



“Piracy” in regard to ITV, IPTV and Mobile-Television’

by

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TABLE OF CONTENTS

Chapter 1: INTRODUCTION

1.1. <u>Nature of the problem</u>	p. 4
1.2. <u>Structure</u>	p. 6
1.3. <u>Methodology</u>	p. 7
1.4. <u>The formats of ITV, IPTV and Mobile-TV</u>	p. 7

Chapter 2: TECHNOLOGIES, INSTITUTIONS AND LEGISLATION – AN

<u>OVERVIEW</u>	p. 11
2.1. <u>Technologies: Downloading and Streaming</u>	p. 11
2.2. <u>Institutions in charge</u>	p. 13
2.3. <u>General Legislation</u>	p. 16
2.4. <u>Operational Licences</u>	p. 19

Chapter 3: COPYRIGHT & ITV, IPTV AND MOBILE-TELEVISION

3.1. <u>Introduction</u>	p. 25
3.2. <u>Content licenses</u>	p. 26
3.3. <u>'Piracy' in South Africa</u>	p. 28
3.3.1. The basic principles of South African Copyright Law	p. 29
3.3.2. Requirements of copyright	p. 31
3.3.3. Infringement and Liability	p. 34
3.3.4. Exceptions and limitations	p. 41
3.3.5. Circumvention Tools	p. 47
3.4. <u>The Copyright Amendment Bill 2015</u>	p. 49
3.4.1. Section 13A	p. 50
3.4.2. DRM/ TPMs	p. 52
3.5. <u>Summary</u>	p. 53

Chapter 4: THE GERMAN PERSPECTIVE

4.1. <u>German copyright fundamentals</u>	p. 55
4.2. <u>Infringement of copyright</u>	p. 57
4.3. <u>Legal dichotomy</u>	p. 58

Chapter 5: COMPARISON AND CONCLUSION

p. 65

BIBLIOGRAPHY

p. 69

Plagiarism Declaration

p. 83

Chapter 1: INTRODUCTION

1.1. Nature of the problem

The aim of my Minor Dissertation is to analyse legal situation of the online services Internet Television (ITV), Internet Protocol Television (IPTV) and Mobile Television in South Africa with special focus on copyright infringement. It is also referred to as 'Piracy' and includes the discussion of downloading and streaming of online content in connection with those services. The subject is very recent and fast-paced, since many such online offers exist worldwide and are widely used in different ways. Especially the different technical aspects and contents ask for different legal evaluations. Therefore the discussion will first deal with the formats and devices and then end up by focusing on the critical ones. While South Africa has a firm general legal framework, as will be discussed, the topic is of further interest, since the lawfulness of some uses is not clearly defined in some areas of copyright and partially falls into a legal gray-area. This legal dichotomy especially concerns the streaming of movies and television-shows, while downloading content is regulated more precisely. Particularly the liability of users and service providers has no distinct legislation in South Africa yet. Another relevant issue are operational and content-licenses, whose importance becomes apparent in a lack thereof and the according legal consequences. Thus they will be presented before going into detail of the copyright issues. The issue is further considered a legal gray-area internationally, which is why I intend to have a closer look at Germany as a second jurisdiction and compare the legal evaluations. I will draw conclusions and give prospect to how the situation could be legally handled in South Africa.

The relevance of this topic is based on the current and fast-paced developments and their increasing use in comparison with former formats such as regular television-programming. The number of pay-IPTV subscribers worldwide has increased from 36.1 million in 2010 to 111.9 million in 2014.¹ By the end of 2014, for example, the United States of America had 13.3 million and Germany has 2.9 million subscribers.² There are no current numbers for South Africa, but in 2020 *Statista* expects a number of 191.2 million users³ worldwide. This trend is expected to lead to the so called effect of 'cutting the chord', which concerns the fact that users switch from the use of regular (pay-) TV-providers via cable or satellite to the mentioned online-services.⁴ This expanding trend shows a negative side for the

¹ <http://www.statista.com/statistics/270137/number-of-pay-iptv-subscribers-worldwide/>, accessed on 24 June, 2015.

² <http://www.statista.com/statistics/272831/global-iptv-subscriptions-by-country/>, accessed on 24 June, 2015.

³ <http://www.statista.com/statistics/270137/number-of-pay-iptv-subscribers-worldwide/>.

⁴ <http://www.oxforddictionaries.com/definition/english/cord-cutter>, accessed on 24 June 2015.

cable industry⁵, since it affects the offers of landline telephones as well as television broadcasted over cable, satellite and such. Two of the main reasons for this development are (1) the costs for television services⁶, which can be – partially drastically – reduced, e.g. in the USA⁷, and (2) the advantages of television- or video-on-demand⁸, which stands for an interactive television technology, that enables subscribers to watch the program either in real time or download them to watch be able to them later⁹. Hence the viewer is not tied to the channel's set TV-program, but can choose the time and content to its own pleasure instead.¹⁰ Moreover these technical developments enable faster and easier copyright infringement through digital copying.

The issue has also reached the South African Government and several of its departments, which deal with different tasks and areas. Their most recent task is to build a modern digital infrastructure and reform the policy accordingly to improve the country's position for 'an advanced knowledge in 2030'.¹¹ By building a modern digital infrastructure and reforming policies a national integrated ICT-policy¹² will be developed and a national broadband network will be rolled out.¹³ They strive to promote the digital advancements in South Africa. An important factor is the so called Broadcasting Digital Migration¹⁴, which stands for the process and transition from analogue broadcasting technology to digital technologies.¹⁵ That migration is a necessary technological development due to the increasing amount of sent data, which takes place worldwide. In Germany, for example, the so called 'analogue switch-off' took place on April 30th 2012 for TV-broadcasting.¹⁶

On a broader scale the South African Government follows the mandate 'to create a vibrant ICT sector that ensures that all South Africans have access to robust, reliable, affordable and secure ICT services'¹⁷. This aims to advance socio-economic development

⁵ <http://www.techopedia.com/definition/28547/cord-cutting>, accessed on 15 June 2015.

⁶ <http://whatis.techtarget.com/definition/cord-cutting>, accessed on June 24 2015.

⁷ <http://www.ft.com/intl/cms/s/0/6f6a9a72-cbda-11e4-aeb5-00144feab7de.html#axzz3dshfYlzb>, accessed on 26 June 2015.

⁸ Jessica Leber, 'Internet isn't ready to displace cable just yet' available at <http://www.technologyreview.com/news/429326/internet-tv-isnt-ready-to-displace-cable-just-yet/>, accessed on 25 June 2015.

⁹ <http://searchtelecom.techtarget.com/definition/video-on-demand>, accessed on 24 June 2015.

¹⁰ <http://mybroadband.co.za/vb/showthread.php/491488-IPTV-amp-VoD-SA-licensing-requirements>, accessed on 24 June 2015.

¹¹ <http://www.gov.za/about-sa/communications>, accessed on 25 June 2015.

¹² ICT = Information- and communications-technology.

¹³ <http://www.gov.za/about-sa/communications>.

¹⁴ *ibid.*

¹⁵ <http://www.gov.za/about-government/government-programmes/digital-migration>, accessed on 25 June 2015.

¹⁶ <http://www.tvdigital.de/analogabschaltung/>, accessed on 25 June 2015.

¹⁷ <http://www.dtps.gov.za/about-us/legislative-and-constitutional-mandates.html>, accessed on 24 June 2015.

goals as well as the African agenda.¹⁸ The latter is the 'understanding that socio-economic development cannot take place without political peace and stability'.¹⁹ One aim is to develop ICT-policies and -legislation to support the growth of the nation's economy, the ICT-infrastructure and to contribute to the development of an inclusive information society amongst other things.²⁰ This goes along with the task to provide vibrant and sustainable communication services for informed citizens and a positive image of South Africa.²¹

1.2. Structure

My thesis will be divided into five chapters. The first chapter seeks to cover the foundations in regard to the technical aspects of the mentioned formats and services as well as their relevant contents. It shall give an overview and a basic understanding of the technical background, which is of further relevance to the mentioned discussion of the devices as well as the services of downloading and streaming.

In the second chapter I will then first summarise the relevant technologies used to use the mentioned formats in order to further distinguish them in regard to the legal evaluations. To add to the basic understanding I will further give an overview over the South African institutions in charge of the different aspects of the topic as well as the general legislation as a legal framework beside the copyright aspects. I will round off the chapter 2 by discussing operational licences, which enable television-providers to transmit the signals.

The third chapter will then proceed with the copyright aspects in South Africa as the main subject. It will cover the issues of copyright licenses in contrast to operational licenses. In lack of such licenses I will then discuss several issues of copyright infringement in regard to the mentioned formats and technologies. Aside the legal basics I will deal in detail with infringement and liability as well as the applicable exceptions and limitations. Further I will briefly portray so called circumvention tools and the relevant proposed amendments of the Copyright Amendment Bill 2015.

In chapter 4 I will discuss the legal situation in Germany, which will focus the crucial aspects of copyright. The discussion shall lead to a comparison of the two different evaluations of the legal gray-area of streaming services in the mentioned formats.

¹⁸ *ibid.*

¹⁹ Chris Landsberg 'South Africa's "African Agenda": Challenges of policy and implementation' available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-za/dv/3_african_agen/3_african_agenda.pdf, p. 1, accessed on 24 June 2015.

²⁰ <http://www.dtps.gov.za/about-us/legislative-and-constitutional-mandates.html>.

²¹ <http://www.doc.gov.za/content/about-us>, accessed on 24 June 2015.

At last chapter 5 will conclude my thesis by summarising and comparing the main aspects of the South African and German approaches and draw conclusions.

1.3. Methodology

My minor dissertation will rely primarily on academic literature and case law concerning copyright infringement. The research did not extend beyond the use of libraries and electronic databases and sources and did not require any form of primary field research. A characteristic of this thesis is that it contains a larger amount of online sources. For one I consulted online sources in regard to the relevant technical aspects to be able to discuss those according to the most prevailing standards. The main reason is, however, that the topic at hand is fairly new and internationally the courts have not handled many cases. In fact, South Africa has no jurisdiction regarding copyright issues of online-streaming and the amount of literature is also rather few. In Germany however the courts have dealt with some problems of downloading and streaming of online content, which will become relevant in chapter 4 as well as the comparative aspects in chapter 5.

1.4. The formats of ITV, IPTV and Mobile-TV

Aside the traditional way of watching movies and series on the television a popular development is to watch them on alternative ways to regular television set-ups. This change of use is also referred to as 'cutting-the-chord', which refers to a change of user habits switching from the use of regular (pay-) TV-providers via cable or satellite to the mentioned online-services.²² A currently preferred way is online content, which is provided through Internet-Television (ITV), Internet Protocol Television (IPTV) and Mobile-Television, which will now be presented in regard to technologies and content. Below I will exemplify those formats, since their technical aspects will be the basis of the legal evaluation of copyright and liability, which differs between the technologies and transmission-techniques.

1.4.1. **Internet Television**

Internet Television (ITV) is transmitted over a broadband connection and is generally available content distributed over the internet. Its options include web-based shows, video on demand (VOD), video-streams and television-shows by the TV-channel's own websites.²³ Technically a television system is utilized to access web programming content that is

²² <http://www.oxforddictionaries.com/definition/english/cord-cutter>.

²³ <http://whatis.techtarget.com/definition/Internet-TV>, accessed on 15 June 2015.

delivered over the internet.²⁴ The content is converted into internet packets, sent over the network and then decoded by the recipient's device to be displayed on the device browser or application.²⁵ These device-to-TV solutions vary from wireless USB, where a USB-transmitter is plugged into a laptop and a receiver into the TV²⁶, to Google's Chromecast to HTPC. Google's Chromecast²⁷ is a device that is plugged into the HDMI-port of a television and enables internet content to be displayed on the TV, while a smartphone is used as a remote via the Chromecast-app²⁸. HTPC ("home theatre PC") is a Windows-PC that is equipped with an interface for large TV screens. Further any computer can be connected to TV with an ordinary video-out-port cable.²⁹

ITV is a model open to any rights holders and the publishers can use a direct communication channel to the consumer on multiple devices independent of any specific carrier or operator.³⁰ The contents are the same television channels as transmitted via cable, satellite, antenna or other conventional telecasting technologies. Hence it is also known as web-television.³¹ Furthermore on demand-services like *Netflix*, *Hulu* and *Amazon*³² offer their own produced content as well as licensed movies and television shows.³³

1.4.2. Internet Protocol Television

Internet Protocol Television (IPTV) is defined as 'a system where a digital television service is delivered by using [IP³⁴] over network infrastructure, which may include delivery by broadband connection'³⁵. In contrast to ITV it is distributed over proprietary networks and generally not available over the internet. It is rather a replacement for regular cable TV, often offered by the same carriers.³⁶ Therefore they are regarded as broadcasting services in South Africa³⁷, which will play a role in the later legal evaluations. The abbreviation IP refers to the method of sending information over a secure, tightly managed network. However the

²⁴ http://www.itvdictionary.com/web_tv.html, accessed on 15 June 2015.

²⁵ <http://www.techopedia.com/definition/13523/internet-television-internet-tv>, accessed on 15 June 2015.

²⁶ <http://encyclopedia2.thefreedictionary.com/Internet+TV>, accessed on 24 June 2015.

²⁷ <http://www.google.com/chrome/devices/chromecast/>, accessed on 26 June 2015.

²⁸ <http://www.google.com/intl/en/chrome/devices/chromecast/>, accessed on 26 June 2015.

²⁹ <http://www.pcmag.com/encyclopedia/term/45263/internet-tv>, accessed on 15 June 2015.

³⁰ Robin Good 'IPTV vs. Internet Television: Key differences' available at http://www.masternewmedia.org/2005/06/04/iptv_vs_internet_television_key.htm, accessed on 24 June 2015.

³¹ <http://www.techopedia.com/definition/13523/internet-television-internet-tv>, accessed on 15 June 2015.

³² <http://www.pcmag.com/encyclopedia/term/45263/internet-tv>.

³³ For example: *Amazon Instant Video* <http://www.amazon.com/b?node=10292742011>, accessed on 24 June 2015.

³⁴ IP = the Internet Protocol.

³⁵ <http://mybroadband.co.za/vb/showthread.php/491488-IPTV-amp-VoD-SA-licensing-requirements>.

³⁶ <http://whatis.techtarget.com/definition/Internet-TV>.

³⁷ <http://mybroadband.co.za/vb/showthread.php/491488-IPTV-amp-VoD-SA-licensing-requirements>.

consumer interacts directly with the carrier of the services and its pipes and infrastructure. Therefore it is also called 'end-to-end systems' or 'semi-closed network'. These TV-systems are delivered via IP-based secure channels and often funded and supported by telecommunication providers, who seek to create an alternative to digital cable and satellite services.³⁸ IPTV consists of a two-way digital broadcast signal, which is sent by way of a broadband connection over the existing telephone- or cable-networks. In addition it uses a set-top-box for reception³⁹ that is connected to a television, which is programmed with software to handle viewer requests to access media sources. Different companies offer set-top-boxes⁴⁰ that decode the IP-video into a standard television signal⁴¹, which can then be displayed on the TV. The content can further be watched on a computer screen or a mobile device⁴² and is provided to the user after selection, the rest remains on the service provider's network. A new stream is transmitted from the provider's server every time the receiving user changes the channel. The delivered programming by video streaming can be for free or fee-based. It can contain live-TV as well as stored video content. Moreover it can be combined with services like Voice-over-IP (VoIP) and high-speed internet-access.⁴³

Consequently the differences between ITV and IPTV are that ITV's content is usually distributed over a website⁴⁴, where as IPTV receives the content via set-top-boxes. IPTV is only delivered over IP-based secure channels⁴⁵ in form of packets provided by network operators over closed networks.⁴⁶ The streaming occurs via so called unicast technologies⁴⁷, which means that the communication and sent data is done between a single sender and a single receiver over the network.⁴⁸ The alternative is the so called multicast technology, where the communication occurs between a single sender and multiple receivers.⁴⁹ The IP-packets are transferred to a group of hosts on a network.⁵⁰ ITV on the other hand is accessible online and not stored on a traditional content server as an open evolving framework for all

³⁸ R Good http://www.masternewmedia.org/2005/06/04/iptv_vs_internet_television_key.htm.

³⁹ *ibid.*

⁴⁰ <http://www.hometechnology.org/television/>, accessed on 16 June 2015.

⁴¹ http://www.webopedia.com/TERM/I/Internet_protocol_television.html, accessed on 15 June 2015.

⁴² <http://electronics.howstuffworks.com/internet-tv.htm>, accessed on 24 June 2015.

⁴³ <http://searchtelecom.techtarget.com/definition/IPTV>, accessed on 15 June 2015.

⁴⁴ *ibid.*

⁴⁵ R Good http://www.masternewmedia.org/2005/06/04/iptv_vs_internet_television_key.htm.

⁴⁶ <http://www.itvdictionary.com/iptv.html>, accessed on 15 June 2015.

⁴⁷ Shamin Chibba 'IPTV heading to South Africa' available at <http://www.medioclubsouthafrica.com/tech/3341-conference-brings-iptv-to-south-africa>, accessed on 25 June 2015.

⁴⁸ <http://searchnetworking.techtarget.com/definition/unicast>, accessed on 24 June 2015.

⁴⁹ *ibid.*

⁵⁰ <http://www.vsicam.com/fag/what-is-the-difference-between-unicast-and-multicast-streams/>, accessed on 15 June 2015.

kinds of content and providers.⁵¹ Therefore it uses the internet for the content storage as well as the delivery to the user.

1.4.3. Mobile-TV

Mobile phones usually premise to pick up compatible radio signals. Based on that, the idea was developed to build phones that are further able to pick up signals in the frequency range of signals used for broadcast television.⁵² Mobile-Television is however a not a third kind of online-format. It rather uses ITV and IPTV to provide the services on mobile devices. It uses the such technologies to transmit video contents. Its broadcasting is optimised for longer period TV-watching by large numbers of simultaneous users, while receiving high picture quality.⁵³ Hence it is defined as the convergence mobile multimedia of digital broadcasting, telecommunications and the internet. It integrates live-TV, personalized time- and place-shifted TV and on-demand audio-visual content, which is delivered to mobile devices.⁵⁴ Mobile-TV involves different kinds of technical productions, from TV-broadcasts, that are streamed via internet or terrestrial networks, which send wireless or radio signals from terrestrial base stations locally, to the use of existing satellite technology to deliver broadcasts.⁵⁵ All of these broadcasting technologies must be integrated with some cellular system in order to provide interactivity, such as pre-recording and active participation by the end-user.⁵⁶

⁵¹ R Good http://www.masternewmedia.org/2005/06/04/iptv_vs_internet_television_key.htm.

⁵² Nat Jay 'How Mobile TV technology works' available at www.streetdirectory.com/travel_guide/134173/phones/how_mobile_tv_technology_works.html, accessed on 15 June 2015.

⁵³ Zahid Ghadialy 'Mobile TV technologies' available at http://www.3g4g.co.uk/Other/Tv/Presentations/mobile_tv_introduction.pdf, p. 2, accessed on 24 June 2015.

⁵⁴ Seung-Hyun Lee *Incorporating Multimedia into everyday life*, p. 35 f.

⁵⁵ <http://www.techopedia.com/definition/30813/mobile-television-mobile-tv>, accessed on 15 June 2015.

⁵⁶ D Turina/ T Lohmar 'Mobile TV – The concept overview and technology enablers' available at http://ieeexplore.ieee.org/xpls/abs_all.jsp?arnumber=4267520&tag=1, accessed on 15 June 2015.

