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**COPYRIGHT IN THE MUSIC INDUSTRY: THE PROTECTION OF
ARTISTS' RIGHTS AGAINST EXPLOITATION IN SOUTH AFRICA**

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ABSTRACT

Over the years, artists who were once the biggest selling artists in the South African music industry have been witnessed to have no financial or other resources upon their death; or when they left the record labels they were signed to, their careers faded and they had nothing to their name. There have been numerous allegations from artists about the treatment they have received from their record labels, particularly with regard to being inadequately compensated for their work and record labels not honouring the agreements they had with them. This dissertation examines how copyright law, as applied to the music industry, solves or tries to solve the problem of artists who die or live as paupers, after having been among the biggest selling artists in the country. It evaluates whether copyright law provides any mechanism to deal with the alleged exploitation that has existed for a very long time in the music industry. Understanding that the purpose of copyright protection is to incentivise authors and motivate them to create more works, the dissertation evaluates whether copyright law has any specific provisions to safeguard this purpose. The dissertation further considers the principles of contract law as a tool used to create binding agreements between artists and record labels. The dissertation argues that the contracts that artists and record labels enter into are unfair, which is as a result, amongst other things, of the imbalance of the negotiating power of the two parties.

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ABBREVIATIONS

CD	Compact Disc
CAPASSO	Composers, Authors and Publishers Association
DVD	Digital Versatile Disc
MP3 Player	MPEG Audio Layer III
PPD	Published Price to Dealer
SAMPRA	South African Music Performance Rights Association
SAMRO	South African Music Rights Organisation

DEFINITIONS

Author – in a literary, musical or artistic work, means the person who first makes or creates the work; in a sound recording, means the person by whom the arrangements for the making of the sound recording were made.¹

Musical work – a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.²

Performer – an actor, singer, musician or dancer who performs a musical work or sound recording.³

Performance – presentation by the operation of a loudspeaker, a radio, television or diffusion receiver, or by the exhibition of a cinematograph film, or by the use of a record, or by any other means.⁴

Sound recording – means any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced.⁵

¹ Copyright Act 98 of 1978 s1(1)

² Ibid.

³ Performers Protection Act 11 of 1967 s1(1)(iv)

⁴ Supra note 1.

⁵ Supra note 1.

CHAPTER 1: INTRODUCTION

1.1 Introduction

The entertainment industry in South Africa has grown significantly over the past decade, and it has encountered many disputes about the ownership of rights.⁶ In this research I consider the alleged exploitation in the South African music industry, whereby artists who are signed to record labels are not fairly compensated for their works and leave record labels with limited or no financial gain, despite having released music that sold well. I discuss whether copyright can provide any remedies for such circumstances. Copyright law is a branch of intellectual property law that deals with the protection of works of authorship that have been reduced to material form⁷ and for the purpose of this research, copyright is defined as ‘the exclusive right in relation to work embodying intellectual content and any related rights as defined in the Performers Protection Act⁸ to do or to authorize others to do certain acts in relation to that work, which can be exploited for personal gain or profit’.⁹ Section 2 of the Copyright Act lists works eligible for copyright protection, namely: literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programs. It is also important to mention that a single song can embody more than one category of protected work, for example a literary work, sound recording and musical work.¹⁰

In the Copyright Act, literary works are defined as—

including, irrespective of literary quality and in whatever mode or form expressed, novels, stories and poetical works; dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts; textbooks, treatises, histories, biographies, essays and articles;

⁶ Malebakeng Agnes Forere ‘Keeping up with the developments in technology: A look into the music industry and the copyright laws in Southern Africa’ (2019) 7 *SAIPLJ* 31–52.

⁷ Copyright Act 98 of 1978 s2(2).

⁸ Supra note 3 s5.

⁹ Brian Komane ‘Ambitious Entertainment vs Fifi Cooper’, available at <http://www.falasattorneys.co.za/ambitiouz-entertainment-vs-fifi-cooper/> (accessed 3 March 2020).

¹⁰ Richard Marais *Investigating musical copyright infringement: Examining international understandings of musical copyright infringement for potential adaptation into South African copyright law* (unpublished LLM thesis, 2019) University of Cape Town.

encyclopaedias and dictionaries, letters, reports and memoranda, lectures, speeches and sermons, and tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer.¹¹

A sound recording is ‘any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a soundtrack associated with a cinematograph film’.¹² All recorded sounds in different formats – CD, DVD, hard drive, flash drives, MP3, those available as downloads, and all other storage media – are covered under sound recordings.¹³ A musical work is ‘a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music’.¹⁴

In this dissertation I use ‘music’ as a generic term referring to all these works and I focus on recording and performing artists’ contracts.¹⁵ I refer to artists who were once the biggest acts and dominated the industry but died poor, and those who are still living, but having allegedly been financially exploited, mostly by record labels that they were signed to, are not as wealthy as the popularity of their music would suggest. The dissertation considers how copyright law can remedy or address their predicament, as copyright is the basis of the relationship that gives rise to the alleged economic exploitation and any referral to “copyright law” herein also includes the provisions of the Performers Protection Act. Because copyright law forms a major part of the relationship between the artist and the record label, this dissertation approaches the question by focusing on copyright law. It also considers the contractual implications of the relationship under contract law and how these contribute to the artist being exploited. Without having access to the exact contract that led to the dispute, one cannot fully argue the facts of that dispute. However, in the absence of actual contractual documents, this dissertation uses available generic components of record label deals and examines what each deal implies and the contracts that result from such deals.

With developments in technology, the legislature has begun developing copyright laws that are in line with the new developments in order to accommodate and regulate these new ways of handling works that fall under copyright protection.¹⁶ However, copyright law does not seem to be addressing the growing claims of financial exploitation of artists by record labels.

¹¹ Copyright Act s 1.

¹² Ibid.

¹³ Nick Matzukis *South African Music Law, Contract & Business* 3 ed Academy of Sound Engineering 2013 345.

¹⁴ Copyright Act s 1.

¹⁵ As done by others, e.g. Marais supra .

¹⁶ Forere supra at 31.

This dissertation will attempt to provide solutions on how best the current laws be applied to solve this problem, and what amendments are needed to further regulate remuneration of artists.

1.2 Background

Copyright law previously defined copyright and performers' rights separately and these rights were recognised only for musical and dramatic works.¹⁷ However, in terms of royalties, the performers' right was not catered for separately, it formed part of the copyright in the work.¹⁸

Over the years, artists, mostly those who were signed to record labels, have made headlines for dying without anything to their names, leaving their families to struggle to even pay for the artists' funerals. In 2017, one of the biggest South African gospel music artists, Lundi Tyamara, died. Although he was one of the highest-selling gospel artists, at the time of his death, he was homeless and insolvent. His friends blamed his manager for the artist's financial plight.¹⁹ His friends claimed that 'at the time Lundi took his last breath, he was both homeless and broke. He had been kicked out of his rental townhouse in Mondeor, Johannesburg. When he was kicked out, he reportedly contacted a friend on WhatsApp to ask for a loan of R950 to pay for a storage facility for his belongings'.²⁰ Regardless of what kind of lifestyle artists have, there is a noticeable imbalance between their financial status at the end of their careers or lives and how big they were when their career was at its peak.

Some artists, after they part ways with record labels, lose everything or own nothing as the labels repossess their properties, for example, houses and cars. All these stories are followed by allegations that record labels and producers enrich themselves while the artists remain poor.²¹ This is supported by how some artists live when they leave record labels and become independent: they are still poor and have to start from where they were before they worked with the labels. Some start seeing their gains after they leave record labels. For

¹⁷ Tanya Wagenaar & Frans Marx "Needletime: The Long and Winding Road", available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fjournals.co.za%2Fdoi%2Fpdf%2F10.10520%2FEJC128564&pdffilename=EJC128564.pdf> (accessed 02 April 2022).

¹⁸ Ibid at 307.

¹⁹ Carol Karen '15 famous South African musicians and celebrities who died poor', available at <https://briefly.co.za/34138-15-famous-south-african-musicians-celebrities-died-poor.html> (accessed 11 May 2020).

²⁰ Ibid.

