Intellectual Property Laws Amendment Act 38 of 1997

National Environmental Management Biodiversity Act 10 of 2004

National Heritage Resources Act 25 of 1999

Performers Protection Act 11 of 1967

Performers’ Protection Act 11 of 1967

Performers’ Protection Amendment Act 8 of 2002

The Books Registry Act 4 of 1888
The Copyright Act 17 of 1897

The Copyright Act 2 of 1873

The Copyright of Works in Art Act 46 of 1905

The Copyright Protection and Books Registration Act 18 of 1895

The Patents, Designs, Trade Marks and Copyright Act, 1916

The Playwrights Act 44 of 1898

Trade Marks Act 194 of 1993

Traditional Health Practitioners Act 22 of 2007

**Regulations**

Regulations on the Establishment of Collecting Societies in the Music Industry, 2006

**Government Gazette**

GG 21156 of 2000-05-10

GG 23555 of 2001-06-25

GG 28894 of 2006-06-01

N 552 in GG 31026 of 5 May 2008

**Proclamations**

Copyright in Military Maps, Proclamation 24 of 1902

**The Netherlands**

Copyright Act, 1803

Related Rights Act, 1993
France

Decree of 1852

European Union

Council Decision 94/800/EC

Directive on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property Council Decision 92/100/EC

Directive on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property Council Decision 2006/115/EC


Directive on the Duration of Copyright and Related Rights Council Decision 93/98/EC


European Community Treaty, 1957

European Economic Area Act, 1993

INTERNATIONAL INSTRUMENTS

Agreement on Trade Related Aspects of Intellectual Property Rights, 1994

Berne Convention, 1886

Declaration on the Rights of Indigenous Peoples, 2007
Draft International Convention Concerning the Protection of Performers, Makers of Phonograms and Broadcasters, 1961

European Area Agreement, 1994

General Agreement on Tariffs and Trade, 1947

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961

International Covenant on Economic, Social and Cultural Rights, 1996

Maastricht Treaty, 1992

Marrakesh Agreement Establishing the WTO, 1994

Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions, 1985

Universal Declaration of Human Rights, 1948

WIPO Performances and Phonograms Treaty, 1996

NEWS ARTICLES


Charter D “Sir Cliff Richard pins hopes on law that will keep cash rolling in until he’s 113” Times Online (17-07-2008) http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/music/article4347643.ece (accessed 12-08-2009)


Gilbert S “Letter to the Editor” The London Times (08-11-1889)


Gowers A “Copyright extension is out of tune with reality” Financial Times (15-12-2008) http://www.ft.com/cms/s/0/ba280756-ca07-11dd-93e5-0000777b07658.html#axzz1A09ufQVh (accessed 21-11-2009)


Kretschmer M “Copyright extension will benefit few” Financial Times (18-02-2008) www.ft.com/cms/s/0/8f81e30-ddc2-11dc-ad7e-0000779fd2ac.html (accessed 27-08-2009)


INTERNET SOURCES


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


Best H “Piano Lessons” 2007 Best & Soames www.i-law.com/ilaw/doc/view.htm?id=1840&searched=true&queryString=%22performers%27+rights%22&querySector=ALL&pubTitle= (accessed 10-08-2010)
Boydell N “Copyright Term Extension in the EU – Sound Recordings” 2009 Bird & Bird http://www.twobirds.com/English/News/Articles/Pages/Copyright_Term_Extension%20in_the_EU_Sound_Recordings.Aspx (accessed 03-12-2010)

BPI “Economic Research into the Case for Extending Copyright Term for Sound Recordings in the UK: Research Brief” 2006


Coyle M “The History of Copyright” 2002 Lawdit http://www.lawdit.co.uk/reading_room/room/view_article.asp?name=../articles/The%20History%20of%20Copyright.htm (accessed 21-07-2010)


Dean O “Perspective of intellectual property” Brands and Branding http://www.brandsandbranding-online.co.za/a-perspective-of-intellectual-property-dr-owen-dean/ (accessed 19-12-2010)


Kahn R “South African Copyright – A Brief History” iCommons http://archive.icommons.org/articles/south-african-copy-right-history (accessed 01-07-2010)


Silver B “…And now for a word from our sponsors” 1999 Webber Wentzel http://www.legalcity.net/Index.cfm?fuseaction=MAGAZINE.article&ArticleID=9432102 (accessed 04-11-2010)

Hollis S “To Play or Not to Play” 2009 Bowman Gilfillan http://www.bowman.co.za/LawArticles/Law-Article~id~2132417409.asp (accessed 04-11-2010)


WTO “Overview: The TRIPs Agreement” http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (accessed 12-08-2010)

**OTHER**


WTO Members and Observers http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 21-07-2010)