Chapter 2: TECHNOLOGIES, INSTITUTIONS AND LEGISLATION – AN OVERVIEW

Based on the above, chapter 2 will proceed to go into detail of different aspects and give an overview of several issues of the topic at hand and thus the background information necessary to get an overall picture of the legal situation in South Africa. I will start off by discussing the technologies according the online formats. The discussing will be relevant regarding the legal evaluation of the copyright aspects in chapter 3. Further I will portray the institutions in charge in the federal as well as the private sector. This again shall give an overview and support the local legal systematic for the topic at hand, since the institutions play a role in regard to the services and devices dealt with in this thesis, for example in copyright licensing matters. Subsequent to these institutions I will present the applicable legislation in form of statutes and acts in South Africa and its contents with relevance to ITV, IPTV and mobile-TV. This overview shall serve as an introduction of the general legislation in South Africa in regard to the mentioned services, and enable a better understanding of the copyright law in the following chapter. The remarks will similarly be relevant for the downloading- and streaming-services. At last I will discuss the subject of operational licenses, which authorise the broadcasters to transmit the mentioned online services. Operational licenses however have to be distinguished from content licenses. The latter authorise to the transmission of the content of the online services like movies and television shows. Hence the lack of content licences lead to copyright infringement, which will therefore be discussed in chapter 3.

2.1. Technologies: Downloading and Streaming

In the following I will sum up the two main technologies used by the above mentioned online services namely downloading and streaming. This will include the content of the online devices, because the technologies as well as the content are relevant to the legal classification of the devices and services. The differences go as far as distinguishing between legal and illegal content.

Downloading is defined as ‘an act of moving or copying a file, program etc., from a usually larger computer system to another computer or device’.⁵⁷ In connection to the internet it is the request to receive a file from another computer or a website.⁵⁸ The opposite is ‘uploading’, where the transmission happens from a usually smaller computer to another one. In that direction the file is send to a computer that is set up to receive it.⁵⁹ Downloads occur

⁵⁷ <http://www.merriam-webster.com/dictionary/download>, accessed on 24 June 2015.

⁵⁸ <http://searchnetworking.techtarget.com/definition/downloading>, accessed on 24 June 2015.

⁵⁹ op cit.

every time one uses the internet and enters a website, since the website's contents have to be used to access and display it. While such downloads happen automatically and often without the user noticing it, one usually thinks of the manual choice to click on a link or file to download it.⁶⁰ In such cases the download is then stored on your device.⁶¹ It can be temporarily, for example as an internet file⁶², or permanently if saved manually, like music-files via *itunes*.

Streaming is generally defined as an 'an act or instance of flowing'. In digital content it is 'a technology for transferring data so that it can be received and processed in a steady stream'.⁶³ The data is sent to a computer over the internet to be played continuously or processed immediately.⁶⁴ It can be played back without being completely downloaded first⁶⁵ and the viewer can display it in real time⁶⁶. Thus the user needs a special program, a player, which un-compresses and sends the video data to the display and the audio data to the speakers. In doing so, the video can either be sent from pre-recorded video files or be broadcasted over a so called 'feed'.⁶⁷ A feed in regard to computers is the 'general term for electronic distribution of information, whether in text, audio or video'.⁶⁸

Hence the contents vary between the different platforms, services and devices. IPTV contains the program of the carriers and providers of common television. The difference is the broadcast of that program through internet protocol instead of conventionally via cable, satellite etc. Further the user can make use of the so called 'time-shift'⁶⁹, which enables users to watch the program outside its ordinary broadcasted times on television. It is the process of recording and storing data to view it later.⁷⁰ The latter occurs through downloads or permanent streaming.

In contrast ITV offers on-demand-services additionally to the program of ordinary television-stations. The content is not stored at some providers' server, but is always available over the internet. It is therefore an interactive technology that enables subscribers to view

⁶⁰ <http://techterms.com/definition/download>, accessed on 25 June 2015.

⁶¹ Walt Mossberg 'The many internet-video options for TV's' available at <http://allthingsd.com/20130813/the-many-internet-video-options-for-tvs/>, accessed on 25 June 2015.

⁶² For Internet Explorer: <http://windows.microsoft.com/en-us/windows/view-temporary-internet-files#1TC=windows-7>, accessed on 25 June 2015.

⁶³ <http://dictionary.reference.com/browse/streaming>, accessed on 25 June 2015.

⁶⁴ <http://www.merriam-webster.com/dictionary/streaming>, accessed on 24 June 2015.

⁶⁵ <http://techterms.com/definition/streaming>, accessed on 25 June 2015.

⁶⁶ <http://searchunifiedcommunications.techtarget.com/definition/streaming-video>, accessed on 25 June 2015.

⁶⁷ op cit.

⁶⁸ <http://www.yourdictionary.com/feed>, accessed on 25 June 2015.

⁶⁹ http://www.itvdictionary.com/personal_tv.html, accessed on 15 June 2015.

⁷⁰ <http://whatis.techtarget.com/definition/timeshifting>.

programming in real time as well as download it and watch it later.⁷¹ The services go beyond traditional television program, for example by producing their own contents. The most popular offers today are *Netflix*⁷², *Hulu*⁷³, *Amazon*⁷⁴ or *Apple-TV*⁷⁵, which were developed in the United States of America and spread out to several countries by now. *Netflix* has recently expanded its services in 130 additional countries, including South Africa.⁷⁶ Other countries developed their own offers like *VIDI*⁷⁷ in South Africa or *Watchever*⁷⁸ in Germany.

Mobile-Television is not a third category of online television, but rather uses the above mentioned services in a mobile format. Thereby the contents can either be streamed, as described above, and watched on the mobile devices or it can be downloaded and watched offline after storing the downloaded file on the device. Examples for such content are *HBO GO*⁷⁹, as the mobile version of the US-American TV-channel *HBO*⁸⁰ itself and apps like *XFINITY*⁸¹ that enable you to watch third parties' content everywhere.

Thus altogether online content can usually be accessed and used in different ways and is not bound to a single form of transmission. The different ways of transmission are solely not relevant, if the providers own the relevant licenses. But in lack of such licenses the differences become relevant in regard to copyright aspects in chapter 3.

2.2. Institutions in charge

Several governmental departments strive to promote the digital advancements in South Africa. An important factor is the so called Broadcasting Digital Migration⁸² as the process and transition from analogue broadcasting technology to digital technologies.⁸³ The difference is that in analogue technology a wave is recorded and used in its original form, whereas in digital technology the wave is sampled at an interval and then turned into numbers that are stored in a digital device.⁸⁴ In other words in digital technology the information can be

⁷¹ <http://searchtelecom.techtarget.com/definition/video-on-demand>.

⁷² <https://www.netflix.com/>, accessed on 24 June 2015.

⁷³ <http://www.hulu.com/>, accessed on 24 June 2015.

⁷⁴ Amazon Instant Video: <http://www.amazon.com/USA-Instant-Video/b?ie=UTF8&node=363238011>, accessed on 24 June 2015.

⁷⁵ <https://www.apple.com/appletv/what-is/>, accessed on 24 June 2015.

⁷⁶ <http://mybroadband.co.za/news/broadcasting/151193-netflix-has-launched-in-south-africa.html>, accessed on January 7, 2016.

⁷⁷ <http://cdn1.vidi.co.za/>, accessed on 24 June 2015.

⁷⁸ <http://www.watchever.de/>, accessed on 24 June 2015.

⁷⁹ <http://www.hbogo.com/geo.html>, accessed on 24 June 2015.

⁸⁰ 'Home Box Office'.

⁸¹ <http://tvgo.xfinity.com/apps>, accessed on 24 June 2015.

⁸² <http://www.gov.za/about-sa/communications>.

⁸³ <http://www.gov.za/about-government/government-programmes/digital-migration>.

⁸⁴ <http://electronics.howstuffworks.com/question7.htm>, accessed on 25 June 2015.

compressed and therefore more information can be transported at once. Another advantage is that it does not degrade after time like analogue waves do.⁸⁵ The relevance for my thesis lies in the fact that such digital development increases the general use of online and digital data as well as the unlawful use. Hence the ongoing digital migration enables online copyright infringement and makes it increasingly easier. The following remarks will again serve as an overview and support the general understanding of the topic.

2.2.1. Department of Telecommunications and Postal Service

The Department of Telecommunications and Postal Service (DTPST, formerly 'Department of Communications') follows the mandate 'to create a vibrant ICT sector that ensures that all South Africans have access to robust, reliable, affordable and secure ICT services'. This aims to advance socio-economic development goals as well as the African agenda.⁸⁶ The latter is the 'understanding that socio-economic development cannot take place without political peace and stability'.⁸⁷ Hence the DTPST aims to develop ICT-policies and legislation to support the growth of the nation's economy, the ICT-infrastructure and to contribute to the development of an inclusive information society amongst other things.⁸⁸

2.2.2. Ministry and Department of Communication

The Ministry of Communications has several entities like the Independent Communications Authority (ICASA) and the South African Broadcasting Company (SABC). These entities play a role in the television industry in South Africa and the current digital developments. Its mission is in accordance with the principle of Digital Broadband Migration along with the task to provide vibrant and sustainable communication services for informed citizens and a positive image of South Africa.⁸⁹

2.2.3. Independent Communications Authority of South Africa

The Independent Communications Authority of South Africa (ICASA) is the regulator for the national communications, broadcasting and postal services sector.⁹⁰ Its responsibility is the regulation of the telecommunications, broadcasting and postal industries.⁹¹ Its main functions

⁸⁵ op cit.

⁸⁶ <http://www.dtps.gov.za/about-us/legislative-and-constitutional-mandates.html>.

⁸⁷ C Landsberg http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-za/dv/3_african_agenda/3_african_agenda.pdf.

⁸⁸ <http://www.dtps.gov.za/about-us/legislative-and-constitutional-mandates.html>.

⁸⁹ <http://www.doc.gov.za/content/about-us>.

⁹⁰ <https://www.icasa.org.za/>, accessed on 26 June 2015.

⁹¹ <https://www.icasa.org.za/AboutUs/OverviewMandate/tabid/631/Default.aspx>, accessed on 26 June 2015.

include to license broadcasters, signal distributors and telecommunications-providers, to impose license conditions, to participate in regulations in these sectors and to handle the frequency spectrum.⁹² It shall further ensure affordable and high quality services for all South Africans through competition.⁹³

ICASA's mandate is spelled out in different legislation, like the Electronic Communications Act, the Broadcasting Act of 2002 and the ICASA Amendment Act of 2006.⁹⁴ The ECA determines ICASA's mandate as the licensing and regulating of electronic communications and broadcasting services, including monitoring the licensee's compliance with the license terms and conditions⁹⁵.

2.2.4. Sentech

Sentech Limited is a state-owned enterprise, which provides broadcasting signal distribution for broadcasting licensees⁹⁶ and therefore most of the country's broadcasters⁹⁷. It was established in terms of the Sentech Act of 1996⁹⁸.⁹⁹ The Act provided that all shares of the South African Broadcasting Company (SABC) in Sentech (Pty.) Ltd. were transferred to the State and Sentech converged from a private to a public company. Section 5 of the Act defines the main object and business of the company as a distributor of broadcasting signal, as a common carrier, for broadcasting licensees in accordance with the provisions of the Independent Broadcasting Authority Act¹⁰⁰ of 1993. The IBA Act further provides regulations about Broadcasting signal distribution licenses and broadcasting licenses in its Chapters V and VI.¹⁰¹ Thus these regulations play a part in the licensing aspects for television services.

2.2.5. South African Broadband Corporation

The South African Broadcast Corporation (SABC) is a public entity with the mandate to provide radio and television broadcasting services to South Africa¹⁰² and beyond its borders to achieve the objectives set out in the Broadcasting Act 4 of 1999¹⁰³, the Independent

⁹² <http://www.gov.za/about-sa/communications>.

⁹³ <https://www.icasa.org.za/AboutUs/OverviewMandate/tabid/631/Default.aspx>.

⁹⁴ <https://www.icasa.org.za/>.

⁹⁵ <http://www.gov.za/about-sa/communications>.

⁹⁶ *ibid.*

⁹⁷ <http://www.sentech.co.za/>, accessed on 25 June 2015.

⁹⁸ Sentech Act 63 of 1996.

⁹⁹ <http://www.gov.za/about-sa/communications>.

¹⁰⁰ Independent Broadcasting Authority Act 153 of 1993.

¹⁰¹ *op cit.*

¹⁰² <http://www.gov.za/about-sa/communications>.

¹⁰³ <http://www.sabc.co.za/wps/portal/SABC/SABCABOUT>, accessed on 24 June 2015.

Broadcasting Authority Act of 1993 as well as the Constitution.¹⁰⁴ SABC is inter alia in charge of television and radio licenses.¹⁰⁵ Further the company participates in Digital Terrestrial Television (DTT) like *Sentech* does.¹⁰⁶

2.2.6. Telkom

Telkom is the largest integrated communication company in Africa and operates in nine countries, while South Africa is the main market with 98.9% of its revenue.¹⁰⁷ Its business is mainly the provision of electronic communications services to the public in terms of the so called Electronic Communications Network (ECN) License and the Electronic Communications Service (ECS) License.¹⁰⁸ Hence they are inter alia the service providers for internet services with relevance in regard to liability in the copyright content.

2.3. General Legislation

Internet-Television, Internet Protocol Television and mobile-television are regulated in several regulations dealing with different aspects of these services. The following discussion shall serve as the basis for the general regulations besides the copyright aspects, which will be dealt with in the third chapter.

2.3.1. The Constitution of the Republic of South Africa, 1996

The Constitution informs all other legislation or law.¹⁰⁹ In regard to Electronic Law and Intellectual Property the relevant subjects are regulated in Sections 14 – the right to privacy –, Section 16 – the right to freedom of expression – and Section 32 – the right of access to information. The latter was given effect in the Promotion of Access to Information Act 2 of 2000.¹¹⁰

2.3.2. Broadcasting Act (No. 4 of 1999)

The Broadcasting Act of 1999 replaced the Broadcasting Act of 1976 and was amended to establish a new broadcasting policy for the Republic of South Africa.¹¹¹ Chapter III of the Act

¹⁰⁴ <http://www.sabc.co.za/wps/portal/SABC/SABCMANDATE>, accessed on 24 June 2015.

¹⁰⁵ <http://www.sabc.co.za/wps/portal/SABC/SABCTVLICENCES>, accessed on 24 June 2015.

¹⁰⁶ <http://www.sabc.co.za/wps/portal/SABC/dtt>, accessed on 24 June 2015.

¹⁰⁷ <http://www.gov.za/about-sa/communications>.

¹⁰⁸ Telkom SA SOC Limited Manual in terms of Section 14 of the Promotion of access to information Act 2 of 2000 available at <http://www.telkom.co.za/sites/documents/b/English.pdf>, 4.1.c., accessed on 26 June 2015.

¹⁰⁹ S Papadopoulos/ S Snail, *Cyberlaw @ SA III*, p. 4, 1.2.1.

¹¹⁰ op cit.

¹¹¹ Broadcasting Act 4 of 1999.

deals with the classifications of broadcasting services and broadcasting licenses and its classes. Chapter IV contains regulations for the incorporation of the Corporation and the Charter.¹¹² The objectives of the Corporation are mainly to provide broadcasting services and their availability in the Republic. Part 7 of that chapter further determines the need to possess as television license to be allowed to use any television set. The Act is furthermore applicable in relation to several other acts, like the Electronic Communications Act and any other legislation applicable to broadcasting or electronic communications.

2.3.3. Electronic Communications Act (36 of 2005)

The Electronic Communications Act 36 of 2005 (ECA) was established to promote convergence in the broadcasting, its signal distribution and telecommunications sector.¹¹³ It is complemented by the ICASA Act as the second part of the regulatory framework of the electronic communications sector. Aside the regulatory and licensing framework the ECA seeks to introduce competition into the ICT-sector. The latter sets it apart from the Telecommunications Act^{114, 115} Moreover service licensing¹¹⁶ and the promotion of universal services¹¹⁷ are provided in the ECA. Universal services are electronic communications networks and services for all South Africans.¹¹⁸ Chapter 9 holds various requirements in regard to IPTV and Video-on-demand (VOD). Both services have to be qualified in terms of the Act to determine whether they require a television license or not.¹¹⁹

2.3.4. Independent Communications Authority of South Africa Act

The Independent Communications Authority of South Africa (ICASA) Act of 2000 was last amended in 2014¹²⁰. It seeks to provide for the establishment of the Independent Communications Authority of South Africa, including the transfer of the functions from the former Independent Broadcasting Authority and the SA Telecommunications Regulatory Authority to ICASA. The basic concepts behind the Act are the acknowledgement of technological and other developments in the fields of broadcasting and telecommunications

¹¹² Broadcasting Act, Sec 1 – definition "Corporation".

¹¹³ Electronic Communications Act 36 of 2005, Preamble.

¹¹⁴ = Independent Communications Authority of South Africa Act 13 of 2000.

¹¹⁵ S Papadoupoulos/ S Snail, p. 28, 3.2.1.

¹¹⁶ *ibid*, p. 30, 3.2.3.

¹¹⁷ *ibid*, p. 33, 3.2.3.6.

¹¹⁸ *ibid*.

¹¹⁹ <http://mybroadband.co.za/vb/showthread.php/491488-IPTV-amp-VoD-SA-licensing-requirements>.

¹²⁰ Independent Communications Authority of South Africa Amendment Act 2 of 2014.

that cause a rapid convergence on these fields. In that connection the establishment of an independent regulatory body became necessary.¹²¹

2.3.5. Sentech Act 63 of 1996

The Sentech Act was established to regulate the transfer all the shares of the South African Broadcasting Corporation (SABC) in Sentech (Pty.) Ltd. to the State.¹²² Pursuant Section 3 all assets and liabilities, including intellectual property rights also had to be transferred to Sentech as the new public company.¹²³ The transferred rights include the broadcasting signal distribution license that was granted to Sentech in terms of section 33 (1) (a) (i) of the IBA Act.¹²⁴

2.3.6. The Electronic Communications and Transactions Act (25 of 2002)

The Electronic Communications and Transactions Act (ECT Act) forms one of the cornerstones of information and communications technology law and cyberlaw and covers a variety of topics¹²⁵, including the regulation of electronic communications and devices¹²⁶. In regard to the topic at hand the act plays a role in connection with the liability of so called Internet Service Providers (ISP's) in copyright matters. Its regulations create so called 'safe harbours' and limit the liability if certain requirements are met.¹²⁷ The ECT Act also governs cybercrime while providing for the criminalisation of certain types of conduct in Chapter 13 and giving effect to the second phase of legal regulation.¹²⁸ Although the criminal provisions are not primarily concerned copyright – which is the emphasis of the following chapter – they can complement copyright protection, e.g. if copyright works are accessed in an unauthorised manner and hence constitute a criminal offence.¹²⁹

2.3.7. Broadcasting Services Code of Conduct

Alongside the mentioned acts and legislation the institutions have to comply with the Code of Conduct for Broadcasting Services.¹³⁰ The regulations were issued in terms of Section 53 of

¹²¹ Independent Communications Authority of South Africa Act 13 of 2000, Preamble.

¹²² Sentech Act No. 63 of 1996, Preamble.

¹²³ Sentech Act, Sec 3 (1) (a).

¹²⁴ Sentech Act, Sec 4 (7).

¹²⁵ S Papadopoulos/ S Snail, p. 4, 1.2.3.

¹²⁶ Dean & Dyer *Introduction to Intellectual Property Law* (2014), p. 423.

¹²⁷ S Papadopoulos/ S Snail, p. 258 f., 12.2.3.2.

¹²⁸ op cit, p. 343, 15.6.2.1.

¹²⁹ Dean & Dyer, p. 423.

¹³⁰ <http://www.gov.za/about-sa/communications>.

the ECA 2005 by ICASA (Notice 958 of 2009) in regard to broadcasting service licenses.¹³¹ Their purpose in accordance with Section 54 (1) ECA is to set standards by ICASA in regard to monitoring the broadcasting service licenses.¹³²

2.4. Operational Licences

The following discussion will deal with the general aspects of licenses in connection with broadcasting services and the before mentioned content. Licenses are generally relevant when dealing with copyrighted content. In lack of licenses content can generally be infringed. The following remarks will however only concern the operational licences in contrast to copyright licences, which will become relevant in the third chapter. Operational licences regard the topic at hand since they are the foundation for transmission of content, such as movies and television shows. They are relevant for my thesis, since they have to be distinguished from copyright licenses, which will be dealt with in chapter 3.