²¹ Tuulikki Pietilä 'To sign, or not to sign? That is the question for South African musicians' (2017) *The Conversation: Academic Rigour, Journalistic Flair*.

example, after parting ways with his then record label Vth Season, Kiernan Forbes (stage name AKA) stated in one of his interviews:

It's [because I am] in control of my own money. You can find a correlation, it's no coincidence that when I was back there [Vth Season], not controlling my own money, I was unhappy and negative and aggressive, and now when I am in control of my money, that I am positive and happy.²²

In 2017 several artists left one of the country's biggest record labels, Ambitious Entertainment. These included Lehlogonolo Ronald Mataboge (A Reece) and Refilwe Boingotlo Meketsi (Fifi Cooper). After having left the label, A Reece released a song titled 'Loyal' wherein he detailed the circumstances that led to his leaving the label. A Reece also explained in a song that during his time at his former record label he was being paid less than R20 000 per month, in breach of his agreement with Ambitious Entertainment, and while many staff of the label were buying cars before artists could afford them.²³ Fifi Cooper had the same concerns and complaints. She stated that she left the label for financial reasons and not on personal grounds.²⁴ In an interview with *Drum Magazine*, Fifi Cooper said: 'I had issues with the owner, Kgosi Mahumapelo, with regards to my finances. He became unhappy when I asked questions. So one day I woke up and realised that I work all the time but with nothing in my bank account, while my kid is starving, it's a lot to handle.'²⁵ She further stated that she would be told that she owed the label money whenever she raised questions about her salary.²⁶ One may argue that a record deal entails more than just recording and distributing the artist's work; it includes a whole team of different role players, from manager to someone to book accommodation. This dissertation further considers the different arrangements that artists may enter into and their implications.

These issues are not new to the music industry. For instance, the Music Industry Task Team in its 2001 report discussed some of the issues highlighted in this dissertation.²⁷ The issues addressed, amongst others, included the inadequate and outdated copyright legislation,

²² Leonie Wanger 'There's more to life than making music, there's making money: AKA', available at <https://www.timeslive.co.za/sunday-times/lifestyle/2017-11-25-poor-little-rich-rappers-aka-and-cassper-nyovest-just-want-more/> (accessed on 11 May 2020).

²³ A-REECE *Loyal* (2017) iTunes.

²⁴ Qhama Dayile 'Fifi Cooper explains why she left Ambitiouz entertainment', available at <https://m.news24.com/Drum/Archive/fifi-cooper-explains-why-she-left-ambitiouz-entertainment-20170728> (accessed 11 May 2020).

²⁵ Ibid.

²⁶ Ibid.

²⁷ Department of Art, Culture, Science and Technology Music Industry Task Team (MITT) Report (2001)

particularly with regard to needletime, unfair contracts, lack of access to education, training and information about the economics of the industry, and lack of transparency and accountability of key players, and transparency in royalty collection.²⁸ Due to continued struggles around the same or similar issues, the Copyright Review Commission conducted a detailed examination of the operations of collecting societies.²⁹ One of the major issues considered was how, nine years after the enactment of needletime legislation in 2002, not a single musician and record company had received a payment of royalties.³⁰ Though the Copyright Review Commission made recommendations that sought to address these problems, there is no enacted legislation that address these concerns as the Copyright Amendment Bill and the Performers Protection Amendment Bill were referred back to the National Assembly by the President.³¹

1.3 Statement of the problem

The dissertation focuses on the plight of artists who die in poverty and artists living in financial difficulties after they leave record labels, yet their music was popular and seemed to be generating income: artists who, at the peak of their careers sold large amounts of units, topped charts, had multiple bookings and went on to win numerous awards, yet whose financial state, when they part ways with record labels, or die, does not correspond with that of their work. This has been the prevailing trend and may be a result of the kind of recording contract between the artists and their respective record labels.³² It is always every emerging artist's dream to get a record deal as this is seen as a way to succeed in the music industry. This may result in desperation on the part of the artist to sign a recording contract at all costs. As such, when presented with that opportunity, artists sign recording contracts without hesitation or even taking a second to consider the terms of that contract.³³

²⁸ Copyright Review Commission Report at 165.

²⁹ Ibid at 3.

³⁰ Ibid

³¹ South African Government 'President Cyril Ramaphosa refers Copyright and Performers' Protection Amendment Bills to Parliament', available at <https://www.gov.za/speeches/president-cyril-ramaphosa%C2%A0refers-copyright-and-performers%E2%80%99-protection-amendment-bills> (accessed 16 November 2021)

³² Pietilä supra at 2.

³³ Komane supra.

1.4 Points not at issue

It is important to note that this dissertation is not arguing that signing into a record label is wrong nor is it making a case for or against record labels. Its purpose is to identify the shortfalls in the contractual arrangements and suggest how, if at all, ownership and the distribution of the rewards can be monitored and improved to ensure fairness to all the parties that contributed to the making of a complete song. The dissertation acknowledges that record labels play a role in the promotion of music and in those instances where the artist does not receive the fair returns of their work, it threatens the growth and improvement of the artist as a creator. There is no doubt that the record label, which takes the risk of investing in the artist's career without any guarantee of making profit, needs a reasonable hold on the work created by the artist. But this should not be a fixed hold on the work, as the nature of the entertainment industry is that as artists grow, the worth of their work increases because they gain more fans. Thus the record label would recoup its investment and start to make a profit within a short space of time. The terms of the contract that the parties sign should make provision for the parties to revisit the terms of the contract regularly, with each improvement or decline in the sales and income generated through the artist.

1.5 Research objectives

Taking into account that the purpose of copyright is to 'afford a qualified monopoly in the use or exploitation of a work in order, firstly to compensate and reward its creator for the effort, secondly, to act as an incentive, because there is no copyright in ideas, only in the expression of ideas',³⁴ it is important for copyright laws to ensure that creators of copyrighted works are rewarded fairly to uphold this purpose. The objective of this dissertation is to discuss and analyse the above with the intention to see how, if at all, copyright law can solve the problem of artists who die or live in financial distress despite their popularity and good sales. In considering whether the current copyright system has any mechanisms to safeguard against unfair financial exploitation of artists, this dissertation evaluates the main cause of these disputes and alleged exploitation. It explores the possible solutions that copyright law can adopt to overcome this problem.

³⁴ Ibid.

1.6 Research questions

With the increase in the number of artists who die poor, leaving no money behind to at least cover their burial, and those artists who live in financial distress while their works are popular, this dissertation considers the following broad question:

How, if at all, does copyright law provide a fair mechanism for ownership and benefit sharing that protects artists from exploitation?

It will be answered by addressing these sub-questions:

- 1.1 Are standard terms in contracts between artists and recording labels fair? This assessment will rely on scholarly commentary, especially on the bargaining power of the contractual parties.
- 1.2 How does copyright law uphold its purpose to incentivise creators of their works and promote development in creativity in the music industry?
- 1.3 Is there any way in which the Department of Trade, Industry and Competition can safeguard the artists' financial interests in the works they created?

1.7 Research methodology

A desktop approach is used, with the aid of case law, legislation, journal articles and media reports, in the form of newspaper articles. The dissertation also considers artists' statements on social media, especially Twitter, about exploitation.

1.8 Chapter outline

The structure of the chapters to follow is as follows:

Chapter 2 provides an analysis of copyright law to evaluate the effectiveness of the remedies for protection of artists' economic rights.³⁵ It discusses how copyright maintains its purpose, which is to incentivise the creator of the work for their work, even when there is a change in ownership.³⁶ The chapter addresses economic rights and what their transfer entails. Relevant aspects of moral rights will also be discussed.³⁷

³⁵ Ibid.

³⁶ Ibid.

³⁷ Owen H Dean 'Protection of the author's moral rights in South Africa' (1995) 7 *SA Mercantile LJ* 73–83 at 74.

The relationship between artists and record labels is guided by the contract they enter into. These contracts often give rise to disputes when the artist challenges the contract. Chapter 3 considers the fundamental principles of contract law, the types of recording contracts, the implications of the clauses of these contracts and the transfer of intellectual property rights. This chapter further discusses how information asymmetry affects the artists in the contracts they enter into.

Chapter 4 considers relevant statutory provisions that can play a role in solving the resulting problem as well as industry specific codes or guidelines that will take into account the nature of copyright works and make recommendations on how copyright law can deal with these disputes. Considering the uneven bargaining position between the artists and the recording labels, this chapter examines how this imbalance can be reduced while taking into account freedom of contract principles. The chapter also considers how the Department of Trade, Industry and Competition can develop policies and regulations based on the Copyright Act that will safeguard the interest of contracting creators.

Chapter 5 provides a summary of the dissertation and gives its findings in answering the research questions.

CHAPTER TWO: COPYRIGHT ANALYSIS – ECONOMIC EXCLUSIVE RIGHTS

2.1 Introduction

Copyright in music is protected as a musical work, a literary work, as well as a sound recording. The definitions of a ‘literary work’, a ‘musical work’ and a ‘sound recording’ under s 1 of the Copyright Act cover various aspects of music content or song – lyrics, music composition and recording.

This chapter analyses copyright law in South Africa as it relates to the music industry, then discusses the rights that vest in the music content: how the limitations affect the rights, the scope of authorship and how ownership affects the author’s right to benefit financially from his or her work and the performance of such works. The dissertation also considers moral rights, the claims that vest in moral rights, whom copyright protection is meant for and the purpose of copyright protection, economic rights, the rights of performers in their performance as ‘works’ and whether the proposed amendments in the Copyright Amendment Bill B13B of 2017 and Performers’ Protection Amendment Bill B24B of 2016 would provide regulation for the fair distribution of royalties if the bill is successfully passed into law.