2.4.1. **Licensing fundamentals**

Licenses are defined as 'the permission granted by competent authority to exercise a certain privilege that, without such authorisation, would constitute an illegal act, a trespass or tort'.¹³³ It is further used as a certificate or document that confers permission to engage in otherwise proscribed conduct.¹³⁴ At hand licenses are mainly used in two aspects. First, as mentioned, the users of all kinds of online content may have to pay license fees to broadcasting companies to be permitted to watch it. Secondly such licenses play a role for television stations, which have to obtain such licences in order to be allowed to technically broadcast and hence transmit films and TV-shows.

The South African Broadcasting Act of 1999 distinguishes between three different kinds of licenses. Section 1 defines a license as (a) a broadcasting license or (b) a broadcasting signal distribution license.¹³⁵ A broadcasting licence is defined as 'a licence granted and issued by the Authority in terms of this Act or the IBA Act to a person for the purpose of providing a defined category of broadcasting service, or deemed by this Act or the IBA Act to have been granted and issued'.¹³⁶ The details are regulated in Sections 4 and 5. The latter entails three categories of broadcasting licences, namely public, commercial and

¹³¹ ICASA Notice 958 of 2009 – Regulations regarding the Code of Conduct for broadcasting service licensees issued in terms of Sec 54 of the Electronic Communications Act No 36 of 2005, p. 3.

¹³² op cit , p. 4.

¹³³ <http://thelawdictionary.org/license/>, accessed on June 26 2015.

¹³⁴ <http://legal-dictionary.thefreedictionary.com/license>, accessed on 1 July 2016.

¹³⁵ Broadcasting Act, Sec 1 – „licence“.

¹³⁶ Broadcasting Act, Sec 1 – „broadcasting license“.

community broadcasting services.¹³⁷ In addition the licenses are categorised, for example, as free-to-air, satellite subscription or cable subscription broadcasting services.¹³⁸ A broadcasting signal distribution licence is similar, but for the purpose of providing signal distribution for broadcasting services.¹³⁹ The Broadcasting Act further thirdly names (c) television licenses, which are defined as 'a current and valid written license issued in terms of this Act for the use of a television set'.¹⁴⁰ Its details are regulated in Section 27 of the Broadcasting Act. They prohibit the use of television sets to any person who does not possess a television licence or a written exemption thereof.¹⁴¹

Television licenses in South Africa are held by the broadcasting companies. Consumers of television content from the South African Broadcasting Authority (SABC) need to pay television license fees. The rule applies for everyone who possesses a television set or any device that is capable of receiving broadcast television signal¹⁴², as stated in the Broadcasting Act.¹⁴³ Therefore the sole possession obligates you to have a valid, paid-up television license at all times.¹⁴⁴ Modern devices like tablet-PCs and smartphones also fall within this category, since they are equally capable of receiving such content usually via internet transmission. The Authority comprises several types of television licenses, such as domestic licenses for households, business licenses as well as mobile licenses for private purposes.¹⁴⁵ SABC states that the fees are used to produce their content as well as the universal access. The payments contribute to the public service mandate of the organization. About 70% of the schedules are local productions.¹⁴⁶

Aside the Broadcasting Act the Electronic Communications Act of 2005 (ECA) also regulates license requirements. The Act has the objective to create a technologically neutral licensing framework for electronic communication¹⁴⁷ and to ensure that commercial and community broadcasting licenses, viewed collectively, are controlled by persons from a diverse range of

¹³⁷ Broadcasting Act, Sec 5 (1).

¹³⁸ Broadcasting Act, Sec 5 (2).

¹³⁹ Broadcasting Act, Sec 1 – „broadcasting signal distribution licence“.

¹⁴⁰ Broadcasting Act, Sec 1 – „television licence“.

¹⁴¹ Broadcasting Act, Sec 27 (1) (a).

¹⁴² <http://www.sabc.co.za/wps/portal/SABC/SABCTVLICENCES>.

¹⁴³ Broadcasting Act, Sec 27 (1) (a).

¹⁴⁴ <http://www.gov.za/node/727541>, accessed on 1 July 2015.

¹⁴⁵ <http://www.sabc.co.za/wps/portal/SABC/tvlicquestionanswer>, accessed on 24 June 2015.

¹⁴⁶ Thinus Ferreira 'SABC's Hlaudi Motsoeneng: You must pay TV license' available at <http://www.channel24.co.za/TV/News/SABCs-Hlaudi-Motsoeneng-You-must-pay-TV-licence-20150129>, accessed on 1 July 2015.

¹⁴⁷ ECA, Sec 2 (b).

communities in the Republic.¹⁴⁸ In general a licence is required, whenever communications are carried from one point to another.¹⁴⁹ Therefore the act is aimed at licenses of content providers, which can also contain data transmission besides movies and television shows like voice messaging.

The licensing framework is stated in Section 5 ECA, which says that the Authority may grant individual and class licenses.¹⁵⁰ An individual licence is granted in terms of Section 5 (2) ECA¹⁵¹ and a class licence is granted under Section 5 (4) ECA¹⁵². Individual licenses may thus be granted for (a) electronic communications network services, (b) broadcasting services and (c) electronic communications services. Subsection 3 names services that require individual licenses. They may be issued for a maximum of twenty years and may be renewed¹⁵³ in accordance with the provisions of this act.¹⁵⁴ Class licenses may also be granted for the before mentioned services (a) – (c). Subsection 5 names services that require class licenses. The differences are that individual licenses are meant for own nationwide networks or networks across a province and allow the provision of voice- or voice-over-IP (VoIP) services. Class licenses on the other side refer to networks in a district or local municipality and therefore smaller areas, which do not include voice-services.¹⁵⁵ Altogether individual licences will serve networks or services of significant importance to socio-economic development, where as class licences are meant for such networks and services without comparable importance for the development.¹⁵⁶ Subsection 5 names services that require class licenses. The different broadcasting services and their granting by the Authority are further determined in Sections 48 ff. ECA.¹⁵⁷

2.4.2. ICASA Licensing

The Independent Communications Authority of South Africa has the mandate to license and regulate the electronic communications and broadcasting services in the ECA, as portrayed before. Hence it has the power to monitor the licensees if they comply with the license terms

¹⁴⁸ ECA, Sec 2 (v).

¹⁴⁹ <http://www.ellipsis.co.za/licensing/service-licensing/eca-chapter-3/>, accessed on 1 July 2015.

¹⁵⁰ ECA, Sec 5 (1).

¹⁵¹ ECA, Sec 1 – „individual licence“.

¹⁵² ECA, Sec 1 – „class licence“.

¹⁵³ ECA, Sec 11.

¹⁵⁴ ECA, Sec 5 (10).

¹⁵⁵ <http://www.ellipsis.co.za/licensing/service-licensing/eca-chapter-3/> (Table 1).

¹⁵⁶ Ellipsis regulatory solutions cc 'Guide to licensing under the Electronic Communications Act' available at http://old.ispa.org.za/regcom/advisories/guide_to_licensing_under_eca.pdf, accessed on 1 July 2015.

¹⁵⁷ ECA, Sec 49 – 51.

and conditions.¹⁵⁸ In addition the Broadcasting Monitoring Complaints Committee (BMCC) was established under the Independent Broadcasting Authority Act 153 of 1993¹⁵⁹. The BMCC monitors the compliance of broadcasting licensees in relation with their broadcasting licenses and the Code of Conduct for Broadcasting Services.¹⁶⁰

ICASA is in charge of determining which services require a license when television content is broadcasted. Therefore the Authority had first published the Position Paper in 2010¹⁶¹, in which it considered how IPTV and Video-on-demand (VOD) should be classified. Alongside the classification goes the decision, if a license is mandatory or not. To begin with the Position Paper from 2010 stated that the ECA no longer recognises a difference between various types of networks in the current regulatory framework. Therefore the same license is required to operate an Electronic Communications Network (ECN), no matter which service is operated over that network.¹⁶² However the ECA still distinguishes between two types of provided services: (1) Electronic Communications Services (ECS) and (2) broadcasting services. Thus their definitions serve to demonstrate the broad categories of services that may be provided by each licensee.¹⁶³ While both services convey electronic communications, broadcasting services consist of 'uni-directional' electronic communications. All other services are regarded as ECS.¹⁶⁴ This resulted in four current distinct licence categories, since ECNS and ECS both have individual and class licences¹⁶⁵, depending of what the offer contains. In that connection the Position Paper also categorized IPTV- and VOD-services. IPTV had been defined as multimedia services such as television, video, audio, text, graphics or data delivered over IP-based networks managed to provide the required level of quality of service and experience, security, interactivity and reliability".¹⁶⁶ Thus IPTV requires a license accordingly and is subject to various requirements of Chapter 9 of the ECA.¹⁶⁷

In 2013 the Authority further published a Review of broadcasting regulatory framework, in which it stated that it obtained a statutory mandate in terms of the Constitution, the ICASA Act and the ECA to regulate broadcasting activities in the public interest in South Africa. ICASA substantiated its task to monitor and ensure compliance by licensees with the

¹⁵⁸ <http://www.gov.za/about-sa/communications>.

¹⁵⁹ IBA Act, Sec 21 and 22.

¹⁶⁰ <http://www.gov.za/about-sa/communications>.

¹⁶¹ ICASA Position Paper in relation to Internet Protocol Television (IPTV) and Video on demand (VOD) services, August 2010 .

¹⁶² *ibid*, p. 10, No. 18.

¹⁶³ *ibid*, p. 10, No. 19.

¹⁶⁴ *ibid*, p. 11, No. 20.

¹⁶⁵ http://old.ispa.org.za/regcom/advisories/guide_to_licensing_under_eca.pdf.

¹⁶⁶ ICASA Position Paper, p. 15. No. 28.

¹⁶⁷ <http://mybroadband.co.za/vb/showthread.php/491488-IPTV-amp-VoD-SA-licensing-requirements>.

terms and conditions of their licenses with all relevant legislation.¹⁶⁸ In addition ICASA seeks to research and develop flexible compliance and reporting frameworks that better adapt to the new digitally converged environment.¹⁶⁹

2.4.3. Licensing of IPTV

Internet Protocol Television also has to be licensed in regard to the transmission process as well as its content. The Position Paper of 2010 and the Review of 2013 ICASA seek to regulate IPTV and Video-on-demand (VOD) in regard to transmission. In 2010 it was debated, if Internet Protocol Television falls within the category of Electronic Communication Networks (ECN) and would hence require a license as a broadcasting service. Therefore it would have to be 'linear' or 'unidirectional' electronic communications, which means that the service is only transmitted in one direction.¹⁷⁰ The determination, in which category the services fit, will lead to the conclusion in which manner the services will require a license as well as the license conditions and regulatory requirements to which the services will be subject.¹⁷¹ The Authority came to the conclusion that IPTV services are a broadcasting service, which require an individual broadcasting service license pursuant Section 5 (3) (b) ECA.¹⁷² Further no exceptions can be made for IPTV.¹⁷³ It also does not make a difference if the service is provided on a free or subscription based commercial basis for the necessity of a class community television broadcasting service license.¹⁷⁴

ICASA further came to the conclusion that VOD-services require an ECS-license to provide content services.¹⁷⁵ In contrary to VOD the Authority does license part of on-demand-television. This concerns the on-demand Web-TV services, for example provided by *DSTV*¹⁷⁶, in form of the transmitted internet service. Therefore the licenses are necessary for the Electronic Communication Networks (ECN) not the content itself.¹⁷⁷ ICASA only has jurisdiction over the part of the service that moves the packets, not their content.¹⁷⁸

¹⁶⁸ ICASA Final Report – The Review of broadcasting regulatory framework towards a digitally converged environment in South Africa, 50, No. 4.3.2.

¹⁶⁹ op cit, 51, No. 4.3.5.

¹⁷⁰ ICASA Position Paper, p. 19, No. 38 f.

¹⁷¹ ibid, p. 27, No. 58.

¹⁷² ibid, p. 33 f, No. 73.1.

¹⁷³ ibid, p. 37, No. 82.

¹⁷⁴ ibid, p. 37, No. 83.

¹⁷⁵ ibid, p. 43, No. 98.

¹⁷⁶ <http://www.dstv.com/en-za>, accessed on 26 June 2015.

¹⁷⁷ ICASA Position Paper, p. 18, No. 35.

¹⁷⁸ <http://mybroadband.co.za/vb/showthread.php/491488-IPTV-amp-VoD-SA-licensing-requirements>.

Moreover their providers have to comply with the standard set in the Broadcasting Services Code of Conduct.¹⁷⁹ In this relation ICASA's review of the broadcasting regulatory framework from 2013 states that it has commenced engagements with the Film and Publication Board (FPB) and the broadcasters on the prospects of a single classification system.¹⁸⁰

2.4.4. Licensing of ITV

As described introductory, Internet Television has to be differed from IPTV in the regard that it is an unmanaged service streamed through the public internet, often on a peer-to-peer network. It is therefore seen to be available to the public sphere.¹⁸¹ Hence ITV does not fall in the usual scope of broadcasting. Thus the Position Paper in 2010 did not state, if any kind of license is necessary. Neither did the Review from 2013 explicitly deal with ITV and its relevance in relation to the necessity of licensing. Furthermore no statement has been published by the institutions in charge until today.¹⁸²

2.4.5. Licensing of Mobile-TV

To be able to classify the legal situation of mobile television licenses one has to qualify what kind of technology is used. The requirement to license mobile-TV has yet not been fully established in South Africa. The only lead is the use of the radio frequency spectrum, if it is used for the transmission. In such cases the Authority aimed to regulate and manage it by requiring a correspondent license pursuant Sections 31 (8), (9) and (10) ECA.¹⁸³ However the Broadcasting Act¹⁸⁴ states that any person or entity that possesses and/ or uses a television set needs to pay for the license, while the actual use is not relevant. Further only one single domestic license is required per household, if all sets are only used in the license holder's residential premises and solely by members of the license holder's family.¹⁸⁵ Hence the license is a requirement for consumers and therefore users of online content such as movies and television shows. Thus no regulations for license requirements of the providers of Mobile-TV exist, but the users might have to pay license fees for the reception itself.

¹⁷⁹ op cit.

¹⁸⁰ ICASA Final Report 'The review of broadcasting regulatory framework towards a digitally converged environment in South Africa' available at <http://www.ellipsis.co.za/wp-content/uploads/2012/01/Final-Report-on-Review-of-Broadcasting-Regulatory-Framework-June-2013.pdf>, p. 27, No. 3.8.10., accessed on 1 July 2015.

¹⁸¹ ICASA Position Paper, p. 15 f., No. 31.

¹⁸² Last researched date: October 28, 2015.

¹⁸³ <http://www.ellipsis.co.za/licensing/frequency-licensing/mobile-tv/>, accessed on 1 July 2015.

¹⁸⁴ Broadcasting Act, Sec 4.

¹⁸⁵ <http://www.sabc.co.za/wps/portal/SABC/tvlicquestionanswer>.

Chapter 3: COPYRIGHT & ITV, IPTV AND MOBILE-TELEVISION

3.1. Introduction

This following chapter will be the focus of my dissertation. It will deal with the copyright law in South Africa in regard to Internet Television, Internet Protocol Television and Mobile-Television as well as the services of streaming and downloading. Today the mentioned services offer a variety of possibilities to watch movies and television shows online. Besides offers like *Netflix* and online-broadcasting by television stations themselves, the internet contains multiple options to use downloads and streams. While some of them are clearly legal and others obviously illegal, there is a third kind of choices where the classification is not as definite. Law is bound to play one of the most important roles in the trends of technology and information culture. And intellectual property protects the works developed in that continuous process.¹⁸⁶

This chapter will examine the issues of copyright in relation to the above mentioned devices and services and will be divided into two main parts. First I will discuss copyright licenses in regard to the mentioned services and the legal regulations of their content. Such licenses are relevant for this dissertation for one to be distinguished from the before depicted operational licenses and secondly – and most importantly – to avoid copyright infringement. The latter occurs in lack of the necessary licenses. The second part will handle the copyright issues in South Africa in regard to the mentioned devices beyond the licensing issues. I will start off by briefly by demonstrating the applicable law in the South African Copyright Act. After that I will cover the topics of copyright infringement and liability in relation to ITV, IPTV and Mobile-TV. The third topic in the second part will deal with the copyright exceptions and limitations. This will cover the general exceptions and limitations in regard to different kinds of infringing use. The remarks will focus on the mentioned services. Lastly I will quickly broach the issue of circumvention tools. Although such do not have a statutory source in South Africa, they form a part of the discussion at hand. The reason is that such tools are used to access locally unavailable content, such as *Netflix* USA, as well as enable users to disguise their IP-address while downloading and streaming 'illegal' content.

Hence the copyright issue arises where the mentioned devices and services are used to watch content without authorisation. The lack of authorisation is usually given due to a lack of necessary licenses on side of the user or internet provider. Generally music and television shows are broadcasted either via the television channels own websites or offered by third parties, like streaming services (ia *Netflix*). Such offers can be assumed to own the relevant

¹⁸⁶ I. Stamatoudi *Copyright and Multimedia works. A comparative analysis* (2002), p. 4.

licenses of the copyright holders. However problems arise on two ends. For one the internet contains websites, which enable users to download copyrighted works. Usually the before mentioned providers do not enable online downloads. Hence the user might assume that downloading the copyrighted material is not legal, since no such necessary licenses might have been issued. Further there are websites that enable users to stream films and television shows. In case of the broadcasting enterprises and known offers, the users can assume that the streaming is legal. The providers shall own the relevant licences to broadcast and distribute the copyrighted material. However many online offers from third parties exist, which do not obviously show if the providers hold the necessary licenses and rights to the content. Especially such offers lie within a legal gray-area and hence will be discussed more detailed in this chapter.

3.2. Content licenses

In the following I will discuss the relevant content licenses for movies and television shows in form of downloading and streaming services. Their relevance lies in the content of the copyrighted works and the authorisation to broadcast or distribute the copyrighted works online. Hence a lack of license and authorisation is likely to result in different forms of copyright infringement. Such infringement can be committed by the online users as well as the providers.

Licenses are used in copyright matters, since copyright can be transferred via assignment, testamentary, disposition or operation of law.¹⁸⁷ Such assignment is limited by Sec. 22 (2) CA. Licenses may inter alia be granted in respect of the copyright in a future or existing work as a transmissible, movable property.¹⁸⁸ The assignment has the legal effect that the assignee is placed in the same position as a third party in relation to that work. Further any reproduction or adaptation of the work by someone without the authority of the assignee would constitute copyright infringement in that work.¹⁸⁹ The copyright can be transferred by the holder to someone else and can comprise all entitlements of the particular copyright or only in respect of some selected entitlements. Furthermore different entitlements can be assigned to different persons.¹⁹⁰ Regarding my thesis licenses will be granted from the copyright holders of the movies and television-shows to the party, who broadcasts and transmits them, independently from the different device- and service-options. Generally IP-

¹⁸⁷ Dean & Dyer *Introduction to Intellectual Property Law*, p. 361.

¹⁸⁸ CA, Sec 22 (5).

¹⁸⁹ Dean & Dyer, p. 365.

¹⁹⁰ S Papadopoulos/ S Snail, p. 166.

rights are so called negative rights that enable the proprietor to prevent others from performing the protected acts in relation to that right. It can take many forms and can be part of various arrangements such as franchising, syndication of television programmes and film production.¹⁹¹

When assigning a copyright to someone else, the holder might lose all the transferred entitlements. In contrast the holder might keep his copyrights and only waive his legal remedies as a holder in favour of a license.¹⁹² It is important to set out the scope of the authorisation clearly and unequivocally when authorising IP-rights. This can contain the subject of the licence, the protected acts, the field of use as well as the nature and territory of the license.¹⁹³ Regarding the nature of the license, distinctions have to be made between exclusive and non-exclusive licenses. Exclusive licenses are defined in Section 1 (1) CA. They grant the power to exercise the particular entitlements to the copyright holder to the exclusion of all parties.¹⁹⁴ The transfer of an exclusive copyright must fulfil the formalities of a written form, be signed by or on behalf of the assignor and further the work must also be clearly identified.¹⁹⁵ Section 1 (1) CA defines writing as including any form of notation, whether by hand or by printing, typewriting or any similar process. Exclusive licences can be granted for any work subject to copyright and therefore also in respect of a cinematograph film.¹⁹⁶ When granting such license the licensee effectively agrees to a restraint that prevents him from performing the protected acts in the territory and field of use.¹⁹⁷ On the contrary when granting a non-exclusive license the licensor retains the licensed rights for himself without restriction but extends these to the licensee. Hence the licensor may also perform the restricted acts and may authorise further licensees in the same territory and field of use.¹⁹⁸ Such licenses can be granted in writing or orally.¹⁹⁹

Furthermore compulsory licenses can be granted by a Copyright Tribunal pursuant Sec. 29 CA. Such will be granted for any type of work where a licensee has been unreasonably refused a license by the copyright proprietor.²⁰⁰

The content license requirements become relevant for the mentioned formats to avoid copyright infringement. Hence for IPTV such licenses are necessary for the broadcasting

¹⁹¹ Dean & Dyer, p. 366.

¹⁹² op cit, p. 167.

¹⁹³ Dean & Dyer, p. 366 ff.

¹⁹⁴ S Papadopoulos/ S Snail, p. 167.

¹⁹⁵ HB Kloppe/ T Pistorius *Law of Intellectual Property in South Africa*, p. 193.

¹⁹⁶ P Ramsden *A guide to Intellectual Property Law*, p. 56.

¹⁹⁷ Dean & Dyer, p. 368.

¹⁹⁸ op cit, p. 368.

¹⁹⁹ S Papadopoulos/ S Snail, p. 167.

²⁰⁰ Dean & Dyer, p. 378.

party. However it can be argued that ITV, on the other hand, does not require a license for its content, since that content differs from usual broadcasting channels, for example by private videos put online by the users themselves. Furthermore ITV does not broadcast itself, which is why it also does not require an operational licence accordingly for the provision of services, as portrayed before. Regarding Mobile-TV South Africa has not established a firm market yet, besides single offers like MultiChoice²⁰¹ from DSTV. Thus it has not been confirmed yet, if offers using the radio frequency spectrum will have to concur to the regulations of Sections 31 (8), (9) and (10) ECA. Consequently, as mentioned before, operational and content licenses become relevant when dealing with copyrighted material. In lack of such licenses, infringement and liability will bear a meaning and thus will be dealt with in detail in the following.

3.3. 'Piracy' in South Africa

Often times the term copyright infringement is substituted by the term 'piracy'. It is usually used in a neutral manner, consistent with its use in contemporary English treaties. The term carries no particular moral charge and is simply used substituting 'infringement'.²⁰² However such acts of infringement can economically be seen as free-riding and therefore be socially harmful as well as unlawful.²⁰³ Henceforth this part will discuss the issues of copyright infringement in respect to streaming and downloading in South Africa on the background of ITV, IPTV and mobile-TV. Its background is that we are facing the process of inventing multimedia today. It is too early yet to grasp the full set of problems that multimedia products are bound to present, inter alia because they are intellectual property rights, which are not visual like other rights.²⁰⁴ Multimedia can be defined as technology, which is meant to combine diverse types of works or information in a single medium. That technology has to be digitally processed, stored and accessed by a computer. Aside the conversion of data into a digital format, this format also enables interactivity and therefore the dialogue between the user and the system.²⁰⁵ The characteristics of multimedia also lead to the fact that there are three essential layers to legal protection, namely (1) the protection of the contents, (2) the protection of the multimedia product itself and (3) the protection of its technical base.²⁰⁶ Copyright and infringement belong to the first category. A relevant aspect of multimedia is

²⁰¹ <http://www.multichoice.co.za/multichoice/content/en/page44169>, accessed on 1 July 2015.

²⁰² L Bently/ J Davis/ J Ginsburg *Copyright and Piracy – An interdisciplinary critique* (2010), p. 25.

²⁰³ op cit, p. 97.

²⁰⁴ I. Stamatoudi, p. 7.

²⁰⁵ ibid, p. 18.

²⁰⁶ ibid, p. 27.

streaming, which is a popular technology to enable consumers to access video content over the internet. It has the advantages of compressing the data using a decoder-program to reach more efficient transmission over the internet, the advantage of usually leaving no trace of the compressed file on the user's computer without the content owner's permission to download it and lastly the advantage of allowing access to streamed media if one has the right decoder or player.²⁰⁷ The websites using streaming technologies need to have the relevant licenses both to use the technology as well as from the video content holder's whose work they intend to stream.²⁰⁸ Piracy mainly tries to find ways to circumvent streaming either by allowing users to download and copy streaming media files or allowing users to convert files from propriety streamed formats to other formats.²⁰⁹

As illustrated before, ICASA does not deal with the regular content of such online services due to a lack of regulatory permission. However the legal classification of downloading and especially streaming of such content partially lies in a legal gray-area and therefore deserves closer attention. Thus the upcoming discussion will deal the regulations in regard to copyright and the content of the relevant formats.

3.3.1. The basic principles of South African Copyright Law

Before discussing the main copyright issues of infringement and liability for my thesis, the following will briefly illustrate the basic principles of South African Copyright Law. Copyright can be defined as the exclusive intellectual property right to exercise the entitlements in respect of the copyright holder's work or to authorise the exercise of such entitlements.²¹⁰ It is further described as the exclusive right in relation to work embodying intellectual content to do or to authorise others to do certain acts in relation to that work, which acts represent in the case of each type of work the manners in which that work can be exploited for personal gain or profit.²¹¹ This is regulated in the Copyright Act No. 98 of 1978 (CA), which came into effect on January 1st 1979. While the applicable law for license regulations is Section 22 CA, as illustrated before, the Act handles different kinds of issues. This part of the chapter will mainly deal with sections 2, 8 and 10 as well as sections 16, 18 and 23 ff. CA in regard to Internet Protocol Television, Internet- and Mobile Television as well as the mentioned services. For sake of completeness further forms of copyright infringement are created in the Counterfeit Goods Act, which could be referred to as tertiary

²⁰⁷ S Stokes *Digital Copyright – Law and practice* 3ed (2009), p. 157.

²⁰⁸ *ibid*, p. 157 f.

²⁰⁹ *ibid*, p. 158.

²¹⁰ S Papadopoulos/ S Snail, p. 140.

²¹¹ O Dean *Handbook of South African Copyright Law* (1987), 1 – 1, 1.1.

infringement.²¹² However this will not play a role for the topics at hand in relation to digital downloading and streaming services.

Typically copyright infringement occurs in forms of copying, reproducing or distributing a copyrighted work without the authorization of the copyright holder. Such unauthorised use can be directly or indirectly infringing.²¹³ Thus the electronic storage of a copyrighted work can be qualified as an infringement of an author's copyright. Infringing copies are for example any copyrighted material that is scanned into digital format, material that is either up- or downloaded from servers and other platforms as well as files that are transferred from one network to another.²¹⁴ The exclusive right of broadcasting is defined as 'a telecommunications service of transmissions consisting of sounds, images, signs or signals [...]'.²¹⁵ Such broadcasts also imply online streaming and downloading, since they are broadcasted in a certain frequency spectrum and are meant for reception by the public. Hence generally the copyright holder has the exclusive right to broadcast his movies or television-shows over the internet or license a third party to do so. Therefore downloading- and streaming-services on the internet may infringe copyright, when the broadcast is done without the authorisation and consent of the copyright holder of the film or television show.

Another matter related to downloads and streaming is caching. A cache in computing is defined as 'a small high-speed memory that improves computer performance'.²¹⁶ It stores recently used information to quickly be accessible at a later time. The user does not notice it, since it usually happens in the background.²¹⁷ Caching can possibly infringe copyright when copying, distributing and publicly displaying copyrighted material. For example search engines organise and provide access to material by reproducing copyrighted content that is made available by third parties. However the legal situation is not clearly regulated and no case law exists in South Africa. Other countries have legislated to allow temporary reproduction and caching as it is seen as part of the normal use of digital technology.²¹⁸ The legal issue has relevance to the liability of service providers and will be further discussed under that point accordingly.

Moreover online-streams and -downloads may also only be transmitted in a diffusion-service. Such service is defined as 'a telecommunication service of transmissions consisting of sounds, images, signs or signals, which takes place over wires or other paths provided by

²¹² Dean-Handbook, 1 – 65, 8.1.

²¹³ S Papadopoulos/ S Snail, p. 168, 9.4.1.2.1.

²¹⁴ op cit, p. 169, 9.4.1.2.2.

²¹⁵ CA, Sec 1 – "broadcast".

²¹⁶ <http://dictionary.reference.com/browse/caching>, accessed on 25 June 2015.

²¹⁷ <http://techterms.com/definition/cache>, accessed on 25 June 2015.

²¹⁸ S Papadopoulos/ S Snail, p. 180, 94.5.4.

material substance and intended for reception by specific members of the public [...].²¹⁹ Online streams and downloads are generally available to the part of the public who uses the specific websites and might thus also infringe copyright.

Furthermore copyright infringement is relevant in regard to peer-to-peer file-sharing platforms, where video and audio files are shared between the users.²²⁰ Developments since 2007 have shown increased focus on the role of intermediaries, especially access providers, in fighting online infringement.²²¹

At hand it is relevant that copyright law can be applied to matters in connection with the internet, although it had not been around when the Copyright Act (CA) was established in 1978. It is important to dissect the process of dissemination of the subject matter and to apply the basic legal principles to the steps involved in the process. It demands an analysis of the manner in which information containing materials are dealt with.²²² Hence the services at hand have to fulfil the requirements for subsistence of copyright.

3.3.2. Requirements of copyright

3.3.2.1. Eligible works

First the relevant services have to contain eligible works pursuant Section 2 CA for copyright protection. A copyright holder is entitled to hold control of communication to the public. This also entails the ability to control the transmission of copyrighted works over the internet, whenever the public is able to access the material from different places and at different times.²²³ I intend to focus my thesis on the format and contents of movies and television shows and both for one fall within that category, since they are either manifested on film or in a digital version and can further be seen as a moving picture. This includes the sounds embodied in a soundtrack associated with the film.²²⁴ Secondly both formats can be classified as a broadcast when aired on television or similar formats, as defined in Sec. 1 CA, where shown on television and such. Broadcasts consist of the signals carrying visual and/ or audio content issued by a broadcaster's transmitter. Hence it is often the carrier of other separate copyright works such as cinematograph films.²²⁵

²¹⁹ CA, Sec 1 – "diffusion service".

²²⁰ S Papadopoulos/ S Snail, p. 178, 9.4.5.3.

²²¹ A Strowel *Peer-to-peer-filesharing and secondary liability* (2009), p. 10.

²²² Dean-Handbook, 1 – 72, 8.4.16.

²²³ S Papadopoulos/ S Snail, p. 148.

²²⁴ CA, Sec 1 – "Cinematograph film".

²²⁵ Dean & Dyer, p. 13.

3.3.2.2. Subsistence of copyright

Moreover the requirements of the subsistence of a copyright must be given. Copyright comes into existence automatically upon compliance with certain conditions stipulated in the Copyright Act.²²⁶ Those requirements are that (1) the work must be original²²⁷, (2) it must be reduced to a material form^{228 229} and (3) the author must be a so called qualified person or the first publication or manufacture of the work must have taken place in South Africa. The nature of the work determines the applicable way to translate it into material form.²³⁰ Thirdly the author must be a qualified person. This is the case if he or she falls within one of the categories of Section 3 CA, since only an author or the owner of the work can claim legal consequences from copyright infringement. The author of a cinematograph film is 'the person by whom the arrangements for the making of the film were made'²³¹, while the author of a broadcast is simple the first broadcaster²³². Alternatively the first publication of the work must have occurred in South Africa.²³³ Again the specific act required for the vesting of copyright will depend on the nature of the particular work. For broadcasts it is the first act of broadcasting, for cinematograph films it is the publication or production.²³⁴

The duration of copyright works differs within the types of works. When the term of copyright expires the work is no longer protected and it may be freely copied, since it falls within the public domain.²³⁵ The copyright duration for cinematograph films subsists for 50 years from the end of the year from either the moment, in which the work had been made available to the public with the consent of the copyright owner or first published, or the making of the work, if it had not been made available or published pursuant Section 3 (2) (b) CA.²³⁶ Pursuant Section 3 (2) (d) CA copyright endures for a broadcast for 50 years from the end of the year in which it first took place.²³⁷

3.3.2.3. Nature and scope of copyright

The nature and scope of the copyright also vary between the different kinds of works. In essence it is the right to do or authorise others to do, or prevent others from doing the acts

²²⁶ Dean & Dyer, p. 16.

²²⁷ CA, Sec 2 (1).

²²⁸ CA, Sec 2 (2) (2A).

²²⁹ *Galago Publishers (Pty) Ltd and another v Erasmus* 1989 (1) SA 276 (A).

²³⁰ S Papadopoulos/ S Snail, p. 157, 9.3.7.4.2.

²³¹ CA, Sec 1 (d).

²³² CA, Sec 1 (e).

²³³ CA, Sec 4 (1).

²³⁴ S Papadopoulos/ S Snail, p. 151, 9.3.5.6.3., footnote 58.

²³⁵ HB Kloppe, p. 179.

²³⁶ *ibid.*

²³⁷ *ibid.*

designated in respect of each type of work. The rights amount to copying the work in one form or another and/ or exploiting the work commercially.²³⁸ The exclusive right is limited by the term of each copyright as well as by the statutory defences²³⁹. The nature of copyright in cinematograph film is regulated in Section 8 (1) CA and the set of exclusive rights of broadcasts is regulated in Section 10 CA. All restricted acts amount to manners of dissemination of the basic work, which happens in form of duplication or transformation of the work in different manners, which are capable of attracting revenue.²⁴⁰ Streaming and downloading concern cinematograph films and broadcasts. The restricted acts in question are, for one, the reproduction pursuant sections 8 (1) (a) and section 10 (a) CA. Secondly the streaming and downloading of films and television shows can concern the exclusive right of broadcasting pursuant section 8 (1) (c) and section 10 (b) CA. Cinematograph films include celluloid films, video tapes, DVDs, laser discs and microchips, if the latter have a film recorded on them.²⁴¹ Broadcasts are subject to copyright in relation to the actual sound and television broadcast, consisting of electromagnetic waves. However the content of the broadcast cannot be protected by this category, but rather in the other categories like films or sound recordings.²⁴² Consequently the nature and scope of copyright protection differs in relation to the work and the way that has been infringed. The movie or TV-show is protected pursuant section 8 CA, when used from a media medium such as DVD, and is protected pursuant section 10 CA, if the infringed source has been, for example, a television broadcast.²⁴³

For Internet Protocol Television, Internet Television and Mobile-television the most pivotal exclusive rights are reproduction of the work, broadcasting the work and transmitting it in a diffusion-service²⁴⁴ in regard to streams and downloads of movies and television shows. Reproduction in relation to broadcasts includes a reproduction in form of a cinematograph film²⁴⁵ and in relation to any other work includes a reproduction made form a reproduction of that work²⁴⁶. This restricted act can take place in different ways, including non-material forms. Since the *Pastel Software*-case²⁴⁷ the electronic reproduction of works is also

²³⁸ Dean-Handbook, 1 – 52, 7.1.

²³⁹ CA, Sec 12 – 19B.

²⁴⁰ Dean-Handbook, 1 – 63, 7.11.

²⁴¹ University of Cape Town Report on the South African Copyright Review - <http://ip-unit.org/wp-content/uploads/2010/07/opencopyrightreport1.pdf>.

²⁴² op cit.

²⁴³ <http://www.unimelb.edu.au/copyright/information/fastfind/filmbroad.html>, accessed on 29 July 2015.

²⁴⁴ S Papadopoulos/ S Snail, p. 145.

²⁴⁵ CA, Sec 1 – “reproduction” (a).

²⁴⁶ CA, Sec 1 – “reproduction” (c).

²⁴⁷ *Pastel Software v Pink Software* 299 JOC (T).

acknowledged. It was based on a wide interpretation of the term material form in connection with Section 2 (2) CA, which states that a work can be 'written down, recorded, represented in digital data or signals or otherwise reduced to a material form'. Thus a reproduction also includes loading data into a computer, downloading material from the internet and displaying material on a computer screen in the electronic context.²⁴⁸ Hence it is necessary to adapt and extend classical copyright concepts to new situation in the electronic age, which also concerns the act of unauthorised reproduction of works.²⁴⁹

3.3.2.4. Copyright holder

Copyright can only be claimed by the copyright holder. Under South African Law this is either the author or owner pursuant section 21 CA. Hence usually the ownership of copyright vests in the author²⁵⁰, if no exceptions are applicable²⁵¹. Further joint ownership can be found in copyright works, because it is categorised as movable property and is therefore an item of incorporeal property.²⁵² The duration of works of joint-ownership expires after 50 years from the end of the year in which the contributing author to die last passes away²⁵³. For movies the onus of proof for alleged infringement states that the person whose name appears on the film shall be presumed to be the author of that film, unless the contrary is proven.²⁵⁴ That name has to satisfy the two requirements that (1) it must claim to be the name of the author and (2) the name must appear in a certain manner.²⁵⁵ Moreover the general principle of ownership of copyright is that it initially vests in the author.²⁵⁶

3.3.3. Infringement and Liability

Copyright infringement is in general terms the unauthorized copying of the work and/ or commercial exploitation of it. The infringement can happen in misusing or misappropriating the whole or a substantial part of the work.²⁵⁷ At hand the most relevant exclusive right is reproduction. This can take place in any form, including any digital format, and is not

²⁴⁸ Dean-Handbook, 1 – 68, 8.4.7.

²⁴⁹ op cit, 1 – 70 f., 8.4.11.

²⁵⁰ CA, Sec 21 (1) (a).

²⁵¹ CA, Sec 21 (3), (4).

²⁵² Dean-Handbook, 1 – 43, 5.5.1.

²⁵³ CA, Sec 3 (4).

²⁵⁴ CA, Sec 26 (6).

²⁵⁵ P Ramsden, p. 77 f.

²⁵⁶ CA, Sec 3 and 4.

²⁵⁷ Dean-Handbook, 1 – 37, 8.2.

confined to the making of a reproduction in material form.²⁵⁸ Hence the infringement can be committed by either downloading a movie or television show as well as streaming it.

The two forms of copyright infringement are direct or indirect pursuant Section 23 (1) and (2) CA. Direct infringement is when the infringer commits any acts in relation to the particular work concerned and the set of exclusive rights, to whom the sole prerogative of the copyright owner is to do or authorise.²⁵⁹ Sections 6 – 11B CA contain the exclusive rights. Infringement is indirect, when the infringer knowingly does something to further the commission of any of these acts without actually committing them.²⁶⁰ While knowledge of infringement is not necessary for direct infringement²⁶¹, guilty knowledge is a prerequisite for indirect infringement²⁶². Further requirements for direct infringement are objective and subjective similarity, the copying of a substantial part and a causal connection between the original and the alleged infringing work.²⁶³ Moreover the copying itself can be direct or indirect, since a reproduction can be made from any work and therefore does not have to be a copy from the original work.²⁶⁴

Direct infringement is relevant at hand, when a provider or user downloads online content or streams it. The latter stream has to result in a permanent storage of data. Indirect infringement is constituted in Section 23 (2) CA, which names four categories. Its two basic forms are unauthorised dealing with infringing copies of a work and permitting an infringing public performance of a work to take place.²⁶⁵ The provision confirms that the infringer must have had knowledge that the act is infringing. Knowledge in this connection means the 'notice of facts such as would suggest to a reasonable man that a breach of copyright law was being committed'.²⁶⁶ However downloading and streaming do not fall under any of those categories of indirect copyright infringement.