2.2 Copyright analysis

This part of the dissertation discusses copyright in South Africa as it relates to the music industry. It is at this point important to note that the person upon whom copyright ownership rests owns a monopoly to perform specific acts in relation to the work, including authorising the performance of such works by another person. Any person who performs those acts without the permission of the copyright owner is infringing upon the owner’s right.¹ These acts, as outlined in the Copyright Act, include: the right to translate the work; the right to reproduce the work; the right of public performance and the communication to the public of such a performance of the work; the right to authorise the broadcasting and rebroadcasting of the work; the communication of the works to the public either through wire or wireless means; the right to authorise public recitations; and the right of adaptation.²

¹ Malebakeng Agnes Forere ‘Protecting copyrights and neighbouring rights in the music industry in Southern Africa: A need for regulatory convergence’ (2018) 26 *African Journal of International and Comparative Law* 585–615.

² Ibid.

Any other person who performs these acts must first acquire the authority to do so from the right holder.³ Section 9 of the Copyright Act affords to the right owner the exclusive right in sound recordings to

make, directly or indirectly, a record embodying the sound recording; let, or offer or expose for hire by way of trade, directly or indirectly, a reproduction of the sound recording; broadcast the sound recording; cause the sound recording to be transmitted in a diffusion service, unless that service transmits a lawful broadcast, including the sound recording, and is operated by the original broadcaster; communicate the sound recording to the public.⁴

Further, the Performers' Protection Act provides that the performer will have the exclusive right to do or authorise another to:

broadcast or communicate the performance to the public, to make a fixation of the unfixed performance, to make a reproduction of a fixation of the performance.⁵

2.3 Exclusive rights

Music content embodies more than just literary and musical work, the sound recording is also exclusively protected under the Copyright Act. The exclusive rights in literary and musical works provide the protection to some of the common infringements that these works are often subjected to.⁶ The most common one is reproduction: the owner has the exclusive right to reproduce and authorise the reproduction of the literary and musical work.⁷ The Act also exclusively vests the right to publish unpublished literary and musical works or to authorise the publishing thereof in the right owner.⁸ Considering the nature of the handling of literary and musical works, this right is important to prevent third parties from publishing (leaking) the work without being authorised by the owner.⁹ The Act also limits any other person, without the authority from the copyright holder, from performing the work in public, this includes public recitations, public performances and broadcasting and rebroadcasting.¹⁰ The Act provides the owner with the exclusive right to authorise the transmission of the work in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is

³ Copyright Act s 6.

⁴ Ibid s 9 (a)-(e).

⁵ Performers' Protection Act s5(1)(a)-(c)

⁶ Forere (2019) supra at 592.

⁷ Ibid.

⁸ Copyright Act s 6(b).

⁹ Forere (2019) supra at 606.

¹⁰ Ibid.

operated by the original broadcaster.¹¹ This exclusive right is important with services like mobile and telecommunication service providers tending to use songs in the background when calls between them and third parties are on hold.¹²

Among these rights, the Act prohibits an unauthorised person from making a record embodying the sound recording. This is an important right with the growing trend of artists sampling sound recordings from other owners. The owner of the copyright in the sound recording shall be the one who authorises the sampling of the sound recording and the letting or exposing for reproduction.¹³ The Copyright Act grants the exclusive rights in order to allow the right holder the sole power to determine how his work is used by other parties and be compensated by any other person who intends to exploit any of the exclusive rights.

The nature of the music content is that it embodies a performance by the artist. In a body of work which contains the performance, the ownership of copyright and ownership of performer's right are two separate and distinct rights.¹⁴ The Performers' Protection Act provides protection for, amongst others, performances of literary, dramatic, musical, artistic works.¹⁵ The Act grants the performer the exclusive rights to authorise a broadcast or communication of the performance if such broadcast or communication is intended to be made from the original performance.¹⁶ The Act further grants the performer the exclusive right to authorise a reproduction of a fixation of the performance if the original fixation was made without the performer's consent.¹⁷ This gives the performer the chance to remedy any further financial loss that may be caused by an unauthorised fixation and a grant of consent for the first fixation or broadcasting is deemed to be consent for any subsequent rebroadcasting or reproduction of the fixation, unless an agreement to the contrary exists.¹⁸ The performer also holds the exclusive right to authorise a fixation if the reproduction of the fixation is made for purposes different from the one previously consented to or if the

¹¹ Copyright Act s 6(e).

¹² Forere (2019) *supra* at 605 }

¹³ Copyright Act s 9(b).

¹⁴ Tanya Wagenaar *A Comparative Analysis of the Development of Performers' Rights in the United Kingdom and South Africa* (unpublished LLM dissertation, 2011) Nelson Mandela Metropolitan University at 99.

¹⁵ *Ibid* at 138.

¹⁶ Performers' Protection Act s5(1)(a)

¹⁷ *Ibid* s5(1)(c)(i)

¹⁸ *Ibid* s5(2).

reproduction is being made for purposes other than the ones granted as an exception in s 8 of the Act.¹⁹

2.4 Limitations and exceptions

The exclusive rights granted by the Copyright Act and the Performers' Protection Act may, under some circumstances, be limited. The limitation placed on the right does not, however, take away the protection that the exclusive right grants the owner, but it is to provide access to the public for valid reasons.²⁰ Section 12 of the Copyright Act and s 8 of the Performers' Protection Act provide exceptions to the exclusive rights provided in ss 6 and 9 and 5, respectively. The fair dealing provision states that if a person performs the exclusive rights of the owner, it will not amount to an infringement if he or she does so for the purposes of: 'research or private study or private use; criticism or private review of that work; for reporting current events, either by newspaper or broadcasting or in a cinematograph film'.²¹ A person who performs any of the author's exclusive rights for purposes of criticism and reporting current affairs will not infringe the right holder's rights if the source and the name of the author are acknowledged.²² Any quotation made from the music content must be in line with the provisions of s 12(3). Thus the quotation should be in line with fair practice in order for it not to amount to an infringement. The measurement for fair practice is that the extent of the quotation must be justifiable by the purpose it is quoted for.²³ The exclusive right in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing the work for purposes of a report of judicial proceedings.²⁴ The exclusive right in a literary or musical work shall also not be infringed by way of illustration in any publication, broadcast or sound or visual record for teaching purposes, provided that the source and author are mentioned.²⁵ Where the work is reproduced by a broadcaster, the requirement is that the copies must be destroyed after six months in order for it not to amount to an infringement of the right in the work if there was no prior authority granted by the right

¹⁹ Ibid s5(1)(c)(ii) & (iii)

²⁰ Forere (2019) *supra* at 608.

²¹ Copyright Act s 12(1)(a)-(e).

²² Ibid s 12(1)(b) & (c).

²³ Ibid s 12(3).

²⁴ Ibid s 12(2).

²⁵ Ibid s 12(4).

holder; and where the right holder granted the permission, the reproduced work must be destroyed within such a period as agreed with the right holder.²⁶

Similar to the Copyright Act, the Performers' Protection Act provides limitations and exceptions to the exclusive rights granted in s 5. The exclusive rights granted by s 5(1) of the Performers' Protection Act shall not be infringed if the performer gave consent to the incorporation of his performance in a visual or audio-visual fixation.²⁷ Also, the exclusive right of the performer shall not be infringed where a performance, fixation, reproduction of a fixation is done for purposes of:

private study or personal and private use, criticism or review or for the purpose of reporting on current events, teaching or scientific research, legal proceedings, or demonstration of recording, amplifying or similar apparatus.²⁸

The person who performs these actions under the scope of s 8 needs to meet some requirements in order for the performance to fall within the scope of this section. Where the performance is used for criticism or review, the use will not infringe if only short extracts are used and where possible, the name of the performer or leading performers are mentioned.²⁹ If the performance is used for demonstration, the demonstration must be made by a licensed dealer on his premises to a specific client.³⁰

While the purpose of copyright protection is to provide remuneration for authors and, in turn, promote creativity and continued authorship, limitations and exceptions are put in place to play the same role of promoting authorship and to also control the level of monopoly in the creative market.³¹ The limitations and exceptions provide continued authorship by allowing other others to quote the pre-existing works of others, provided that they mention the authors they are quoting from.³² The role played by limitations and exceptions in ensuring that artists are fairly remunerated for their works and this is done through requirements which must be met before the use can be within the scope of these limitations and when the work was used

²⁶ Ibid s 12(5).