In addition the principle of contributory infringement exists, although no local courts have established it in any reported decision yet. It could be accepted as a form of delictual liability in the form of assisting, aiding or abetting aids to copyright infringement. The available remedies are damages and injunctive relief as a form of interdict.²⁶⁷ The topic is a

²⁵⁸ Dean & Dyer, p. 428.

²⁵⁹ HB Kloppe, p. 199, 27.1.

²⁶⁰ *ibid*, p. 199, 27.1.

²⁶¹ *ibid*, p. 200, 27.2.

²⁶² *ibid*, p. 205, 27.3.4.

²⁶³ *ibid*, p. 201 – 203, 27.2.1. – 27.2.3.

²⁶⁴ *ibid*, p. 203, 27.2.4.

²⁶⁵ Dean-Handbook, 1 – 44, 8.12.

²⁶⁶ P Ramsden, p. 63.

²⁶⁷ HB Kloppe, p. 205, 27.4.1.

main issue in regard to the liability of service providers and will be further discussed and dealt with later.

The permanent digital storage of a copyrighted work is a restricted act. Furthermore the making of a transient electronic copy of material might constitute copyright infringement, which will be elaborated later regarding the South African legislation. In the international context the WIPO Copyright Treaty (WCT) (1996) also provides that the right to make a reproduction is applicable to the storage of works in digital systems of a permanent, temporary, transient or incidental nature.²⁶⁸ The use and storage of such data can for one be relevant while streaming movies and television shows, where the storage is temporary. As explained before, during streams the data is downloaded while the user can already watch the chosen content. In regard to the broached central issue of IPTV, ITV and Mobile-TV streaming is used in all three formats to view the desired content. However copyright is only infringed, if the use has not been authorised by its copyright holder. Therefore infringement is can only be given in cases, where no license has been given to the content provider or other similar agreements. Hence the issue of illegal streaming is most likely to occur during the use of ITV, which is based on the circumstances that it is most likely to contain content that is not regulated by the federal authorities, like ICASA. ITV is transmitted over a broadband connection and is generally available content distributed over the internet.

At last the Copyright Act grants remedies for criminal offences.²⁶⁹ The contained offences are substantially the same as the acts of secondary civil copyright infringement. They also require guilty knowledge on the part of the infringer who deals with infringing copies.²⁷⁰

3.3.3.1. (Special) Liability

Henceforth the above mentioned general principles and issues of copyright infringement will be dealt with in regard to liability matters. They will be illustrated and discussed in regard to the relevant formats as well as the procedures of online-downloading and -streams in South Africa. I will depict the copyright liability of users as well as the service- and content-providers of download- and streaming-services.

3.3.3.1.1. User liability

Internet users are commonly described as 'someone aged 2 years old and above, who went online in the past 30 days'.²⁷¹ Hence it is someone who uses an internet connection and

²⁶⁸ S Papadopoulos/ S Snail, p. 169 f.

²⁶⁹ CA, Sec 27.

²⁷⁰ Dean & Dyer, p. 43.

access. This meaning can be applied to all forms of use, and therefore for mobile online devices, including mobile television, when accessed online. A user can only be a natural person, since it demands the ability to actively gain access to websites. Hence internet users are liable for their actions as natural persons. The personal liability also includes file-sharing in the absence of any defence.²⁷² On these grounds the main issues are liability pursuant Sections 23 and 27 CA. Copyright also covers storage in a digital form. This includes the internet transmissions as well as the act of making available copyrighted material for access on the internet.²⁷³

Direct infringement usually occurs in form of reproducing or copying²⁷⁴, which is defined as 'something that is or looks exactly like something else, a version of something that is identical or almost identical to the original'²⁷⁵. In the context of the internet, an act of copying occurs whenever there is a transfer or transmission of a computer file representing the copyrighted work.²⁷⁶ At hand copying is relevant in form of downloads, where content is duplicated on the user's PC in a digital format. The copy then is a form of reproduction, which is permitted under Sec. 8 (1) (a) for movies and Sec. 10 (a) CA for broadcasts.

Users of online content can rarely be held liable for indirect infringement, because it is done by aiding and enabling someone to infringe copyright. The users who streams or downloads content are rather on the other side and do not enable others to download or stream themselves. However someone is liable as a contributory infringer, if he/ she has knowledge of the infringing activity [and] induces, causes or materially contributes to the infringing conduct of another.²⁷⁷ Courts often consider if the defendant benefited from the infringing activity, which already suffices where the infringing activity merely enhances attractiveness to potential customers.²⁷⁸

Infringement and liability become relevant, when the internet user is not authorised to either use the services of IPTV, ITV or Mobile-TV or its contents. Such authorisation can for one be acquired by paying license fees for television programme, as established by SABC²⁷⁹. Other authorisation can be gained by payment of television costs, like for the online contents

²⁷¹ <http://www.internetworldstats.com/surfing.htm>, accessed on 29 July 2015.

²⁷² A. Strowel, p. 213.

²⁷³ See further: op cit, p. 20.

²⁷⁴ G Albert Jr./ Laff Whitesel & Saret Ltd. *Intellectual property law in cyberspace* (2012), Ch. 8 I., 8-2.

²⁷⁵ <http://www.merriam-webster.com/dictionary/copy>, accessed on 13 August 2015.

²⁷⁶ G Albert Jr. et al, p. 247.

²⁷⁷ ibid, p. 252.

²⁷⁸ ibid, p. 253.

²⁷⁹ www.sabc.co.za/tvlicences.

of *DSTV Multichoice*²⁸⁰ Digital Media or offers like *Netflix*²⁸¹, which are independent from regular television-stations and television service providers. It can further be argued that internet end users have an implied license to access the copyright content made available on the internet by copyright owners who have not restricted access thereto.²⁸² As stated above, movies and television shows are generally eligible works under the Copyright Act. Internet users can therefore infringe one of the exclusive rights by downloading or streaming such media. The usual infringement is be done by reproducing the cinematograph films or broadcasts pursuant Sections 8 (1) (a) and 10 (a) CA without the copyright holder's authorisation.

Further technologies involving the transmission of video content over the internet are relevant in two aspects regarding piracy. First a user can 'hack' the encryption protecting the copyrighted content and thus enabling it to widespread copying. The second form of hacking is the circumvention of copyright protection measures by misappropriating material into analogue format, converting it into digital format or posting it on the web.²⁸³ The latter will be discussed later in this chapter.

3.3.3.1.2. Provider Liability

Service providers are commonly defined as an organisation that provides a network, storage or processing service in computing.²⁸⁴ The ECT Act defines service providers as 'any person providing information system service'.²⁸⁵ An information system is then defined as 'a system for generating, sending, receiving, storing, displaying or otherwise processing data messages [which system] includes the internet'.²⁸⁶ The terms Online or Internet Service Providers (OPS's/ ISP's) are used identically and refer to the company that receives a monthly fee to in order to use the internet. Thus they are necessary to connect to the internet.²⁸⁷ Content and access providers are considered main players in the internet context.²⁸⁸

Online activities face several challenges like identifying perpetrators and the multiplicity of possibilities that unlawful materials can be reproduced and disseminated.²⁸⁹ Thus an approach was developed to hold the providers liable for activities that they enable

²⁸⁰ <http://www.multichoice.co.za/multichoice/content/en/page62159>, accessed on 1 August 2015.

²⁸¹ <https://www.netflix.com/>.

²⁸² Dean & Dyer, p. 429.

²⁸³ Albert Jr. et al, Ch. 8.II.L., 8-29.

²⁸⁴ <http://www.pcmag.com/encyclopedia/term/51187/service-provider>, accessed on 13 August 2015.

²⁸⁵ ECT Act, Sec 70.

²⁸⁶ ECT Act, Sec 1.

²⁸⁷ <http://techterms.com/definition/isp>, accessed on 1 August 2015.

²⁸⁸ C Visser 'Online service provider liability under the Electronic Communications Act' (2002) SA Merc LJ 758.

²⁸⁹ S Papadopoulos/ S Snail, p. 239.

knowingly or unknowingly, as they are the gateway to internet access. Further they are expected to assist in the enforcement of laws in the online environment.²⁹⁰ The liability of providers for the infringement of intellectual property rights remains a controversial issue in IP-law until today.²⁹¹ The general dilemma is, if providers should be treated as electronic publishers and hence made directly liable for all online activity connected or should they rather be qualified as mere postmen of the internet and therefore be exempt from all liability.^{292 293}

In connection with such online activity, intermediary liability becomes relevant, where a secondary party facilitates unlawful activity by another, and as a result, the secondary party is held responsible for the activities of the primary perpetrator.²⁹⁴ The key issue is the imposition of contributory liability and hence also of those who assist, aid or abet the commission of a delict.²⁹⁵ The *lex Aquilia* includes the persons who assist the infringer in any way.²⁹⁶ Hence, depending on the kind of online action, service providers can be held liable for direct infringement of copyright, e.g. when making an unauthorised reproduction of a work. Further when enabling a user to transmit or facilitate access to infringing material, the provider may be liable for contributory infringement.²⁹⁷

The ECT Act²⁹⁸ defines an intermediary as 'a person, who on behalf of another person, whether as agent or not, sends receives or stores particular data message or provides other services with respect to the data message'.²⁹⁹ The term is commonly applied to telecommunications companies that provide at least internet access and connectivity between two or more individuals as one type of third party.³⁰⁰ Intermediaries provide information system services, which can include the provision of connections, the operation of facilities for information systems and the processing and storage of data at the individual request of the recipient of the service.³⁰¹ The regulation of online activity through intermediaries mostly includes making them directly liable for unlawful activity, requiring them to block access to

²⁹⁰ op cit, p. 240.

²⁹¹ C Visser, SA Merc LJ 758.

²⁹² op cit LJ 759.

²⁹³ HB Klopper, p. 205, 27.4.1.

²⁹⁴ S Papadopoulos/ S Snail, p. 240, 11.1.1.

²⁹⁵ C Visser, SA Merc LJ 759.

²⁹⁶ *McKenzie v Van der Merve* 1917 AD 41 at 51.

²⁹⁷ C Visser, SA Merc LJ 759.

²⁹⁸ Electronic Communications and Transactions Act No. 25 of 2002.

²⁹⁹ ECT Act, Section 1 – "intermediary".

³⁰⁰ A Strowel, p. 14.

³⁰¹ S Papadopoulos/ S Snail, p. 240, 11.1.2.

or to take down offending contents.³⁰² In South Africa the liability of them for their users' copyright infringement is determined by the Copyright Act.³⁰³

The Act further defines service providers as 'any person providing information system services'.³⁰⁴ An information system is then defined as 'a system for generating, sending, receiving, storing, displaying or otherwise processing data messages [which system] includes the internet'.³⁰⁵ The Act affords intermediaries various forms of exemption from liability, depending on their role in the dissemination of information over the internet.³⁰⁶ However an internet service provider can limit his liability by meeting two requirements: (1) it must be a member of the representative body referred to in Section 71 ECT Act and (2) it must have adopted and implemented the official code of conduct of that body³⁰⁷ pursuant Section 72 ECT Act. Further limitations and exceptions will be discussed as part of this chapter.

Three different theories cover liability regarding direct infringement, contributory infringement and vicarious liability.³⁰⁸ Copyright is directly infringed by unauthorised reproduction, if a copy of the work has in fact been made. This has to be determined in present matters in relation to up- and downloading as well as streaming of files over the internet. Despite many arguments to the contrary, courts have consistently affirmed this in regard to up- and downloading of files, since an actual copy is made on the user's computer.³⁰⁹ Streaming however has not been dealt with in South African courts yet. Therefore the common debate about whether or not transient copies through streaming can be considered copyright infringement has not been decided locally yet.

Contributory infringement is imposed if the copyright holder establishes that a user of the service provider directly infringed the copyright at hand. In another step the owner has to show that the provider, with knowledge of the user's infringing activity, induced, caused or materially contributed to the infringing activity.³¹⁰ The latter exists, for example, by actively soliciting the infringing activity, adding features to the system that enable the infringing activity as well as selling devices necessary to commit or enjoy the infringing act.³¹¹ If a provider merely passively provides a system where infringement happens to occur, contributory infringement has to be evaluated in regard to the degree to which the ISP could

³⁰² op cit, p. 240, 11.1.1.

³⁰³ CA, Sec 23 (2).

³⁰⁴ ECT Act, Sec. 70.

³⁰⁵ ECT Act, Sec. 1 – "information system".

³⁰⁶ Dean & Dyer, p. 429.

³⁰⁷ HB Klopper, p. 206, 27.4.1.

³⁰⁸ G Albert Jr. et al, p. 298.

³⁰⁹ *ibid*, p. 299.

³¹⁰ *ibid*, p. 310 f.

³¹¹ *ibid*, p. 312.

have stopped the known infringing activity without adversely affecting the ability of other, non-infringing parties, to also use the system.³¹² Moreover vicarious infringement can be applicable based on the relationship between the service provider and the directly infringing user. The liability is given, if the ISP has the right and ability to control the infringer's act and receives a direct financial benefit from the infringement.³¹³ The first requirement depends on the two conditions of the agreement between the ISP and the user as well as its ability to monitor and control the information available on its system.³¹⁴ At last courts have developed inducement liability, in which a third party distributes a device with the 'object of promoting its use to infringe copyright',^{315 316}

Moreover the liability of content providers is debated. The term 'content' can be used in a very wide sense, since it may entail voice data, graphics and text.³¹⁷ The contents of websites often concerns legal actions against service providers, because ISP's are also held reliable for the content transferred via their services. Since there are no relevant distinctions between service and content providers, the discussed rules also apply to the latter.

3.3.4. Exceptions and limitations

In conclusion users as well as internet service- and content-providers can generally be held liable for different actions and under several regulations in regard to downloading and streaming actions. However as outlined before there are several exceptions and limitations for each group that constitute copyright infringement, but allow it under certain conditions. The Copyright Act contains several exceptions and limitations from copyright infringement. They usually are based on a public interest, which leads to the fact that no monopoly in the performance of a particular act in relation to his work should exist. After the general principle it shall be assumed that an act of infringement has been committed, but the act is excused by the exemption.³¹⁸

In the following I will discuss the legal exceptions and limitations in connection with the mentioned devices and services and their applicability. The exemptions are regulated in Sections 12 – 19B CA. They are often referred to as statutory defences to actions for copyright infringement. It is generally recognised that users of someone else's work have a legitimate interest to use it without prior permission of its copyright holder. It would be an

³¹² *ibid*, p. 313.

³¹³ *ibid*, p. 313.

³¹⁴ *ibid*, p. 313.

³¹⁵ *MGM Studios Inc., v. Grokster., Ltd.*, No. 04-480, at 1 (S. Ct. 27 Jun. 2005).

³¹⁶ A Strowel, p. 16.

³¹⁷ S Papadopoulos/ S Snail, p. 243, 11.2.3.

³¹⁸ Dean-Handbook, 1 – 92, 9.1.

obstacle and unpractical to ask for permission every time someone wants to use someone else's work on the one hand. On the other hand the copyright holder has the right to proper remuneration when allowing someone else to use his work. Therefore it is imperative to precisely determine the boundaries to permit using someone else's copyrighted work.³¹⁹ These general exceptions concern mainly users of such online content as well as online-download and -streaming services. The liability of service providers on the other hand can moreover be limited pursuant the ECT Act.

I will focus on the actions of unauthorised downloads and streaming of movies and television shows, which concerns films and broadcast works. The general exceptions of Sections 12 (1) (b), (c), (2), (3), (4), (12) and 13 in connection with 16 (1) CA are applicable for cinematograph films. Broadcasts generally fall under the exceptions of Sections 12 (1) – (5), (12) and (13) in connection with 18 CA. Moreover the general exception in regard to reproduction of works pursuant Section 13 CA is relevant at hand for both kinds of works as well as the proposed new regulation in Section 13A CA in the Copyright Amendment Act. The latter will be discussed separately at the end of this chapter. The provisions of these sections are equally applicable in the digital field.³²⁰

3.3.4.1. Section 13 CA

Streams and downloads of films and television shows fall under the category of reproduction as a restricted act of the copyright holder of a work. As portrayed before, a download is the permanent digital reproduction of these works, while a stream is usually a temporary reproduction thereof. The latter is characterised by the facts that it is data, which is sent to a computer over the internet to be played continuously or processed immediately. Both forms can be categorised as the reproduction of work, one being permanently the other being temporary. The CA also declares the reproduction of a reproduction as such.³²¹ Therefore also the stream and download of a copy of the movie or television show can be qualified as a reproduction and hence that second copy will also generally infringe copyrights.

Section 13 CA exempts works from copyright infringement, if a reproduction is authorised in terms of the act, as long as the reproduction is not in conflict with the normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the copyright holder. Such permissions were issued by the Minister of Trade and Industry and deal with general reproductions as well as, for example, reproductions in connection with

³¹⁹ HB Klopper, p. 211, 28.1.1.

³²⁰ S Papadopoulos/ S Snail, p. 181, 9.4.6.

³²¹ CA, Sec 1 (1) – "reproduction" (c).

libraries, archives and educational institutions.³²² Therefore the circumstances covered by the regulations are only private study and the personal and private use equivalent to Section 12 (1) CA.³²³ Hence the permissive effect of these regulations is rather limited.³²⁴ The Copyright Regulations also require copyright warnings to be displayed at the place where orders for copies are accepted by such institutions.³²⁵ The applicability for the otherwise unauthorised download and streaming of films and television shows has to be therefore judged in each case separately and accordingly – especially in regard to the criterion of private use.

3.3.4.2. Exceptions for cinematograph films

Streaming and downloading of movies can fall under several exceptions of the Copyright Act (CA) in connection with the works of cinematograph films. Sections 16 and 12 CA include several exceptions:

- Sections 16 (1), 12 (1) (b) CA, which apply in cases where the film is used to be reviewed or criticized and provided that the source will be mentioned and the name of the author appears on the work;
- Sections 16 (1), 12 (1) (c) CA, which regard film when streamed or downloaded in connection with a current event; further the same provision as section 12 (1) (b) CA must be fulfilled;
- Sections 16 (1), 12 (2) CA, which relate to judicial proceedings; such are defined as 'proceedings before any court, tribunal or person having by law power to hear, receive and examine evidence on oath',³²⁶;
- Sections 16 (1), 12 (3) CA allow an exception of copyright infringement in regard to any quotation from a work and provided that the quotation is compatible with fair practice and does not exceed the extent justified by the purpose; again the source of the original work shall be mentioned;
- Sections 16 (1), 12 (4) CA will limit the liability for copyright infringement, if the cinematograph film will be used for teaching purposes. Further again the requirements of fair practice and the mentioning of the source has to be given as well; the same applies to the phrase 'to the extent justified by the purpose', which is compatible with the term of fair practice³²⁷;

³²² Dean-Handbook, 1 – 102, 9.17.

³²³ HB Kloppe, p. 213, 28.3.

³²⁴ op cit, p. 214, 28.3.

³²⁵ P Ramsden, p. 39.

³²⁶ CA, Sec 1 (1) – "judicial proceedings".

³²⁷ HB Kloppe, p. 215 f., 28.6.3.

- The exception of Sections 16 (1), 12 (12) CA refers to the bona fide use of cinematograph films by a dealer of television receivers during a demonstration,
- At last Sections 16 (1), 12 (13) CA make an exception for cinematograph films, in cases where it serves as a basis for the making of another film or as a contribution to its making.

All the named exceptions were only mentioned briefly, since they have fairly any practical use to the topic at hand. They are mostly unlikely to be applicable and therefore do not need further elaborations. In summary the scope of applying the presented exceptions and limitations seems very small for downloads and streams, due to the practical nature of the use.