²⁷ Performers' Protection Act s 8(1)

²⁸ Ibid s 8(2)(a)-(e)

²⁹ Ibid s 8(2)(b)

³⁰ Ibid s 8(2)(e)

³¹ Pamela Samuelson 'Justifications for Copyright Limitations & Exceptions', available at <https://ssrn.com/abstract=2476669> (accessed 07 April 2022)

³² Ibid.

for financial gain, for example by a corporation, the limitations and exceptions require that the artist should be remunerated.³³

The limitations and exceptions are premised on the principle of fair dealing. The purpose of copyright protection is to promote creativity and creation of more copyright works through remuneration. The remuneration awarded is a limitation-based remuneration.³⁴ The limitations and exceptions are aimed at providing access to the work for non-commercial use which may also improve creativity, for example by excluding those who use the work without consent for purposes of review or criticism.³⁵ The requirements set out for meeting some of the limitations and exceptions balance the interests of the artists and where the work is used for financial gain, the limitation may not apply. The limitations and exceptions need to be reasonable and not allow use that may result to financial loss on the part of the artist.

2.5 Authorship and ownership

For the purposes of establishing ownership of copyright in a work, it is important to first establish where or with whom the authorship lies.³⁶ The Copyright Act defines the author as, in relation to literary and musical works, the person who first creates the work and in relation to sound recordings, as a person who makes the arrangements for the making of the sound recording.³⁷ In order for a work to exist, firstly there must be an author who, after embarking on a thinking process, creates a work that is original, as required by s 2(1) of the Copyright Act, and puts it in a material form, as copyright protection does not cover ideas.³⁸ The author then becomes the person responsible for the creation of the work, which means the work is the result of his intellectual engagement and skill.³⁹ If more than one person is involved in the creation of the work, they shall be joint authors of the work.⁴⁰

³³ Ibid. See also Performers' Protection Act s 8(3)(a)(iii).

³⁴ Christophe Geiger 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' (2010) 12 Vanderbilt Journal of Entertainment and Technology Law 515-548 at 528.

³⁵ Pamela Samuelson 'Justifications for Copyright Limitations & Exceptions', available at <https://ssrn.com/abstract=2476669> (accessed 07 April 2022)

³⁶ Owen H Dean *The application of the Copyright Act, 1978, to works made prior to 1979* (unpublished PhD thesis, 1988) University of Stellenbosch 243.

³⁷ Copyright Act s 1.

³⁸ Dean (1998) *supra* at 244.

³⁹ Ibid 127.

⁴⁰ Ibid.

Subject to a few exceptions, the general presumption is that the author is the owner of the work, or where there is more than one author, the authors are joint owners of the work.⁴¹ In relation to a sound recording, s 21(1)(c) of the Copyright Act states that the ownership of the copyright in the work that was created under payment of commission shall rest on the person who paid or promised to pay the commission.

Prior agreement must exist between the commissioner and the author. Thus, if the co-authors of a musical work are commissioned by way of a feature in a song, they shall not have a claim to the copyright as joint right holders. The person who paid or offered to pay the commission shall be the copyright owner for that work.⁴² Copyright ownership may, in some cases be altered if the author assigns the rights by way of a contractual agreement. The provisions of s 21(1)(d) state: ‘Where in a case not falling within either paragraph (b) or (c) a work is made in the course of the author’s employment by another person under a contract of service or apprenticeship, that other person shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4.’⁴³ Notwithstanding the provisions of s 21(1)(d), s 21(1)(e) makes provision for cases where the agreement between the author and the other party do not fall within the scope of s 21(1)(b) and (c) to decide their own terms.⁴⁴ This gives the author and the other party the discretion to determine by way of a contractual agreement who owns the rights to the work. The agreement shall be subject to the provisions of s 20 of the Act, which relates to the scope of protection of moral rights.⁴⁵

As copyright ownership and performer’s right are separate rights, the artist can be the owner of performer’s right and not owner of the copyright in the work. If the artist assigns the copyright together with performer’s rights, the owner of the rights is still required to pay to the performer a share of needletime royalties as agreed, and in the absence of such agreement, the Tribunal can decide the applicable share.⁴⁶ Section 2 of the Performers’ Protection Act also states that the provisions of the Copyright Act shall not be restricted or affected by the provisions of the Performers’ Protection Act.⁴⁷

⁴¹ Copyright Act s 21(1)(a).

⁴² Ibid.

⁴³ Ibid s 21(1)(d).

⁴⁴ Copyright Act .

⁴⁵ Ibid s 20(1)(e).

⁴⁶ Ibid s 9A (2)(b)

⁴⁷ Performers’ Protection Act s 2.

2.6 Moral rights

Moral rights award the author the right to claim authorship, to object to any form of misuse, distortion, or any modification of the work that would be prejudicial and could negatively impact the reputation of the author.⁴⁸ The author is a brand and, as copyright is associated with the author, it is important for the reputation of the author to be protected to maintain a favourable and appealing standard. While the right does not give the author the power to object to modifications that are necessary for trade, the author has the right to have his or her authorship acknowledged in such modifications.⁴⁹ Section 20 of the Copyright Act authorises the author to claim authorship of his or her work, regardless of whether the author has transferred the ownership of the copyright in the work.⁵⁰

The moral rights to a work rest with the author, whether he is the copyright owner or not. Moral rights exist separately from the copyright that is in the work (usually referred to as ‘economic rights’) and are not transferred with copyright ownership.⁵¹ The moral right makes provision for two kinds of protection, the right of attribution and the right of integrity.⁵² The right of attribution gives the author the authority to claim authorship.⁵³ The right of integrity allows the author to object to any distortion or taking apart of the work and to object to any performance or any conduct that may be degrading to the work and prejudicial to the author’s integrity.⁵⁴

The moral right is linked more to the personal protection of the author’s image or integrity in that, regardless of who has copyright ownership of the work, the work is always associated with the author. This is the case with the author of a literary work, musical work or sound recording (hereafter collectively referred to as musical content).⁵⁵ The moral right is separate from the economic right in the work and cannot be transferred.⁵⁶ The author has the right to object to an action on the work that is prejudicial to his integrity. Since the economic rights and moral rights are separate, the author has the right to object when the conduct of an economic rights holder who is not the author, while dealing with the work, infringes on the

⁴⁸ Dean (1995) *supra* at 74

⁴⁹ *Ibid.*

⁵⁰ Copyright Act s 20(1)(e).

⁵¹ Dean (1995) *supra* at 39.

⁵² *Ibid.*

⁵³ Lee-Ann Tong ‘The effect of employee-authors’ moral rights on employer-owned copyright: Surviving article 6bis of the *Berne Convention*’ (2014) 26 *SA Mercantile LJ* 212–227 at 217–218.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

moral rights of the author. There is no fixed standard on how these actions should be measured in order for them to amount to an infringement.⁵⁷ Therefore, claims for the infringement of moral rights are dealt with on a case-by-case basis.⁵⁸

2.7 Purposes of copyright protection

Copyright protection is concerned with, amongst other things, the promotion of development in the creative industry, by providing protection to the works that are created, which in return provide income for creators.⁵⁹ The protection is given in the form of exclusive rights, which allows the author to control the use of these rights by third parties and receive payment for such use.⁶⁰ Though some copyright scholars have tried to describe how copyright protection is provided to motivate creators to continue to create works for public consumption, the courts have not provided much demonstration in practice how the incentives work to motivate the creation of the works.⁶¹ The protection that copyright law provides to creators allows for the improvement and progress of innovations. As the creators are able to receive profits from the works, they are motivated to create more works.

The requirement for originality in the work is not strict; courts have held that the author must make a certain degree of effort and that there must be sufficient application of their mind.⁶² The new work must not be a direct copy of existing work.⁶³ Provided that the work meets the requirements of originality and fixation, it shall be protected by copyright.

It follows that the author is at the centre of copyright protection and remuneration because copyright protection is awarded to expressed works and the author is the expressor of the idea. Where another person becomes the copyright owner, that person is an investor, not originator of the idea.⁶⁴ Therefore, if a contract assigning ownership to another party leaves the author in an adverse position financially, where she ends up not getting a fair reward for her work, this may demotivate her, which will defeat the purpose of copyright. If the copyright protection is granted mainly to incentivise the authors, then the administration of

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Shyamkrishna Balganesi 'Foreseeability and Copyright Incentives' (2009) 122 Harvard Law Review 1569-1633 at 1577.

⁶⁰ WIPO 'Managing intellectual property in the book publishing industry', available at https://www.wipo.int/edocs/pubdocs/en/copyright/868/wipo_pub_868.pdf (accessed 2 January 2022).

⁶¹ Ibid.

⁶² *Moneyweb (Pty) Limited v Media 24 Limited and Another* 2016 (3) All SA 193 para 15.

⁶³ *HAUPT t/a Soft Copy v Brewers Marketing Intelligence (PTY) LTD and Others* 2006 BIP 317 (SCA) para 35.

⁶⁴ CB Ncube & DO Oriakhogba 'Monkey selfie and authorship in copyright law: The Nigerian and South African perspectives' (2018) 21 *PER / PELJ* 10.

the exclusive rights that attach to the works must be in a manner that ensures that this purpose is not defeated by interference from another party.⁶⁵ Copyright authors must be fairly remunerated, as remunerating authors is at the heart of copyright protection. ‘Fair remuneration’ here and in this dissertation means the intention that fundamentally underlies the purpose of the protection granted by copyright, which is to ensure that the author receives an appropriate amount of income, so that he or she can enjoy the fruit of their work and be encouraged to create more works.⁶⁶

Fair remuneration is premised on the basis of a weaker contractual position against powerful role players who are involved in the copyright market, which has been called ‘the real value gap’ shown in the copyright market.⁶⁷ The principle is that an imbalance in the contractual positions is caused by information asymmetry, which sees record labels possessing more information in the handling and dealing of copyright works and also possessing more resources to strengthen their bargaining power. Fair remuneration involves addressing this imbalance by setting as a requirement that the author be adequately paid for creating the works and that he shall not be inappropriately remunerated because he possessed the weaker understanding of the copyright market at the negotiating table.⁶⁸ This rationale is found in various provisions of the Copyright Act. For example, s 43(c) requires the owners of copyright in a cinematograph film to remunerate the owner of copyright in the original dramatic work and provides for arbitration if parties are unable to reach an agreement as to what is appropriate. Section 9A also deals with representative collecting societies who may be involved in the negotiation of amounts of royalties to be paid for broadcasting or transmission of sound recordings.

2.8 Music royalties

Royalties are the income earned from the sales of the record or song,⁶⁹ or for broadcasting or communication of a performances to the public, for example on radio, television, concerts and other public performances of music. They also include mechanical royalties from a record

⁶⁵ Balganesch supra at 1577.

⁶⁶ Giulia Piora ‘Catching sight of a glimmer of light: Fair remuneration and the emerging distributive rationale in the reform of EU copyright law’ available at <https://www.researchgate.net/publication/338655563> (accessed 20 January 2022).

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Cosher Recording Studios ‘*Music Royalties – The Basics in South Africa*’, available at <https://www.cosherstudios.co.za/music-royalties-basics-south-africa/> (accessed 10 August 2020).

company to a songwriter or publisher when the mechanical right is used.⁷⁰ A mechanical right is a ‘right given, allowing a musical piece work (song) to be legally reproduced onto different mediums such as CDs, tapes, computer hard drives, cell phones, MP3 players, on-demand streaming services and other forms’.⁷¹ Unlike moral rights, economic rights in a musical work are attached to the copyright that exists in the work and are transferable together with copyright.⁷² These rights are attached to copyright because –

copyright is fundamental to earning income in the music industry. The rights in the music and the lyrics, the sound recordings, the performance and the published editions, together with the rights underlying the merchandising, are the source of the money that flows through the music industry.⁷³

Royalties are a form of remuneration that the copyright owner of the work is rewarded with for the work. This reward is given to the copyright owner because the economic right is attached to the copyright.⁷⁴ Record deals and how they influence the economic rights of artists and how they affect the royalties is discussed in the next chapter.

Section 9A(1)(a) of the Copyright Act provides that ‘in the absence of an agreement to the contrary, no person may broadcast, cause the transmission of or play a sound recording as contemplated in s 9(c), (d) or (e) without payment of a royalty to the owner of the relevant copyright’. Royalties exist to ensure that the copyright owner is compensated for any use of their work, unless they have authorised the user to make use of the work or such use qualifies under the fair dealing principle.⁷⁵

Where the author is not the owner of the copyright, and the record label owns the copyright, the copyright owner, performer(s) and the author are entitled to benefit from performance royalties such as from television and radio plays. These are called needletime rights or royalties.⁷⁶ The performer is entitled by virtue of the definition of ‘performance’ in the Performers Protection Act, which includes, among others, presentation by a loudspeaker, a

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Nothando Migogo ‘Getting your head around music rights’, available at <https://www.iol.co.za/sundayindependent/news/getting-your-head-around-music-rights-14985680> (accessed 8 August 2020).

⁷³ Laura N Gasaway ‘Copyright basics: From earliest times to the digital age’ (2009) 10 *Wake Forest Intell. Prop. LJ* 241.

⁷⁴ Colin Sher ‘Music Royalties – The Basics in South Africa’ available at <https://www.cosherstudios.co.za/music-royalties-basics-south-africa/> (accessed 10 August 2020).

⁷⁵ Copyright Act s 12(1).

⁷⁶ Tanya Wagenaar *supra* at iii.

radio, a television, diffusion receiver, or by the exhibition of a cinematograph film or by the use of a record.⁷⁷ Section 9A(2)(a) provides:

The owner of the copyright who receives payment of a royalty in terms of this section shall share such royalty with any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act No 11 of 1967).

There is no rate of royalties prescribed either by statute or common law, but the Copyright Act makes provision for the determination of the amount of the royalty that is due to the owner. What is most important to note from s 9A(1)(b) is that it provides for three parties who are eligible to determine the amount of royalties. These are the user of the sound recording, the performer (i.e. the recording artist) and the copyright owner. In practice, the amount of royalties is determined by the agreement between the copyright owner and the user of the sound recording with the copyright owner's stance determined by a prior agreement between the owner and the performer (i.e. the recording artist).⁷⁸ The copyright owner may then share the royalties with the performer. Another party that can determine the amount of royalties due is the collecting society representing the parties mentioned above.⁷⁹

Where there is no prior agreement that determines the amount of royalties payable, the user, the performer or the owner may refer the matter to the Copyright Tribunal or for arbitration.⁸⁰ Section 29(1)(a) of the Copyright Act provides that 'the judge or acting judge who is from time to time designated as Commissioner of Patents in terms of section 8 of the Patents Act, 1978, shall also be the Copyright Tribunal (in this Chapter referred to as the Tribunal) for the purposes of this Act'. The Tribunal has jurisdiction to hear matters that involve disputes arising between licensing bodies, or other persons from whom licences are required and persons requiring licences, or organisations claiming to be representatives of such persons.⁸¹ The Tribunal has the capacity to hear disputes surrounding payment of royalties. This means that the collecting society or the user who is not satisfied can approach the Tribunal to solve their dispute in determining the royalty payable or they can both agree to take the matter for arbitration.⁸² The Tribunal plays a role in determining the correct royalty

⁷⁷ Ibid s 1.

⁷⁸ Coshier Recording Studios *supra*.

⁷⁹ Copyright Act s 9A(1)(b).

⁸⁰ Ibid s 9A(1)(c).

⁸¹ Ibid s 30(1).

⁸² Ibid s 9A(1)(c).

that the user needs to pay to the collecting society for distribution to the owner and the performer or correcting the procedure to be followed in determining the royalty payable.⁸³

The 2002 amendment of the Performers' Protection Act brought about the inclusion of needletime royalties into that legislation.⁸⁴ The amendment saw the performer being awarded a right and royalty in that, the needletime rights are separate from the copyright or ownership rights.⁸⁵ A needletime royalty awards the author the right to be compensated every time their performance is being broadcast, communicated in public, a fixation is made, and a reproduction of a fixation is being made.⁸⁶ In the event that the performer gives consent for the fixation to be made, in this case, to a record label, it is deemed that the performer has authorised the record label to receive the performance royalties for the work. However, the record label is required to pay the royalties to the performer whose performance is included in the sound recording.⁸⁷ Where there is more than one performer of the work, the manager, authority or leader of the group shall provide consent with regards to the rights in s 5 of the Performers' Protection Act.⁸⁸ The manager, authority or leader shall share the proceeds emanating from the uses in s 5 with all the performers whose performance is in the work in accordance with their agreement.⁸⁹ If the performers did not have a prior agreement, the performers' share shall be determined in accordance with the Arbitration Act or the performers can elect, with a majority vote, to approach the Copyright Tribunal to make the determination of their remuneration.⁹⁰ The amount of royalties payable is determined by an agreement between the performer and the broadcaster, or between their representative collecting societies.⁹¹

The four collecting societies in the South African music industry that are relevant to this dissertation are considered here. These are the South African Music Rights Organisation (SAMRO), South African Music Performance Rights Association (SAMPRA), Independent Music Performance Rights Association (IMPRA) and Composers, Authors and Publishers

⁸³ *Foschini Retail Group (Pty) (Ltd) and Others v South African Music Performance Rights Association* [2013] ZAGPPHC 304 (25 October 2013) paras 63–64.

⁸⁴ Tanya Wagenaar *A Comparative Analysis of the Development of Performers' Rights in the United Kingdom and South Africa* (unpublished LLM dissertation, 2011) Nelson Mandela Metropolitan University at 111.