3.3.4.3. Exceptions for broadcasts

The provisions of the exceptions and limitations for broadcasts can be granted pursuant Section 18, 12 (1) – (5) inclusive and (12) and (13) CA *mutatis mutandis*. Unauthorised streams and downloads can fall under this category if they are taken from previous broadcasts, meaning that they have been transmitted over a telecommunication service consisting of sound, images, signs or signals. Further the broadcast has to be transmitted in frequencies of lower than 3.000 GHz and are intended for reception by the public or sections thereof.³²⁸ The above mentioned in regard to cinematograph films is also applicable for broadcasts, when the requirements from the mentioned sections are met.

Another exception for broadcasts can be made pursuant Sections 18, 12 (1) (a) CA, which is not applicable to films. Thus copyright shall not be infringed in relation to the purposes of research or private study or the personal or private use of the broadcast. Hence the unauthorised streaming or download of a broadcast will not infringe copyright, if the person uses it for one of those purposes. This use is thinkable in regard to broadcasts of movies and maybe television shows, which contain academic information, for example in form of a documentary. However the four requirements of Fair Dealing will have to be considered again in each single case. Such streamed and downloaded broadcasts are also more likely to fall under the other exceptions than the cinematograph films themselves.

3.3.4.4. Exceptions for Service Providers

The before mentioned general exceptions, Sections 12 – 19B CA are mainly applicable for users of online download and streaming services. As stated before service providers may also be generally liable for indirect/ secondary copyright infringement. The internet entails three

³²⁸ CA, Sec 1 (1) – "broadcast".

main provider-types, namely (a) a 'host', who supplies the server and services to persons wishing to operate websites, (2) information provider, who posts information in the form of a website on the host servers and (3) an access provider who enables access to information on the host server by linking the user with the hosting service provider.³²⁹ All types of providers can infringe copyright in different ways. A host provider (1) might infringe by using unauthorised reproductions on his website.³³⁰ The access provider (3) can assist in such infringements or in infringements by users who download the infringing material by reproducing it.³³¹ All providers might therefore infringe copyrights, sometimes even unknowingly. The provision of internet access in one way or another could cause potential (joint) liability resulting from transmitted material by the user via the service providers.³³² To countervail such risks, exceptions and liability limitations were established in Chapter XI of the ECT Act.³³³ The chapter follows the European model by excluding or limiting the liability for all unlawful action.³³⁴

To fall under such exceptions the service providers have to first become a member of a recognised representative body, which secondly follows a Code of Conduct and must be implemented and followed by the service providers.³³⁵ This does not encompass everyone using the internet, but only those who perform the functions that make the internet available to users.³³⁶ When meeting these two requirements, the service provider's liability can be limited for delictual remedies, if he further performs certain stated functions and acts:

- Transmitting, routing and providing connections to unlawful material ('mere conduit' limitation),
- System caching, storing infringing material at the direction of the user ('hosting' limitation) or
- Linking or referring users to infringing material ('linking' limitation).³³⁷

Initially an agreed statement to the World Copyright Treaty (WCT) addressed the joint liability and provided that the mere provision of physical facilities does not constitute an act of communication within the meaning of the Treaty or the Berne Convention.³³⁸ The so called 'mere conduit' limitation states that the service providers are not liable under certain

³²⁹ Dean-Handbook, 1 – 105, 9.22.3.

³³⁰ *ibid*, 1 – 105, 9.22.4.

³³¹ *ibid*, 1 – 105, 9.22.4.

³³² P Ramsden, p. 384.

³³³ Dean-Handbook, 1 – 105, 9.22.4.

³³⁴ Visser, SA Merc LJ 760.

³³⁵ ECT Act, Sec 71 and 72.

³³⁶ Visser, SA Merc LJ 760.

³³⁷ *Ibid* LJ 760.

³³⁸ P Ramsden, p. 384.

requirements stated in Section 73 (1) ECT Act, such as that they do not initiate the transmission or modify the data contained in the transmission. This refers to the acts of transmission, routing and provision of access to data, which is further defined in subsection 2. At last subsection 3 determines that a competent court may notwithstanding order a service provider to 'terminate or prevent unlawful actions in any terms of other law'.³³⁹

Secondly the ECT Act orders the 'system-caching' limitation under Section 74. Caching typically refers to the copying and temporary storage of material from a website for later use when it is visited again. The first kind is 'local caching' which means the caching of information on the user's own computer. The second form is 'proxy caching' which refers to the storage of information on someone else's server, like a provider's system. Hence caching can increase the risk of infringement through reproduction, if it does not fall in the possible licensing agreement or the exception of Fair Dealing.³⁴⁰ The limitation concerns the availability of delictual remedies against a service provider that transmits data under the provider's control for the storage of material on its system or network. Subsection 1 states the requirements for the service provider, who inter alia has to prove that he did not modify the data and he complies with conditions on access to the data.³⁴¹ Again a court may order to 'terminate or prevent unlawful action in terms of any other law' under subsection 3.³⁴² The service provider needs to remove data upon receipt of a take-down notice.³⁴³

Another category of exceptions is the so called 'hosting' limitation pursuant Section 75 ECT Act. Hosting is the provision of a service consisting of the storage of data provided by a recipient of the service. The service provider will not be liable for damages arising from the stored data under the conditions of subsection 1, which mainly regards the knowledge and awareness of the facts and circumstances of the infringement. Pursuant subsection 2 the provider has to further assign an agent. The exemption is however not available where the website operator maintains his website under the authority or control of the hosting service provider.³⁴⁴

In summary the exemptions in respect to hosting and access provision only refer to the payment of damages, while the exemptions for mere conduit and caching refer to all liability, if interpreted literally.³⁴⁵ However the exemptions do affect certain circumstances like obligations found in an agreement or the obligation to act as a service provider under a

³³⁹ HB Kloppe, p. 206, 27.4.2.

³⁴⁰ G Albert Jr. et al, p. 293.

³⁴¹ Dean & Dyer, p. 430.

³⁴² HB Kloppe, p. 207, 27.4.3.

³⁴³ ECT Act, Sec 77.

³⁴⁴ Dean-Handbook, 1 – 106 f., 9.22.8.3.

³⁴⁵ *ibid*, 1 – 108, 9.22.12.

licensing.³⁴⁶ Aside those exceptions and limitations the providers remain liable for copyright infringement by act, aid or omission without the authorisation of the copyright holder. Further the service providers agreed, in exchange for these limitations, to an injunctive procedure called 'notice and take-down'.³⁴⁷ In a nutshell it means that a provider is obliged to take down unlawful content after having been notified or becoming aware of it.³⁴⁸ However the service provider does not have a general obligation to monitor the transmitted or stored data or to actively seek facts or circumstances.³⁴⁹ The main relevance for this is liability for direct or indirect copyright infringement of the service provider in regard to reproduction.³⁵⁰

3.3.5. Circumvention Tools

Copyright infringement in the form of piracy is steadily increased by the use of technology and its advancements.³⁵¹ The main challenges are inter alia that (1) duplication became easy and inexpensive, (2) that every copy is perfect, whether it is from an original or another copy, and (3) that distribution to users can be achieved virtually cost-free and instantaneously worldwide.³⁵² Therefore tools and measures are developed to protect works from this, such as electronic anti-copy devices, access control, encryption and monitoring of usage. These management systems are attached to the copyrighted works and identify the rights holder and the work or object. Moreover the terms and conditions for the use of such works can be regulated.³⁵³ At hand such issues can become relevant, when online content is accessed, which is either not uploaded legally or is accessed from countries, where no necessary licenses are assigned. For example, offers like *Netflix* and *Hulu* are legal within each national license agreements, which the content providers acquire on a territory-to-territory basis.³⁵⁴ Hence the content may not be watched where no correspondent license agreements subsist. Having the ability to access those websites does not equate to permission to access it.³⁵⁵ The operators further state that bypassing region restriction is a breach of the terms of use and

³⁴⁶ *ibid*, 1 – 108, 9.22.14.1. and 9.22.14.2.

³⁴⁷ Visser, SA Merc LJ 762.

³⁴⁸ *See further*: Visser, SA Merc LJ 762 ff.

³⁴⁹ ECT Act, Sec 78.

³⁵⁰ Dean-Handbook, 1 – 109, 9.22.15.

³⁵¹ S Papadopoulos/ S Snail, p. 181, 9.4.7.1.

³⁵² http://www.wits.ac.za/files/5bfo5_274680001348062809.pdf, p. 2, accessed on 13 August 2015.

³⁵³ S Papadopoulos/ S Snail, p. 181, 9.4.7.1.

³⁵⁴ Drew Prindle 'Unlock hundreds of movies on Netflix with a simple Internet Browser extension' available at <http://www.digitaltrends.com/computing/unblock-netflix-watch-region-blocked-content/>, accessed on 15 August 2015.

³⁵⁵ <http://mybroadband.co.za/news/internet/98330-netflix-hulu-streaming-illegal-in-sa.html>, accessed on 15 August 2015.

grounds for termination of the accounts.³⁵⁶ This was inter alia relevant in South Africa before *Netflix* had recently launched their services in 130 new countries³⁵⁷. Meanwhile legal alternatives like DSTV's MultiChoice and 'VIDI' also exist, which offer a variety of online streaming content³⁵⁸.

However there are no (civil) national regulations in South Africa yet, only propositions in the Copyright Amendment Bill of 2015. Hence the international regulations are consulted to handle the issues nationally. The applicable legislation is found in Art. 12 of the WIPO Copyright Treaty as the model law.³⁵⁹ The WCT protects rights management information and supports rights management systems. It also obliges member states to assure adequate legal protection against deliberate removal or alteration of rights management information as well as against the dissemination of different works pursuant Article 12 of the WCT.³⁶⁰ The WCT contains two main kinds of measures in connection with the WIPO Performances and Phonograms Treaty (1996)³⁶¹ being (1) 'Anti-circumvention-provisions' pursuant Art. 11 WCT and Art. 10 WPPT³⁶² and (2) so called 'Rights Management Information' pursuant Art. 12 WCT and Art. 19 WPPT.³⁶³ South Africa has signed to the WCT and will therefore ratify and implement it.³⁶⁴ Local legislation prohibits the circumvention of rights management protection³⁶⁵, ia pursuant Sections 85, 86 ECT Act titled as Cybercrime. However Sec. 86 ECTA only deals with criminal liability and does not impose civil liability.³⁶⁶

The two main kinds of measures are Digital Rights Management (DRM) and Technological Protection Measures (TPMs). DRM is a collective term for wide range of technological measures which may be applied to a digital work in order to verify and control the lawful exploitation of the work, prevent reproduction or restrict the manner in which a user can deal with a digital work. Often they are also referred to as anti-circumvention mechanisms.³⁶⁷ TPMs on the other hand refer to specific technologies that control and/ or restrict the use of access to digital media content on electronic devices with such technologies

³⁵⁶ op cit.

³⁵⁷ <http://mybroadband.co.za/news/broadcasting/151193-netflix-has-launched-in-south-africa.html>.

³⁵⁸ <http://www.tvsa.co.za/channels/viewchannel.aspx?channelid=125>, accessed on 15 August 2015.

³⁵⁹ Dean & Dyer, p. 442.

³⁶⁰ S Papadopoulos/ S Snail, p. 181, 9.4.7.2.

³⁶¹ P Ramsden, p. 383.

³⁶² *ibid*, p. 380.

³⁶³ *ibid*, p. 381.

³⁶⁴ S Papadopoulos/ S Snail, p. 183 f., 9.4.7.5.

³⁶⁵ op cit, p. 181 f., 9.4.7.3.

³⁶⁶ Marlice Conroy 'A comparative study of technological protection measures in copyright law' (Dissertation, UNISA), p.242.

³⁶⁷ Dean & Dyer, p. 441.

installed. DRM usually relies on TPMs to implement the controls and restrictions³⁶⁸ and hence form part of the much broader concept of DRM³⁶⁹. These management systems are attached to works and identify the holder of the rights and the work object.³⁷⁰ Thus TPMS are generally anti-copying devices that either make copying of a work more difficult or prevent copying altogether or devices which control access to copyright works.³⁷¹ The difference between TPMs and DRM is that the latter are technologies that control and/ or restrict the use of and access to digital media content on electronic devices with such technologies installed.³⁷² Examples for such measurements are encryption and digital watermarking^{373 374} as well as further employed measures like access control, viewer software as well as passwords.³⁷⁵ Other examples of circumvention tools are so called proxy-servers³⁷⁶ or "un-blockers"³⁷⁷.

3.4. The Copyright Amendment Bill 2015

Besides the recent legislation the South African Government has developed and proposed a draft to amend the current copyright law. The draft Copyright Amendment Bill had been published in the Government Gazette³⁷⁸, which was available for public comment in September 2015.³⁷⁹ It had been approved by the South African Cabinet on June 25th, 2015.³⁸⁰ The Amendment Bill would inter alia give power to CIPRO (the Companies and Intellectual Property Office) and create a Copyright Tribunal.³⁸¹

In relation to this minor dissertation the proposed amendments would for one bring newness regarding Section 13A of the Bill that seeks to exclude temporary reproduction from infringement³⁸². In addition the Bill seeks to develop its own regulations for Digital Rights Management and Technical Protection Measure (works), which are relevant in relation to

³⁶⁸ https://www.priv.gc.ca/resource/fs-fi/02_05_d_32_e.asp, accessed on 14 August 2015.

³⁶⁹ T Schonwetter/ C Ncube 'New hope for Africa? Copyright and access to knowledge in the digital age', p. 10.

³⁷⁰ S Papadopoulos/ S Snail, p. 181.

³⁷¹ http://www.wits.ac.za/files/5bfo5_274680001348062809.pdf, p. 2.

³⁷² https://www.priv.gc.ca/resource/fs-fi/02_05_d_32_e.asp.

³⁷³ N Lucchi *Digital Media & Intellectual Property* (2006), p. 97.

³⁷⁴ See further: <http://techterms.com/definition/encryption>, <http://www.techopedia.com/definition/24927/digital-watermarking>, both accessed on 15 August 2015.

³⁷⁵ S Papadopoulos/ S Snail, p. 181.

³⁷⁶ See further: <http://whatis.techtarget.com/definition/proxy-server>, accessed on 15 August 2015.

³⁷⁷ See further: <https://www.unblock-us.com/>, accessed on 15 August 2015.

³⁷⁸ http://www.gov.za/sites/www.gov.za/files/39028_gon646c.pdf, accessed on 16 August 2015.

³⁷⁹ <http://www.ip-watch.org/2015/07/28/42534/>, accessed on 16 August 2015.

³⁸⁰ <http://mybroadband.co.za/news/government/130406-copyright-amendment-bill-approved-by-sa-cabinet.html>, accessed on 16 August 2015.

³⁸¹ Linda Daniels 'South Africa draft Copyright Amendment Bill published for public comment' available at <http://www.ip-watch.org/2015/07/28/42534/>, accessed on 16 August 2015.

³⁸² http://www.gov.za/sites/www.gov.za/files/39028_gon646c.pdf, p. 17.

circumvention tools (Section 20D and F of the Bill³⁸³). These new regulations would also be an offence pursuant Section 23 (4) (e), (h), (i) of the Bill.³⁸⁴ Further the technological protection measures shall be regulated and prohibited under Sections 28O – S CA.³⁸⁵

3.4.1. Section 13A

If the criterion of private use pursuant Section 13 CA is not applicable, the proposed insertion of Section 13A could give users of online content another exception. This exception to copyright infringement shall therefore be made for 'Temporary Reproduction' and thus copies of works, if they are transient or incidental and further an integral and essential part of the technical process. Moreover the provision demands that the only purpose of such copies is either to enable transmission of a work or a work between third parties by an intermediary or a lawful use of a work that have no independent economic significance³⁸⁶. Hence the new proposed exception shall be relevant for streaming services and the liability of the service providers as well as the users. The exception shall be applicable where a temporary copy of a work is made, which is transient or incidental and which is an integral and essential part of a technological process.³⁸⁷ Due to the new propositions the term reproduction shall be defined as 'a copy made of a fixation or audio-visual fixation of a performance'³⁸⁸.³⁸⁹ Referring to my former implementations, streaming is the temporary download of online-data, e.g. films, which enables the user to watch the content already while still downloading and buffering it. Usually the data is only stored during the streaming process and leaves no trace online or on the computer after the services are finished. This transient use is often debated to be acceptable, because in contrast to regular downloads, the data is not stored as a permanent file. This also leads to the circumstances that a stream has to be loaded new for every use. Usually trace of data is neither left in the cache of the internet browser.

The proposition of Section 13A CA in the Bill hence seems reasonable, since no copyright is permanently infringed and the copyright holder's exclusive right for reproduction is also not violated. This is complemented by the provision which refers to the necessity of intermediary or lawful use of the work, which also shall have no own economic value. This goes along with the idea that the regular user of streaming services does not intend to keep a version of the streamed work for longer than the actual streaming activity. Hence the user

³⁸³ *ibid*, p. 26.

³⁸⁴ *ibid* p. 28 f.

³⁸⁵ *ibid*, p. 31 ff.

³⁸⁶ *ibid*.

³⁸⁷ *ibid*, p. 17.

³⁸⁸ Amendment of Section 1 (j) – "reproduction".

³⁸⁹ http://www.gov.za/sites/www.gov.za/files/39028_gon646c.pdf.

only watches the content once (per stream) and is further not able to pass it on to third parties. Therefore no economic significance can be seen in such regular streaming activities. In addition the use must be lawful.

However the Amendment Bill does not give a precision which use is considered lawful and which party has the burden of proof. On the one hand it could be debated that the burden of proof should rely on the user that his/ her use was lawful since he/ she did not assume to commit an unlawful act. On the other hand it could be debated that the burden of proof lies on the service and/ or content providers, because they make the films and TV-shows available online. In my opinion, the second option seems favourable, when the provider is in control of the content and can rather prove its lawfulness than the sheer user of the website. Further it is not stated in the Bill if knowledge of unlawfulness is required or if negligence suffices to state infringement.

Altogether the Amendment Bill does not offer any specific guidelines how to approach the new regulations at this point. It is preferable to review the public comments on the Bill, which were due in September 2015³⁹⁰, which might show a direction of if and how to apply the new regulations. Until now³⁹¹ not many comments were published that dealt with the section at hand. The Anton Mostert Chair of Intellectual Property Law of Stellenbosch University qualifies the proposed section as 'wholly inappropriate and outright dangerous to the interests of copyright owners in South Africa'³⁹². For one the statement is based on the facts that other legislation is similar, but based on existing jurisdiction. Especially the vague terminology like 'integral and essential' and 'technical process' would need further specification, which is done in other jurisdictions to limit the scope of the regulation.³⁹³ It is moreover claimed that the needs for online service providers are adequately provided for otherwise already³⁹⁴, which would make the section decrepit. Another argument from their comment is that the section seeks to aid service providers, which is, in their opinion, already done better by existing legislation in Sec. 73 ECT Act.³⁹⁵ Furthermore it is stated that the section goes too far by excluding service providers and 'anyone' from liability for copyright infringement, which might lead to exploitation by online service providers.³⁹⁶ In conclusion

³⁹⁰ L Daniels <http://www.ip-watch.org/2015/07/28/42534/>.

³⁹¹ Last researched date: February 18, 2016.

³⁹² The Anton Mostert Chair of Intellectual Property 'Commentary on the Copyright Amendment Bill 2015' available at <http://blogs.sun.ac.za/iplaw/files/2015/08/CIP-Formal-Comments-Copyright-Amendment-Bill-2015-Online1.pdf>, p. 37, accessed on 18 August 2015.

³⁹³ *ibid*, p. 36.

³⁹⁴ *ibid*, p. 37.

³⁹⁵ *ibid*, p. 37.