⁸⁵ *Ibid.*

⁸⁶ Performers' Protection Act s5(1)(a)-(c).

⁸⁷ Copyright Act s9A(2)(a).

⁸⁸ Performers' Protection Act s 6(1)

⁸⁹ *Ibid* s 6(2)

⁹⁰ *Ibid.*

⁹¹ Copyright Act s9A(2)(b)

Association (CAPASSO).⁹² SAMRO deals with performing rights and royalties, and handles the payment of money owed to artists and collaborators whose music has been on radio, TV, film or other media in the public space.⁹³ Radio and TV stations inform SAMRO of the songs that they have added into their rotational list and pay a certain fee to ensure that artists get paid for their songs that are on air.⁹⁴ Previously, SAMRO only focused on the performing and broadcasting rights; later two other rights were covered under SAMRO's collection – publishing or printing rights and reproduction rights.⁹⁵ SAMPRA handles needletime rights and royalties that affect the artist and record labels, such as sound recording royalties.⁹⁶ Needletime royalties are paid to fairly compensate the copyright owner for the use of its sound recording, the musician, and producer, to reward and acknowledge their contribution to the sound recording.⁹⁷ These royalties are paid for public performances of commercially released sound recordings.⁹⁸ IMPRA carries the same functions as SAMPRA. The main focus of IMPRA is to collect needletime royalties for distribute to recording artists..⁹⁹ recording artists include “lead vocalists, backing vocalists, instrumentalists, and studio producers who make a performing contribution to the recorded performance.”¹⁰⁰ A person cannot hold dual membership, they are either members of SAMPRA or IMPRA.¹⁰¹ CAPASSO deals with the mechanical rights in the work, which are rights involved when a song is reproduced by converting it from one format to another.¹⁰²

In *SAMPRA v Foschini Retail Group (Pty) Ltd*¹⁰³ a dispute arose between SAMPRA and Foschini and nine other retailers over the payment of royalties for the background music that they play in their stores. Upon deliberation on the royalty payable, SAMPRA gave the retailers a tariff that was not open to negotiation. The retailers made a referral to the Copyright Tribunal for the determination of the rate payable to SAMPRA by the retailers. The retailers succeeded against SAMPRA. The Tribunal set aside the tariff that SAMPRA had determined

⁹² Coshier Recording Studios *supra*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Matzukis *supra* at 51.

⁹⁶ Coshier Recording Studios *supra*.

⁹⁷ Matzukis *supra* at 41.

⁹⁸ *Ibid.*

⁹⁹ IMPRA website, available at <https://www.impra.co.za/> (accessed 08 April 2022)

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Coshier Recording Studios *supra*.

¹⁰³ *SAMPRA v Foschini Retail Group (Pty) Ltd* [2016] 2 All SA 40 (SCA).

and replaced it with a different one. Upon appeal by SAMPRA, the Supreme Court of Appeal held that:

No reasons were given in the judgment for this radical departure from the approach of SAMPRA and the retailers that there should be a progressive increase in the rate, based upon the increased size of a store. In addition, no reasons were furnished in the judgment why a particular tariff was determined for each category. The tariff set by the tribunal is considerably less than the tariff set by SAMPRA ... An examination of the tariffs determined by the tribunal reveals no rational or consistent basis for their computation, save that it appears the tribunal arrived at the initial rate of R389 up to 50 square metres, by averaging the initial rates for this category of SAMPRA and the retailers.¹⁰⁴

The Court, used the expert evidence provided by Professor Ross in order to determine what the reasonable circumstances were in the case¹⁰⁵ and set aside the order of the Tribunal and replaced it. The court set the tariff to be R150 for a store with an area of 50m² with an increase of R150 for the every next category of m² as the court determined it to be reasonable and in line with s 9A of the Copyright Act.¹⁰⁶

The failure of the Act to determine the rate of royalties payable to the copyright owner and recording artist leaves room for disputes which arise from each party wanting to unfairly benefit more than the other, which usually leads to the artist suffering more as they are the vulnerable party.¹⁰⁷ The South African legislature could adopt an approach similar to that of Indonesia, which has regulations on this, namely Government Regulation 56 of 2021 on Song and/or Music Copyrights Royalties Management (GR 56/2021). The Regulations provide guidelines for the implementation of the distribution of royalties. The guidelines include, amongst others, the establishment of music and/or song Database and royalty management.¹⁰⁸ The database will serve as basis of royalty distribution for the commercial use of the songs which will have every song that was recorded and published under the governing authority and will be updated every three months.¹⁰⁹ Royalty management will assist the database in keeping record of the use of the song by integrating any commercial use of the song into the

¹⁰⁴ SAMPRA case (supra) para 53.

¹⁰⁵ SAMPRA case (supra) para 54

¹⁰⁶ SAMPRA case (supra) para 56.2.a.

¹⁰⁷ *National Association of Broadcasters v South African Music Performance Rights Association* 2014 (3) SA 525 (SCA).

¹⁰⁸ Danny Kobrata 'The Government Issues Implementing Regulations on Song and/or Music Royalties Management' available at <https://www.irgglobal.com/article/the-government-issues-implementing-regulations-on-song-and-or-music-royalties-management/> (accessed 09 April 2022)

¹⁰⁹ Ibid.

database.¹¹⁰ This makes the calculation of royalties payable transparent and easy to do. The responsible South African Minister has not intervened, even after calls urging him to consider an amendment in the regulations with the insertion of a prescribed tariffs to be paid, as this will be a guideline and the first step in dealing with the continuous allegations of exploitation in the music industry. This will be by having a minimum prescribed rate for dealing with copyright works between artists and record labels that will regulate the rate which the parties offer and agree to in their contracts. A legislative provision that sets down the share of the royalties each party is entitled to will prevent the unfair amounts of royalties that artists get paid and provide them with the opportunity to claim against such unfairness.

Further, enforcement of Regulation 8(1) of the Regulations on the Establishment of Collecting Societies in the Music Industry which states that the collecting society must distribute the amounts it collected at least once a year in accordance with a distribution plan in order to ensure that the collecting societies distribute funds collected regularly and efficiently.¹¹¹ If both the owner of the copyright in the sound recording and the performer are members of the collecting society, the funds collected shall be distributed equally or in accordance with an existing agreement to the performers and to owners of the copyright sound or to their collective organisations.¹¹²

2.9 Copyright Amendment Bill and the Performers' Protection Amendment Bill

The Copyright Amendment Bill B13B/2017 and the Performers' Protection Amendment Bill B24B/2016 (the Bills) seek to address the issue of unfair remuneration of creators of copyright works. It is important to examine the Bills to see how the amendments they propose would help to solve the problem of exploitation of authors in the music industry. The continual allegations from various artists claiming to have been exploited under the contractual agreements they entered into with different record labels gave rise to an inquiry, which led to the Bills being drafted.¹¹³ The Bills addresses the issues raised in the report of the Copyright Review Commission, which followed the task team established in 1998 by the Minister of Arts and Culture to look at the problems in the music industry.¹¹⁴ The proposed

¹¹⁰ Ibid.

¹¹¹ Copyright Act: Regulations: Establishments of collecting societies in music industry 2006 available at <https://www.gov.za/documents/copyright-act-regulations-establishments-collecting-societies-music-industry> (accessed 08 April 2022)

¹¹² Ibid Regulation 8(5)(b).

¹¹³ Malebakeng Agnes Forere 'Reforming the Right to Remuneration in the South African Copyright Amendment Bill' (2021) *Digital Commons @ American University Washington College of Law*, available at <https://digitalcommons.wcl.american.edu/research/67/> (accessed 8 July 2021) 4.

¹¹⁴ Department of Trade and Industry Copyright Review Commission Report (2011) available at <https://www.gov.za/documents/copyright-review-commission-report-2011> (accessed on 1 March 2020).

amendments are considered below. If passed, the Bills, as they are, will address the major issues that recording artists face, in particular exploitation with regard to unpaid royalties. Based on the reasons for the referral of the Bills back to the National Assembly by the President, two concerns affect this dissertation and the plight of artists, the first being the concern that the Bills have a retrospective and arbitrary effect on copyright owners, as they would be entitled to less royalties than before.¹¹⁵ Secondly, the President raised concerns about the copyright exceptions that may constitute arbitrary deprivation of property, which may violate the right to freedom of trade, occupation and profession, and may be in conflict with the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty, both of which South Africa intends to become party to.¹¹⁶

The Copyright Amendment Bill aims to protect the artists'/authors' rights to remuneration by proposing an amendment that provides for the regulation of all collecting societies and makes them accountable to their members who are authors, performers and copyright owners.¹¹⁷ The Bill seeks to regulate music industry contracts by introducing standardised contracts that eliminate the previously popular buyout contracts,¹¹⁸ and regulating royalties: clause 5 proposes that the Act is amended, as discussed below. The Bill proposes that assignment of literary and musical works should be subject to a limit of 25 years.¹¹⁹ The Bill is intended to apply retrospectively upon enactment, ensuring the reversion of rights on the basis of non-use and to facilitate dispute settlement.¹²⁰ The Bill does not provide much for accountability with regard to musical and literary works, but it makes provision for the user of a sound recording to log their usage and submit this log to the performer and the owner of the sound recording for the calculation of royalties payable.¹²¹ The Bill makes provision for the author to apply to the Tribunal for reversion of rights where the right owner is not using the work for the intended purpose.¹²²

¹¹⁵ SA government 'President Cyril Ramaphosa refers Copyright and Performers' Protection Amendment Bills to Parliament' (23 June 2020), available at <https://www.gov.za/speeches/president-cyril-ramaphosa%C2%A0refers-copyright-and-performers%E2%80%99-protection-amendment-bills> (accessed 16 November 2021).

¹¹⁶ Ibid.

¹¹⁷ Copyright Amendment Bill B13B of 2017 clause 22D(1).

¹¹⁸ Clause 33 of the Bill. See also Malebakeng Agnes Forere 'Reforming the Right to Remuneration in the South African Copyright Amendment Bill' (2021) Digital Commons @ American University Washington College of Law [Available] <https://digitalcommons.wcl.american.edu/research/67/> (accessed 08-07-2021)

¹¹⁹ Clause 23, through the substitution of s 23(3).

¹²⁰ Ibid.

¹²¹ Ibid 10.

¹²² Ibid.

Clause 5 of the Copyright Amendment Bill proposes an insertion of s 6A in the Copyright Act, which will deal with royalties in relation to literary and musical works (provisions of clause 5 of the Bill shall hereafter be referred to as clause 6A of the Bill). The proposed provision states:

Notwithstanding the assignment of the copyright in a literary or musical work the author shall have the right to a percentage of any royalty received by the copyright owner, subject to the provisions of this Act, for the execution, or authorisation, of any of the acts contemplated in section 6.¹²³

The Copyright Amendment Bill makes clear provision for the involvement of the author in the administration of royalties and makes the author the centre of the royalties of the work he or she created. Clause 25 proposing the insertion of s 22D(1) provides that '[a] collecting society is subject to the control of the authors, performers or copyright owners whose rights that collecting society administers', thus including authors in the administration of royalties and the operation of the collecting society.¹²⁴ The collecting society is required to regularly provide the author, performer or copyright owner with full and detailed information concerning its activities and the administration of the rights pertinent to that specific author.¹²⁵ The Bill makes it compulsory for the author of a musical and literary work to be paid royalties in respect of the use of the work, regardless of whether the author elects to receive the royalty share or not.¹²⁶ The Bill states that, in spite of the authorisation the author gave for the use of the work and even with an existing agreement to the contrary, the author of a literary or musical work shall still be eligible for a fair share of the royalties.¹²⁷ Unlike the current Copyright Act provision, the Bill requires the author and the copyright owner to enter into a written agreement that will determine the percentage of royalties due to each of them.¹²⁸ To remedy the shortfall of the Copyright Act in determining the percentages of royalties due to each party prior to the assignment of ownership, the proposed s 6A will have a retrospective effect:

A person who obtained the copyright in a literary or musical work prior to the commencement of the Copyright Amendment Act, 2019, must within 48 months after said commencement

¹²³ Clause 6A.

¹²⁴ Ibid.

¹²⁵ Ibid clause 22D(1)*I*.

¹²⁶ Ibid.

¹²⁷ Ibid clause 6A(2)(b).

¹²⁸ Ibid clause 6A(2)(a).

negotiate a percentage of royalty as contemplated in subsection (1) with the author of the copyrighted literary or musical work in question.¹²⁹

With regard to sound recordings, the Copyright Amendment Bill provides that:

In the absence of an agreement to the contrary or unless otherwise authorised by law, no person may, without payment of a royalty to the owner of the relevant copyright—

(i) broadcast[,] a sound recording as contemplated in section 9(c);

(ii) cause the transmission of a sound recording as contemplated in section 9(d).¹³⁰

Paragraph (aA) states that the user must submit a complete report to the performer, and copyright for purposes of royalty calculation which shall be distributed based on the existing agreement between these parties. The copyright owner, which is the record label in this case, authorises the use of the work and the royalties from such use will be shared with the author.¹³¹

On the other hand, the Performers' Protection Bill makes similar provisions to those provided in the Copyright Amendment Bill particularly in relation to the issues discussed in this dissertation. The Performers' Protection Bill makes provision, amongst others, for the fair remuneration of performers where the performance has been sold or rented out, the transfer of rights, the introduction of standardised contracts and the inclusion of audio-visual fixation and sound recording. The Bill extends the scope of s 3 of the principal Act by making further and express provision for moral and economic rights of the performer.¹³² Independent of his or her economic right, the performer shall have the exclusive right with regards to his or her live performances or performances fixed in audiovisual fixations or sound recordings to "claim to be identified as the performer of his or her performances, to object to any distortion, mutilation or other modification of his or her performances that would be prejudicial to his or her honour or reputation."¹³³ The Bill gives to the performer the right to authorise another person to perform his or her exclusive right as provided.¹³⁴

Clause 3 of the Bill proposes an insertion of s 3A in the principal Act which will make provision for transfer of rights where the performer has given consent.¹³⁵ Where the performer consents to the fixation of his or her performance in an audiovisual fixation or sound

¹²⁹ Ibid clause 6A(5)(A).

¹³⁰ Ibid clause 11, proposed 9A (1)(a)(i) & (ii).

¹³¹ Ibid clause 11, s 9A(1)(aA)(ii).

¹³² Copyright Amendment Bill clause 2.

¹³³ Ibid clause 2(a)-(b)

¹³⁴ Ibid clause 2(4)

¹³⁵ Ibid clause 3.

recording, the exclusive rights granted to the performer shall also be transferred through a standardised contract that will also include terms of payment of royalties.¹³⁶ The Bill further provides for reversion rights, where the performer transferred his or her exclusive rights, the transfer shall be for valid for a period of 25 years after which, the rights shall revert to the performer.¹³⁷

The President's reaction to the Bill was that he acknowledged the noble objectives of the Bill.¹³⁸¹³⁹ As far as the provisions discussed here are concerned, the issue raised and proposed amendment was that clause 2 of the Performers' Protection Amendment Bill should be amended to be gender neutral, to which the Portfolio Committee on Trade Industry and Competition agreed.¹⁴⁰ An amendment was proposed for clause 3 to provide a distinction between audiovisual work and sound recordings in relation to royalties and equitable remuneration.¹⁴¹ The Department of Trade, Industry and Competition agreed to these proposed amendments.¹⁴²

The Portfolio Committee on Trade, Industry and Competition is currently deliberating and consulting on the President's reservations on the Bill and the proposed amendments and considering the proposed amendments that the Department of Trade, Industry and Competition has agreed to, they do not change the impact the Bill intends to make as far as this dissertation is concerned. The proposed provisions will correct the anomalies because, clause 3, requires that there must be standardised contracts which will promote fair remuneration.¹⁴³ The Bill will be enacted into the Act as the National Assembly is currently dealing with the proposed amendments in order to clear the President's concerns.¹⁴⁴ Some of these reservations have been attended to, including clause 3A(3)(b) which has been amended to refer to audiovisual fixations and sound recordings separately and states that:

¹³⁶ Ibid clause 3A(1) –(2)(a)

¹³⁷ Ibid clause 3A(3)(c)

¹³⁸ President of the Republic of South Africa 'Referral of the Copyright Amendment Bill [B13B-2017] and the Performers' Protection Amendment Bill [B24- 2016] to the National Assembly' available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://libguides.wits.ac.za/ld.php?content_id=55785870 (accessed 19 May 2022)

¹³⁹ Ibid

¹⁴⁰ Parliamentary Monitoring Group 'Copyright & Performers' Protection Amendment Bills: deliberations; Committee Oversight Visit Report' available at <https://pmg.org.za/committee-meeting/34956/> (accessed on 19 May 2022)

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Performers' Protection Amendment Bill clause 3.