³⁹⁶ *ibid*, p. 37.

the comment states that a redrafting of the section is impossible and shall thus be deleted completely.³⁹⁷

The written comments from the IP Unit of the University of Cape Town came to an opposing conclusion. While not going into the details of the proposed Section 13A, the IP Unit called it 'the important new "transient copy" exception'.³⁹⁸ It further suggested a slight revision³⁹⁹ of the section being

'provided that the purpose of such copies and adaptations is (i) to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of the work, or (ii) to adapt the work to allow use on different technological devices, such as mobile devices'.⁴⁰⁰

Hence it is suggested to include adaptations of the work, which have to be distinguished from the restricted acts of reproduction. This shall also take the mobile environment into account, where smaller changes are made due to a smaller screen.⁴⁰¹

To my mind the second opinion is preferable, since it is more realistic to the current online habits. However I also think the exception should not only apply to service providers but also the users of streaming-services, because it is not stated that the exception should only be applicable to secondary infringement. Primary infringement by the regular user should also be considered even though the copyright holders tend to approach the service providers for legal actions and hold them liable⁴⁰².

3.4.2. DRM/ TPMs

Further the Copyright Amendment Bill⁴⁰³ includes several regulations regarding Technological protection measures. TPMs are defined in Section 1 (k) of the Bill. The proposed amendments seek to incorporate anti-circumvention measures where a copyrighted work in digital format is protected by or controlled with the aid of DRM tools or TPMs.⁴⁰⁴

³⁹⁷ *ibid*, p. 38.

³⁹⁸ University of Cape Town Intellectual Property Unit 'Written comments on the Copyright Amendment Bill 2015' available at http://ip-unit.org/wp-content/uploads/2015/09/CopyrightAmendmentBill_IPUnitSubmission092015.pdf, p. 22, accessed on 18 August 2015.

³⁹⁹ *ibid*, p. 22.

⁴⁰⁰ *ibid*, p. 28.

⁴⁰¹ Academic comments on the South African Copyright Amendment Bill 2015, available at <http://section27.org.za/wp-content/uploads/2015/09/ACADEMIC-COMMENTS-ON-COPYRIGHT-AMENDMENT-BILL-2015-TABLE.pdf>, p. 19, accessed on 18 August 2015.

⁴⁰² Dean & Dyer, p. 429.

⁴⁰³ http://www.gov.za/sites/www.gov.za/files/39028_gon646c.pdf.

⁴⁰⁴ CIP <http://blogs.sun.ac.za/iplaw/2015/08/19/a-diamond-in-the-rough-technology-and-the-copyright-amendment-act/>.

Thus Intellectual Property Law might be amended to meet the needs of the increasing technological world. Also the technology has to take bigger steps since the first technical protection system.⁴⁰⁵ It is used in different ways like preventing users from gaining access or engaging in definite uses, like copying, and can further be used to develop licensing models with the rights holder's own terms and conditions.⁴⁰⁶

TPMs may not be circumvented, which is not stated in the amended Section 20D as prohibited conduct. This contains the use of circumvention devices as well as the exceptions related pursuant Sections 28O and 28P of the amended Act. Section 20D (2) qualifies the contravention as a criminal offence and holds convicted persons liable in terms of the provisions of the act. The amended Section 27 (5A) also provisions for such measures in connection with restricting importation of copies. However the Bill does not regulate anti-circumvention in a civil legal manner, but only in regard to criminal offences, which was done by the principal act already.⁴⁰⁷ Still an act of circumvention does not amount to copyright infringement but constitutes a criminal offence.⁴⁰⁸

3.5. Summary

The issue of online content via services like ITV, IPTV and mobile TV is current and will experience further development in the near future, especially in South Africa, because the variety of offers still lags behind other countries like the USA or in Europe. Generally the South African law, especially in copyright matters, has created a regulatory framework which serves the needs of the modern online content. Regarding that the recent Copyright Act was amended in 1978 the necessity of a revision and amendment has been recognised by the people and institutions in charge. The current draft of the Copyright Amendment Bill takes steps in the right direction, like implementing technological issues like wireless services and online matters like technological protection matters. However the pressing issues of downloading and streaming services still have to be legally established. Especially the proposed Section 13A handles temporary reproduction of works. Time will tell how that regulation will be interpreted and applied by the legal profession, if the amendments will take place as planned. The exception points in the direction of limiting the copyright holders' rights under certain conditions.

⁴⁰⁵ N Lucchi, p. 90.

⁴⁰⁶ op cit, p. 91.

⁴⁰⁷ CIP <http://blogs.sun.ac.za/iplaw/2015/08/19/a-diamond-in-the-rough-technology-and-the-copyright-amendment-act/>.

⁴⁰⁸ Dean & Dyer, p. 445.

Alternatively copyright holders can secure their copyright, at least in cinematograph films, through registration.⁴⁰⁹ The effect of the registration is therefore the prima facie evidence that the registrar holds all the rights to all matters in respect of the work directed and authorised by the Act to be inserted in the register.⁴¹⁰

More legal evaluations will be discussed in Chapter 5, when comparing it to the German Copyright law and approach, which I will discuss in the following.

⁴⁰⁹ Dean-Handbook, 1 – 182, 15.1.

⁴¹⁰ op cit, 1 – 183 f., 15.4.

Chapter 4: THE GERMAN PERSPECTIVE

Chapter 4 will present the legal situation of IPTV, ITV and mobile television as well as downloading and streaming of online content in Germany. I chose to discuss the legal situation in Germany for my thesis, because for one I wanted to compare the South African legislation to another jurisdiction. Secondly I chose to compare it to Germany in particular, because it has a more particular jurisdiction on the unsettled issues at hand. Therefore I intend to have a look at the German law and analyse findings, which could also be applicable in the South African legislation.

In general the German legislation handles the copyright issues at hand similarly to South Africa. Especially the basic requirements concur in both countries and thus copyright is granted basically for the same kind of works. Further the exclusive rights concur, especially the relevant right to reproduce a copyrighted work. The aspect I will pay special attention to is the legality of and liability in regard to temporary streaming of online-content. Hence this chapter will be divided into three parts. I will start by briefly summarising the copyright protection for films and television shows in Germany and the recent content offers of the mentioned services and only point out differences as many requirements are comparable to South African copyright law. After that I will focus on the legal dichotomy of downloading and streaming of online content by presenting the relevant statutes as well as the case law until today, which dealt with such copyright issues.

4.1. German copyright fundamentals

The applicable German Statute is the Copyright Act of 1965⁴¹¹, which was last amended on December 5th 2014.⁴¹² For sake of completeness other relevant domestic statutes are the Act on Copyright for Works of Fine Arts and Photography⁴¹³, the Act on the Administration of Copyright and Neighbouring Rights⁴¹⁴ and the Code of Civil Procedure^{415, 416} which will however not be discussed as they play no role in this thesis. Moreover several European Directives are relevant in relation to the Copyright Law, such as the Directive 2001/ 29/ EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society^{417, 418}.

⁴¹¹ Urhebergesetz – UrhG.

⁴¹² See: <http://www.gesetze-im-internet.de/bundesrecht/urhg/gesamt.pdf>, accessed on 27 August 2015.

⁴¹³ Kunsturhebergesetz – KUG.

⁴¹⁴ Urheberrechtswahrnehmungsgesetz – UrhWG.

⁴¹⁵ Zivilprozessordnung – ZPO.

⁴¹⁶ Klett/ Sonntag/ Wilske *IP Law in Germany* (2008), p. 59.

⁴¹⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML/>.

In the UrhG infringement of copyright is regulated in §§ 106 ff., while movies and their special set of rights receive special attention in §§ 88 – 94 UrhG. First the German Copyright Act has to protect the works in question. The requirements for protection are (1) an eligible work as a personal intellectual creation (§ 1 UrhG) that falls within the work categories of § 2 UrhG and (2) author-/ creatorship.⁴¹⁹ The requirements are similar to the South African and therefore need no further specification. The listed eligible works in § 2 I UrhG are only exemplary and therefore not secluded.⁴²⁰ Film works are explicitly protected in § 2 I Nr. 6 UrhG. Cinematograph films are defined as a moving pictures or pictures and sound through the sequence of photographic or similar to photographic images that create the impression of a moving image. The film is characterised by the unit of image and sound.⁴²¹ Depending on the production technique television works are protected alike as well as other works that are produced in similar manners.⁴²² Aside the regular films such cinematograph films created by modern electronic recording techniques are also included.⁴²³ Hence films and television shows have copyright protection in the classic as well as modern digital formats under the German Copyright Act. § 10 UrhG presumes that the author is the person named as such until the opposite is proven.⁴²⁴ However the German Copyright law does not explicitly state who the author of a cinematograph film is.⁴²⁵ The assignment of the copyright in fact depends on the character of the work.⁴²⁶ The exclusive rights of the film producer are regulated in § 94 UrhG.

The German Copyright Act also grants the author exclusive rights to exploit his work⁴²⁷ in §§ 15 ff. UrhG. § 15 UrhG states that the exploitation may be in any tangible form and the communication of the work may be in any intangible form. Hence the exclusive rights stated in §§ 6 ff. UrhG are only exemplary, which gives the copyright holder a wider scope of protection.⁴²⁸

⁴¹⁸ Klett/ Sonntag/ Wilske, p. 60.

⁴¹⁹ Prof. Dr. Wandtke

<file:///H:/UCT%202015/3 IP%20Law LL.M.%20minor%20dissertation/HU%20Berlin Skript%20Urheberrecht.pdf>, accessed on 20 August 2015.

⁴²⁰ op cit, p. 6.

⁴²¹ H. Schack *Urheber- und Urhebervertragsrecht* 7ed (2015), p. 131, Rn. 241.

⁴²² op cit, p. 132, Rn. 245.

⁴²³ <file:///H:/UCT%202015/3 IP%20Law LL.M.%20minor%20dissertation/HU%20Berlin Skript%20Urheberrecht.pdf>, p. 8.

⁴²⁴ op cit, p. 11.

⁴²⁵ H. Schack, p. 175, Rn. 334.

⁴²⁶ <file:///H:/UCT%202015/3 IP%20Law LL.M.%20minor%20dissertation/HU%20Berlin Skript%20Urheberrecht.pdf>, p. 11.

⁴²⁷ Klett/ Sonntag/ Wilske, p. 62.

⁴²⁸ ibid, p. 62.

The Act moreover provides for certain limitations to the granted exclusive rights. However there is no 'Fair Use'-regulation, but rather several specific provisions which limit the scope of rights with respect particular uses made by third parties under certain circumstances. Examples are legal licenses in regard to certain scenarios and for free use by third parties. Such licenses include the public performance of a work if the audience is not charged an entrance fee pursuant § 52 I UrhG and reproductions for private and individual use pursuant §§ 53 and 54 UrhG. Other works are permitted for use without remuneration right to the author or a similar payment obligation to the user.⁴²⁹ In regard to cinematograph films the UrhG gives further rights to the copyright holder in §§ 88 ff. as so called 'verwandte Schutzrechte' (= neighbouring rights). § 94 UrhG grants the copyright holder in films the exclusive exploitation rights with respects to the film during a term of protection of 50 years after the earlier of the publication of the copies of the film or its first public performance.⁴³⁰

The granted claims of the copyright holder are regulated in §§ 96 ff. UrhG.

4.2. Infringement of copyright

In Germany copyright infringement is regulated in §§ 106 ff. UrhG. The Act knows three kinds of infringement, namely (1) direct infringement, (2) contributory liability and (3) vicarious liability. The conditions are again comparable to South African copyright and thus need no further specifications. Each infringement needs to fulfil the requirements as stated above. Aside the (a) eligible work or (b) neighbouring rights infringement is given, if (c) an infringing act is at hand and (d) no limitations and exceptions are applicable.⁴³¹ An infringing act (c) is given, if the alleged infringer commits a restricted act pursuant §§ 15 ff. UrhG. § 15 UrhG names the two categories of exploitation of the work (subsection 1) and public reproduction/ display of the work (subsection 2) with several infringing actions. At last (d) the infringement may not fall under an exception or limitation. First the copyright can be subject to a temporary limitation under §§ 64 ff., 70 III, 71, III UrhG and such.⁴³² Moreover the statutory limitation period for legal actions is three years from the end of the year in which the copyright holder became aware of the infringing acts pursuant § 102 UrhG.⁴³³ That paragraph refers to the regulations in Common Law under the German Civil Code. Further exceptions

⁴²⁹ *ibid*, p. 63.

⁴³⁰ *ibid*, p. 69.

⁴³¹ Rafael Harnos/ Julia Kilian 'Übersicht zur Urheberrechtsverletzung' available at <http://www.uni-konstanz.de/FuF/Jura/koch/lehre/ws12/agwettbewerbssrecht/materialien/Uebersicht%20zur%20Urheberrecht%20verletzung.pdf>, accessed on 20 August 2015.

⁴³² *op cit*.

⁴³³ Klett/ Sonntag/ Wilske, p. 73.

exists with regards to contents pursuant §§ 23 – 24, 44a ff. UrhG.⁴³⁴ § 44a UrhG, for example, makes an exception for transient duplications of a work, which will be discussed later. At last exceptions and limitations are stated by law like the public interest in information or for educational and social purposes.⁴³⁵ These kinds of exceptions are comparable to the principle of Fair Use/ Dealing although there are not explicitly appointed as such.

When the requirements for copyright infringement are given the legal consequences contain remedies like injunction against infringement or monetary claims.⁴³⁶ In addition the procedural actions of dissuasion and a regular infringement lawsuit are available for the copyright holder.⁴³⁷ The tangible claims comprise such for destruction or restitution of infringing copies, omission and damages.⁴³⁸ The latter monetary claims can be compensation for either actual damages like lost profits and reasonable royalties, or compensation for immaterial damages. The German Copyright Act grants immaterial damages, if the infringer acted intentionally or negligently pursuant § 97 (2) UrhG.⁴³⁹ Furthermore the act enables actions under Criminal Law pursuant § 106 UrhG. However civil actions are generally more promising since the state prosecution authorities only tend to investigate copyright infringement of some seriousness.⁴⁴⁰

4.3. Legal dichotomy

In the following I will depict the liability of users and service providers in Germany in regard to downloads and streaming services. The latter has an inherent legal dichotomy since it lies in the legal gray-area in regard to streaming services.

4.3.1. **Downloading**

In Germany the legal situation regarding downloading content is similar to South Africa and other countries. Illegal downloads are being prosecuted after civil and criminal law. The German Copyright Act stipulates civil remedies containing omission, damages and the right to

⁴³⁴ R Harnos/ J Kilian <http://www.uni-konstanz.de/FuF/Jura/koch/lehre/ws12/agwettbewerbtsrecht/materialien/Uebersicht%20zur%20Urheberrecht%20verletzung.pdf>.

⁴³⁵ op cit.

⁴³⁶ Klett/ Sonntag/ Wilske, p. 70 f.

⁴³⁷ R Harnos/ J Kilian <http://www.uni-konstanz.de/FuF/Jura/koch/lehre/ws12/agwettbewerbtsrecht/materialien/Uebersicht%20zur%20Urheberrecht%20verletzung.pdf>.

⁴³⁸ op cit.

⁴³⁹ Klett/ Sonntag/ Wilske, p. 71.

⁴⁴⁰ op cit, p. 74.

information⁴⁴¹. Further the act provides for criminal actions and administrative fines.⁴⁴² § 106 II UrhG further declares the attempt punishable. The unlawful use can happen in form of reproduction, dissemination or public display of the work or an adaptation of it.

4.3.2. Streaming

Regarding the legality of streaming online-content like movies and television shows on the other hand, it has to be distinguished between the liability of service providers and users. The latter partially falls into a legal gray-area in Germany.

4.3.2.1. Provider liability

The providers' liability is rather distinct and has been substantiated by the jurisdiction. The precedent case was made by the District Court of Leipzig/ Germany in 2011⁴⁴³. It ruled that streaming is illegal for providers. The decision was made in regard to the online-portal "kino.to" which offered streams and downloads of more than 1 million links to movies and television shows.⁴⁴⁴ The content was derived from bootleg copying.⁴⁴⁵ The court came to the conclusion that the content provider has to make sure to have the agreement of the copyright holder of each work. The provider of "kino.to" was convicted pursuant §§ 106, 108 UrhG and §§ 25 I, II, 52 I StGB⁴⁴⁶ in matters of criminal copyright infringement.⁴⁴⁷ The works were exploited pursuant § 15 I, II UrhG.⁴⁴⁸ The violated restricted acts were the reproduction of a copyrighted work (§ 16 UrhG) as well as its distribution (§ 17 UrhG).⁴⁴⁹ The exception of § 44a UrhG was moreover not applicable according to the court.⁴⁵⁰ Furthermore the copies were made publically available pursuant § 19a UrhG.⁴⁵¹ The provider infringed § 19 UrhG as it is an exclusive right of the copyright holder pursuant § 15 II 2 Nr. 2 UrhG.⁴⁵²

Besides providers are liable under civil law without receiving the compliance of the copyright holder, for example because they did not want to pay the necessary licence fees.⁴⁵³

⁴⁴¹ §§ 97 ff. UrhG.

⁴⁴² §§ 106 ff. UrhG.

⁴⁴³ Amtsgericht Leipzig, 21.12.2011 – 200 Ls 390 Js 184/11.

⁴⁴⁴ supra, 4.

⁴⁴⁵ supra, 15.

⁴⁴⁶ StGB = German Criminal/ Penal Code.

⁴⁴⁷ supra, 38.

⁴⁴⁸ supra, 40.

⁴⁴⁹ supra, 43.

⁴⁵⁰ supra, 46.

⁴⁵¹ supra, 51.

⁴⁵² Sören Siebert 'Abmahnung Streaming: Kino.to, Redtube & Co.' available at <http://www.recht24.de/artikel/urheberrecht/6558-kino-to-sind-streaming-filmportale-legal-oder-illegal.html>, accessed on 23 August 2015.

⁴⁵³ op cit.

It is the content providers' duty to proof the legality of the original.⁴⁵⁴ The average user on the other hand may assume that the provider owns the necessary publication rights⁴⁵⁵, because he does not have the means to control the legality.⁴⁵⁶

Another exception for host-providers is given in §§ 7-10 TMG.⁴⁵⁷ Pursuant those sections his liability is limited to their own published information⁴⁵⁸. Aside that the providers are not required to monitor the information transmitted and stored by them or to search for circumstances indicating an illegal activity⁴⁵⁹, which is regulated in §§ 8-10 TMG.

4.3.2.2. User liability

The liability of users of online streaming services on the other hand is not as distinct. In the past few years it was common for a number of law firms in Germany to send out final dissuasions to users of downloading- and streaming-services on behalf, for example, of the record or film production companies. There are several issues connected to that procedure and the entire topic of legality of streaming. The legal majority is of the opinion that the exclusive right of the copyright holder to reproduce the work is infringed pursuant § 16 I UrhG. However that right could be limited under § 53 UrhG or § 44a UrhG.

First the Federal Jurisdiction expressed its opinion about the legality of online streaming at the end of 2013. The issue came up over the so called "*RedTube*"-case dealing with streaming videos with sexual content over the platform. The federal government came to the conclusion that only watching online films cannot be characterised as copyright infringement by referring to §§ 44 and 52 UrhG.⁴⁶⁰ The alleged infringement usually shows two main problems. First the IP-address cannot always definitely be assigned to a specific user.⁴⁶¹ The main problem however is that infringement requires a restricted act like duplication or distribution of the work, which is disputed in regard to online streaming. In the '*Redtube*'-case the videos were watched in a so called film-on-demand technique, where the

⁴⁵⁴ Caschy 'Bundesregierung: Europäischer Gerichtshof muss entscheiden, ob Streaming illegal ist' available at <http://stadt-bremerhaven.de/bundesregierung-europaeischer-gerichtshof-muss-entscheiden-ob-streaming-illegal-ist/>, accessed on 23 August 2015.

⁴⁵⁵ <http://www.zm-kanzlei.de/fachgebiet/rechtsprechung/>, accessed on 23 August 2015.

⁴⁵⁶ Dr. Christian Behrens 'Schallende Ohrfeige für Urmann in Sachen RedTube-Abmahnungen' available at <http://www.zm-kanzlei.de/schallende-ohrfeige-fuer-urmann-in-sachen-redtube-abmahnungen/#more-949>, accessed on 23 August 2015.

⁴⁵⁷ *Ernstahler*: Streaming und Urheberrechtsverletzung (NJW 2014, 1553 ff.).

⁴⁵⁸ § 7 (1) TMG.

⁴⁵⁹ § 7 (2) TMG.

⁴⁶⁰ Frederik Trub 'Bundesregierung: Streaming legal nicht illegal' available at <http://www.rechtsindex.de/internetrecht/3973-bundesregierung-streaming-legal-und-nicht-illegal>, accessed on 23 August 2015.

⁴⁶¹ Landgericht Köln in MMR 2014, 193 – Headnote 3.

film is saved in the cache during streaming, which enables the user to fast forward and rewind. The main question is, if the non-deliberately storage in the cache suffices for copyright infringement. Generally an act has to be committed deliberately, which is not the case for most users in regard to the cache-storage. The counter-argument is that the user's clicking on the video entails the condoned storage as a necessary act. The relevant exceptions are §§ 53 and 44a UrhG, especially the requirement of temporary storage, which has to be 'lawful' or 'obviously produced contrary to the law'.⁴⁶²

§ 53 UrhG constitutes an exception and limitation to copyright infringement as a right to produce a private copy. Several duplications may be made by a natural person for private use, if it is not used for commercial purposes and the duplication does not use an obviously illegal original. However it has not been defined yet, what exactly compromises an 'obviously illegal original'.⁴⁶³ One legal opinion sees the requirement given, where the illegality of the original work suggests itself, for example by streaming a movie which was just released in cinemas.⁴⁶⁴

Further § 44a UrhG has to be considered, which has been inserted into the Act in September 2013.⁴⁶⁵ It is an exception to the exclusive right in § 16 UrhG that only the copyright holder may duplicate his/ her work. § 44a UrhG limits the wide term duplication under several conditions and gains relevance in cases where necessary data is stored in the background.⁴⁶⁶ The rule shall serve to facilitate the 'digital life' by enabling the lawful use without prior permission from the copyright holder⁴⁶⁷ and adds to the liability privilege of §§ 7 ff. TMG⁴⁶⁸. However the exception shall only be relevant in special cases, which violate neither the normal exploitation of the work nor the interests of the copyright holder. This refers to the three-step-test is inter alia based on the TRIPS-agreement.⁴⁶⁹

⁴⁶² F Trub <http://www.rechtsindex.de/internetrecht/3903-redtube-abmahnungswelle-abmahnun%20gen-an-eine-vielzahl-von-verbrauchern>.

⁴⁶³ S Siebert <http://www.e-recht24.de/artikel/urheberrecht/6558-kino-to-sind-streaming-filmporale-legal-oder-illegal.html>.

⁴⁶⁴ Dr. Jens Bücking 'Die Rechtslage bei Filesharing, Streaming und Framing; Verhalten bei Abmahnungen' available at <http://www.kanzlei.de/rechtsgebiete/it-recht/die-rechtslage-bei-filesharing-streaming-und-framing-verhalten-bei-abmahnungen>, part 2, accessed on 23 August 2015.

⁴⁶⁵ <http://dejure.org/gesetze/UrhG/44a.html>, accessed on 1 September 2015.

⁴⁶⁶ Janina Brandes '8 Fragen zu flüchtigen Vervielfältigungen im Netz' available at <http://www.telemedicus.info/article/2035-8-Fragen-zu-fluechtigen-Vervielfaeltigungen-im-Netz.html>, accessed on 23 August 2015.

⁴⁶⁷ op cit, 1.

⁴⁶⁸ Spindler/ Schuster/ Wiebe, UrhG § 44a, I.

⁴⁶⁹ J Brandes <http://www.telemedicus.info/article/2035-8-Fragen-zu-fluechtigen-Vervielfaeltigungen-im-Netz.html>, 2.

The requirements for § 44a UrhG are based on Art. 5 of the EU-Directive 2001/29/EG.⁴⁷⁰ ⁴⁷¹ Its requirements are tailored for the digital use of works.⁴⁷² The regulation was considered necessary, because Art. 5 of the Directive is rather wide and vague and hence needs national clarification. To receive such privilege the scope of the action is relevant, not the purpose in which the action was done.⁴⁷³ The European Court of Justice has defined the criteria in three decisions until now. The requirements are (a) the elusive, transient duplication of the work, (b) a non-integral and essential part of the work, (c) that the work has no independent economic significance and (d) that the sole purpose of the work is lawful use.⁴⁷⁴ In one of the decision⁴⁷⁵ the EUCJ discussed the criterion of lawful use. It stated that 'mere reception as such of those broadcast – that is to say, the picking up of the broadcasts and their visual display – in private circles does not reveal and act restricted by the European Union legislation'.⁴⁷⁶ This ruling however only referred to an exception for the user, not the provider.⁴⁷⁷

The relevance of § 44a UrhG is further debated in relation to caching, because such kind of reproduction of data is considered incidental in course of the technical process.⁴⁷⁸ The majority considers the exception applicable to caching as well as downloading on proxy-servers and browsing.⁴⁷⁹ However so called browser-caching has to be distinguished there from, because internet browsers store the cache as temporary internet files, which maintain stored for a longer period and are only deleted during updates.⁴⁸⁰ Each requirement has been discussed in literature⁴⁸¹ as well as jurisdiction, as exemplary portrayed before.⁴⁸²

A main argument for the applicability for the users is the independent economic relevance of the stream, since the data is unlikely to be used solely. It is agreed that § 44a

⁴⁷⁰ Spindler/ Schuster/ Wiebe *Recht der elektronischen Medien* 3ed (2015), UrhG § 44a, I.

⁴⁷¹ Directive No. 2001/29/EC of the European Parliament and the Council of 22 May 2001.

⁴⁷² Dreyer/ Korthoff/ Meckel *Urheberrecht* 3ed (2013), p. 736, footnote 7.

⁴⁷³ Dreier/ Schulze *Urheberrechtsgesetz – Kommentar*, p. 895, footnote 1.

⁴⁷⁴ Spindler/ Schuster/ Wiebe, UrhG § 44a, I.

⁴⁷⁵ ECLI: EU – C 2011/631, available at

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=110361&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=665153>, accessed on 23 August 2015.

⁴⁷⁶ ECLI: EU – C 2011/631, 171.

⁴⁷⁷ Legal Webhosting 'Streaming als Urheberrechtsverletzung nach der Rechtsprechung des EuGH' available at <http://www.legal-webhosting.com/blog/streaming-als-urheberrechtsverletzung-nach-der-rechtsprechung-des-eugh>, accessed on 23 August 2015.

⁴⁷⁸ J Brandes, <http://www.telemedicus.info/article/2035-8-Fragen-zu-fluechtigen-Vervielfaeltigungen-im-Netz.html>, 4.

⁴⁷⁹ Spindler/ Schuster/ Wiebe, UrhG § 44a, I.

⁴⁸⁰ J Brandes <http://www.telemedicus.info/article/2035-8-Fragen-zu-fluechtigen-Vervielfaeltigungen-im-Netz.html>, 5, accessed on 23 August 2015.

⁴⁸¹ Ahlberg/ Götting *Beck'scher Online-Kommentar UrhG* (2012), § 44a.

⁴⁸² See further: Amtsgericht Potsdam, Versäumnisurteil vom 09.04.2014 – 20 C 423/13 – Headnote 1.

UrhG is applicable where the original has not obviously been produced illegally and made available.⁴⁸³ Moreover the use usually has no independent economic value beyond the one-time use in cases where the data is deleted again after the watching. The sole sensory perception of a work does not constitute copyright infringement.⁴⁸⁴ Also the average user cannot re-use the temporary stored data.⁴⁸⁵

Moreover the distinction between live- and on-demand-streaming becomes relevant. In March 2015 the European Court of Justice ruled on the protection of live internet-broadcasts⁴⁸⁶. As portrayed before such streams do not infringe copyrights, when the broadcasters have the exclusive rights to control such transmissions which is comparable to 'on-demand' streaming. The right is included in the copyright holder's right to authorise or prohibit any 'communication to the public' of their works, because such communication includes live-streaming.⁴⁸⁷ In cases other than live-streaming the storage in the receiving-set falls under § 44a UrhG, when it is assured that the buffered data will automatically be deleted after shutting down the client-server.⁴⁸⁸

The exception of § 44a is moreover debatable in connection with streams using the so called *DivX-Player*, because they store the cached data in temporary download files on the hard drive, which amounts to permanent storage.

The EUCJ decided last about the matter in June 2014⁴⁸⁹ and dealt with the interpretation of Article 5 (1) of the Information Society Directive 2001/29/EC. It concerned the obligation to obtain authorisation from the copyright holders of the viewing of websites where it involves copies of such sites being made on the user's computer screen and in the internet-cache of that computer's hard disk.⁴⁹⁰ Further the exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction in alliance with Art. 5 (1) of the EU-Directive. If the conditions are met, the exception should also

⁴⁸³ J Brandes <http://www.telemedicus.info/article/2035-8-Fragen-zu-fluechtigen-Vervielfaeltigungen-im-Netz.html>, 6, accessed on 23 August 2015.

⁴⁸⁴ Melchior/ Illig 'AG Leipzig: "Streaming" illegal?!' available at <http://www.mi-kanzlei.de/recht-aktuell/items/ag-leipzig-streaming-illegal-nicht-so-schnell-euer-ehren.html>, accessed on 23 August 2015.

⁴⁸⁵ Gerald Spindler 'Bei Streaming handelt es sich um keine Urheberrechtsverletzung' available at <http://irights.info/artikel/gerald-spindler-bei-streaming-handelt-es-sich-um-keine-urheberrechtsverletzung/20350>, accessed on 23 August 2015.

⁴⁸⁶ ECLI: EU – C 2015/199.

⁴⁸⁷ Emily Parris/ Amy Lambert 'European Court of Justice rules on the protection of live internet broadcasts' available at <http://intellectualpropertyblog.fieldfisher.com/2015/european-court-of-justice-rules-on-the-protection-of-live-internet-broadcasts>, accessed on 23 August 2015.

⁴⁸⁸ Dreyer/ Kotthoff/ Meckel, p. 736, footnote 6.

⁴⁸⁹ EUCJ – C-360/16: *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and others*.

⁴⁹⁰ ECLI: EU – C 2014/1195 available at <http://curia.europa.eu/juris/document/document.jsf?text=Newspaper%2BLicensing%2BAgency%2B&docid=153302&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=705894#ctx1>, accessed on 23 August 2015.

include acts which enable browsing and caching to take place.⁴⁹¹ The court applied the three-step-test set out in Art. 5 (5) of the Directive and came inter alia to the conclusion that the creation of the on-screen copies and cached copies may not conflict with a normal exploitation of the work⁴⁹², which it does not by simply viewing the website.⁴⁹³ Hence it is not justified to demand from the user to first receive permission from the right holder.⁴⁹⁴ At last the rightful interests of the right holder shall not be violated improperly.⁴⁹⁵ The decision dealt with copies of press articles, but can be transferred and similarly applied to video streams and sound files.⁴⁹⁶ Further § 44a UrhG is as applicable as Art. 5 of the EU-Directive since it is based on the European original.⁴⁹⁷

⁴⁹¹ supra, 33.

⁴⁹² supra, 60.

⁴⁹³ supra, 63.

⁴⁹⁴ Christian Solmeke 'Nach EuGH-Urteil: sind jetzt alle Streaming-Seiten legal?' available at <https://www.wbs-law.de/urheberrecht/nach-eugh-urteil-sind-jetzt-alle-streaming-seiten-legal-53574/>, accessed on 23 August 2015.

⁴⁹⁵ op cit.

⁴⁹⁶ Dr. Ralph Oliver Graef 'EuGH bewertet Video-Streaming als legal' available at <http://www.absatzwirtschaft.de/eugh-bewertet-video-streaming-als-legal-18013/>, accessed on 23 August 2015.

⁴⁹⁷ op cit.

Chapter 5: COMPARISON AND CONCLUSION

My minor dissertation dealt with different legal aspects of the formats of IPTV, ITV and mobile-TV and downloading- and streaming-services. Overall South Africa has a stable legal framework to regulate the discussed topics and issues, whether it is copyright law or other legislation.

The findings regarding operational and content licenses emphasise the importance of contractual and licensing terms in regard to ITV, IPTV and mobile-TV as well as downloading and streaming services. To gain greater legal certainty in a general and legal perspective the operator of a website should require users to agree to clear and binding terms of licensing and use. Such terms should first set out the ground rules for all parties to avoid future disputes.⁴⁹⁸ Moreover the risk of liability for the website operator or service provider could be reduced by including certain provisions like warranties by the author of the work as well as granting the operator the right to take down and/ or edit or modify content preferably for any reason and to be able to pass on the user's details to rights owners alleging infringement and law enforcement agencies.⁴⁹⁹ Generally the following should be considered when acquiring internet content. First one should make sure if the content obtains a license, since most content will be subject to copyright protection.⁵⁰⁰ This also takes the intended use into account and exceptions could be applicable. In that connection the user also has to consider if he/ she intends to use or own the content and receive the appropriate license. In addition the use can be limited in regard to the assigned entitlements of the copyright and the warranties should be clearly defined, especially in regard to possible infringement claims.⁵⁰¹

In absence of licenses the issues of copyright infringement, liability and exceptions become relevant. The general regulations are similar in both countries, especially regarding the requirements for subsistence of copyright. The accentuation however has to be made regarding the legal dichotomy of streaming-services of ITV, IPTV and mobile-TV, especially temporary and transient streaming. Differences emerge when going into detail of the liability matters regarding streaming services. First the user liability of such streaming-websites shows differences in both countries. While South Africa has not established but only proposed legislation until now, the German law and courts have establishing a system of liability and exceptions. The most relevant exception regards temporary/ transient streaming. While the

⁴⁹⁸ S Stokes *Digital copyright – Law and practice 3ed* (2009), p. 173 f.

⁴⁹⁹ *ibid*, p. 154.

⁵⁰⁰ *ibid*, p. 204.

⁵⁰¹ *ibid*, p. 205.

South African Copyright Amendment Bill 2015 proposed such an exception in Section 13A, the German Copyright Act already contains such in §§ 53 and 44a UrhG. § 44a UrhG was inserted on the basis of the European Directive 2001/29/EC⁵⁰².⁵⁰³ The proposed Section 13A in the Amendment Bill also relies on international regulations like the Information Society Directive of the European Parliament.⁵⁰⁴ However the South African comments on Section 13A show that it is still unclear if and how to implicate and possibly apply the proposed Amendment.

The German courts on the other hand already dealt with the matter and based their exposure to § 44a UrhG on European Directives and specifications by the European Court of Justice. The requirements and findings can be summarized as follows. The use of the regulation is (1) to find an exception to the right of duplication in § 16 UrhG, because otherwise any use of the copyrighted work would constitute infringement without the copyright holders consent; (2) the digitalisation of works creates more ways of using a work, which should be decided over by the owner.⁵⁰⁵ Further lawful use shall not be hindered by technically induced multiplication without the consent of the copyright holder⁵⁰⁶, which also contains caching⁵⁰⁷. Hence the use shall be similar to analogue use, which entails the sheer enjoyment, e.g. watching, of it, as long as it is not stored to be restored.⁵⁰⁸ Such sole enjoyment shall not be qualified as duplication and hence not constitute infringement. It has to be determined in regard to the result of the use not the act itself.⁵⁰⁹ It is moreover relevant that the exception meets two appropriations. § 44a Nr. 1 UrhG privileges the transmission in a network between third parties by an intermediary, while Nr. 2 requires lawful use⁵¹⁰.⁵¹¹ The latter means that the use and the publication may not be evidently unlawful.⁵¹² This has been specified by a district court in 2014 by stating that the average internet-user may, without any evident proof of the contrary, assume that the providers of streaming-portals acquired the necessary rights regarding the content.⁵¹³

⁵⁰² Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001.

⁵⁰³ Ernstahler: Streaming und Urheberrechtsverletzung (NJW 2014, 1553 ff.).

⁵⁰⁴ CIP <http://blogs.sun.ac.za/iplaw/files/2015/08/CIP-Formal-Comments-Copyright-Amendment-Bill-2015-Online1.pdf>, p. 36.

⁵⁰⁵ Ernstahler, V. 1.

⁵⁰⁶ BeckOK UrhG, § 44a, I.

⁵⁰⁷ op cit, § 44a, C. I.

⁵⁰⁸ Ernstahler, VIII. 2.

⁵⁰⁹ BeckOK UrhG, § 44a, B.

⁵¹⁰ http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html, assessed on October 27 2015.

⁵¹¹ BeckOK UrhG, § 44a, E.

⁵¹² Spindler/Schuster, p. 6.

⁵¹³ Amtsgericht Hannover, Urteil vom 27.05.2014 – 550 C 13749/13 – Headnote 2.

The German Courts considered it pivotal for streaming, if each buffered part of the streamed work is itself a personal intellectual creation or an infringement of the exclusive right, not if the streamed work is has copyright protection as a whole.⁵¹⁴ Another aspect is that the jurisdiction judges from the users point of view and thus considers § 44a UrhG applicable for the reception of streaming-services, at least when streaming from a non-obvious unlawful source. The EUCJ does not even distinguish between lawful and unlawful sources and hence the legal evaluation is still unclear.⁵¹⁵ Another decisive aspect is the technical implementation of the retrieved content. Hence progressive downloading is considered illegal, since the data remains on the computer after watching.⁵¹⁶ In case of 'true streaming', where the data is automatically deleted from the temporary cache or overwritten, the EUCJ⁵¹⁷ did not consider the sheer reception and display of protected content within private circles as infringement. Thus even the use of illegal streaming-offers is exempt from infringement pursuant § 44a UrhG, provided that no re-usable copy of the work remains on the receiving set.⁵¹⁸ The regulations shall aim to prevent, that certain fixations of a work in the virtual memory or temporary storage need a separate permission by the copyright holder, although the following actual use does not need such permission itself.⁵¹⁹

When comparing the South African and the German approach to provider liability it becomes apparent that both countries execute it similarly. Both hold the providers liable under contributory infringement. However the German legal practice already constituted further legal principles. For one the burden of proof of legality of the original lies on the provider.⁵²⁰ Secondly the provision of the online-content falls under § 19a UrhG⁵²¹, which is the exclusive right to make a work publically available. Hence the provider has the burden of proof that the streamed content was made legally available.

Summing up, both jurisdictions handle the matters at hand similarly for the most part. For the mentioned aspects, where the German and European approach is more progressed than the South African one, it could be consulted. Although the South African legislation and jurisdiction is not bound to any European legal principles, the mentioned administration of the

⁵¹⁴ Dreier/ Schulze, p. 896, footnote 4.

⁵¹⁵ op cit, p. 899, footnote 8.

⁵¹⁶ Fromm/ Nordemann, p. 1093, footnote 2.

⁵¹⁷ EUCJ, GRUR 2012, 156.

⁵¹⁸ Fromm/ Nordemann *Urheberrecht – Kommentar*, p. 1099, footnote 27.

⁵¹⁹ Dreyer/ Kotthof/ Meckel, p. 735, footnote 6.

⁵²⁰ Caschy <http://stadt-bremerhaven.de/bundesregierung-europaeischer-gerichtshof-muss-entscheiden-ob-streaming-illegal-ist/>.

⁵²¹ Dreier/ Schulze, p. 899, footnote 8.

recent problems can be considered in case such legal problems should arise in a South African court for the first time. At hand it is not apparent, why the mentioned German considerations should not be applicable in the South African context. As the introductory remarks showed South Africa is on its way to catch up in regard to the technological standards of ITV, IPTV and Mobile-TV as well as the necessary technological foundations. Hence multimedia will become more and more relevant and thus the inherent problems of copyright infringement due to the vast possibilities offered by multimedia.

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