¹⁴⁴ Parliamentary Monitoring Group 'Copyright & Performers' Protection Amendment Bills: proposed amendment' available at <https://pmg.org.za/committee-meeting/33911/> (accessed 20 May 2022)

“(3) The written agreement contemplated in subsection (2)(b) must set out the

- (i) Royalties or equitable remuneration in respect of audiovisual works; and
- (ii) Equitable remuneration in respect of sound recordings

due and payable to the performer for any use of the fixation of the performance.”¹⁴⁵

Therefore, when the National Assembly has made the amendments to satisfy the President’s reservations, the Bill will be sent to the National Council of Provinces in line with the provisions of section 76 of the Constitution.¹⁴⁶

The Copyright Amendment Bill’s provisions on the retrospective negotiation of royalties for contracts that were concluded two years before the enactment of the amendment, reversion of rights and introduction of standardised contracts, if enacted, will address the issue of the alleged unfair agreements which lead to artists not being adequately remunerated for the creation of the works.¹⁴⁷ With the Bills having been referred back to the National Assembly and subject to possible changes, it is important to note that some of the issues noted for referral are valid.¹⁴⁸ The retrospective application of the Bills is necessary; however, the Bills need to specify that the application shall be on those contracts that unfairly remunerated the authors and were not in line with the provisions of the Bills, as the purpose is to correct what was done wrong and leave the contracts that were justly carried out.¹⁴⁹ Both Bills will play a positive role in facilitating a fair remuneration of artists and performers in the music industry and a just administration of their works.

2.10 Concluding remarks

The author has a claim to his moral rights, as these are not transferable. The moral rights, however, only protect the personality and integrity of the author. They are limited in their scope of application because there are some considerations that have to be made before the author can claim remedies for the infringement of his or her moral rights. Regardless of assigning the copyright to another person, the author is entitled to a certain percentage of royalties. The Copyright Amendment Bill and Performers’ Protection Amendment Bill seek to bring a remedy to most disputes that arise when royalties are to be paid or have been paid but

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Malebakeng Agnes Forere 'Reforming the Right to Remuneration in the South African Copyright Amendment Bill' (2021) *Digital Commons @ American University Washington College of Law* [Available] <https://digitalcommons.wcl.american.edu/research/67/>, (accessed on 08 July 2021).

¹⁴⁸ SA government (supra).

¹⁴⁹ Forere (2021) supra at 11.

the author has not received any income from his or her work that is being put out to the public. The Bills also affirm the stand of the author and performer in terms of eligibility to benefit from the royalties for their work, regardless of him or her having assigned the copyright to a record label.

CHAPTER 3: CONTRACT LAW v INTELLECTUAL PROPERTY LAW

3.1 Basic contract law

The Copyright Act recognises the freedom of the artists, record labels to contract and provide the option for them to set out their terms of payment of royalties in the form of a contract.¹ The user of the sound recording, the performer and the owner of the copyright, or the representative collecting societies have the discretion to enter into a contract and agree on the payment of royalties.² The Performers' Protection Act also provides the same discretion for the performer to exclude the rebroadcasting, when he or she gives consent to the broadcasting of his or her performance, in a contract.³ Contract law plays a major part in the music industry. It creates relationships between the artists and record labels that will determine the entitlement of each party to the work concerned. Before the negotiation of a contract begins, the record label will make an offer to the artist to sign them under their banner. Thus, an offer is the starting point of a contract. For the purposes of this chapter, general principles of contract will not be discussed. The focus is on contract law in the music industry. Contract is defined as:

A lawful agreement, made by two or more persons within the limits of their contractual capacity, with the serious intention of creating a legal obligation, communicating such intention, without vagueness, each to the other and being of the same mind as to the subject-matter, to perform positive or negative acts which are possible of performance.⁴

For a contract to be valid, the parties must have the legal capacity to enter into binding contracts, the formalities for the specific music contract must be met, the agreement must be one that is recognised by the law, the obligations must be possible to fulfil, the agreement must have determinable terms and obligations so that they can be ascertained and enforced, and the minds of the parties must meet, or at least appear to meet, on all the terms of the contract.⁵ Neither party must be vague as to the terms of the contract. The meaning of the requirement for the meeting of the minds of the parties is to some extent a concern because

¹ Copyright Act s 9A(1)(b)

² Ibid.

³ Performers' Protection Act s 5(2).

⁴ JA Tromp *Freedom of contract and the enforceability of exemption clauses in view of section 48 of the Consumer Protection Act* (unpublished LLM Mini-dissertation, 2014) North West University.

⁵ Dale Hutchison, Chris Pretorius, Tjakie Naude et al *The Law of Contract in South Africa* 3 ed (2017).

the parties are not always at the same level of understanding and not in the same position to make demands.

However, a contract can meet these requirements and still be not enforceable. The law grants a party to a contract the right to repudiate the contract if the party can successfully prove an existence of a ground that renders the contract void or void *ab initio*. These grounds are undue influence, duress, misrepresentation and mistake.⁶ Undue influence is when one party uses their position to put pressure on the other party to make a decision in their favour.⁷ Undue influence can be as a result of an unequal relationship that exists between the parties, for example, an attorney–client relationship, a doctor–client relationship or an employer–employee relationship.⁸ One party has a certain level of authority that provides them with the advantage of having the other look up to them. Undue influence renders the contract voidable if the party claiming undue influence successfully proves that the other party had the capacity to influence the agreement, the other party exercised influence over him, that influence led to him entering into the agreement, and the agreement was disadvantageous to him.⁹ Duress occurs when a party to the agreement exercises force or threatens the other party into agreeing to their terms of agreement.¹⁰ Duress renders the contract voidable at the instance of the complainant. In order for a claim of duress to be successful, these elements must be met: the existence of violence and reasonable fear; the fear must be caused by a threat imposed upon the party or the party’s relative; the threat must be immediate; the threat must be contrary to public policy; and the threat used must have caused the party to conclude the agreement.¹¹

Misrepresentation refers to false information provided by a party before or at the time of entering into the contract in order to induce the other party to enter into a contract.¹² Misrepresentation can be expressed (fabrication) or failure to disclose a material fact.¹³ Where the party provides an untrue statement or conceals a fact that would assist the other party in making the decision with regards to the agreement, that would amount to fraudulent misrepresentation. For the misrepresentation to be fraudulent it must be made knowingly, or

⁶ Duru Onyekachi Wisdom Ceazar ‘Vitiating elements of contract as a source of contractual validity’, available at <https://ssrn.com/abstract=2156749> or <http://dx.doi.org/10.2139/ssrn.2156749> (accessed 2 December 2021).

⁷ Tromp *supra* at 130.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid 127.

¹¹ Ibid.

¹² Hutchison, Pretorius, Naude, et al *supra* at 116.

¹³ Tromp *supra* at 112.

without belief in its truth or recklessly.¹⁴ Mistake is a doctrine in contract law which, if successfully proven, allows the party to a contract to repudiate on the ground that if the party had the true understanding of the facts, he would have not entered into to the contract.¹⁵ The mistake must be material such that it renders the contract void *ab initio*.¹⁶ The party who claims mistake must prove a mistake on the material facts or identity of the contract, or mistake on the type of contract that was signed or the contents thereof.¹⁷ The onus of proof is on the party making the claim. Upon proving the existence of mistake, the obligations placed by the contract will not be enforced. The next paragraphs discuss consensus and what it entails.

3.2 Consensus

Consensus is at the very base of contract law because it gives the contract its full validity. The minimum standard of consensus is that the minds of the parties must at least appear to have met.¹⁸ The requirements for valid consensus are that the parties must intend to contract with each other, they must be of the same understanding as of the material aspects of the contract, and they must be conscious of the fact that their minds have met.¹⁹ If these requirements have been met, then consensus has been reached and, together with the other requirements having been met, the contract will be valid.

For proper consensus to be achieved, the following must be established. The offer and acceptance must be complete, clear and certain; the offer and acceptance can be expressed or tacit; and the offer and acceptance must be made with the intention of creating binding legal relations. An offer may be made to a particular person or group of persons, and the offer and acceptance must be communicated. An offer can fall away before it is accepted. Mistake and misrepresentation can affect consensus, as is the case with duress and undue influence.²⁰ Offer and acceptance are important: the offeror must make all the terms of the offer clear so that when the offeree accepts the offer, he or she can fully understand the terms of the offer. The acceptance too must be complete, clear and certain. The court, when ascertaining this

¹⁴ Ibid.

¹⁵ Ibid

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Matzukis supra at 176–188.

consensus, will evaluate these elements together with requirements for valid consent in order to establish if the minds of the parties had met.

However, with the minimum standard of contract law stating that the minds of the parties must at least appear to have met, the risk is that the minds might appear to have met, while they have not. When the parties are dealing with a contract, with the intention of entering into an agreement with the other party, they always want to have a better side of the negotiation and benefit more from the resulting agreement. Other jurisdictions have a principle of contract law referred to as false consensus bias, which is where the parties to a contract each have their own understanding of the terms of the contract and they believe that those are the true terms and their minds have met in those terms.²¹ When this happens, the parties often do not notice that they did not understand their rights and obligations under the contract until a dispute arises.²² This is evident by how often musicians who had signed to a specific label would later claim exploitation by the label and that the label had diverted from the true terms of their agreement.

The concept of false consensus bias is also recognised in psychology as a belief that particular views are important and dominant while, in actual fact, they are not.²³ In the case of music contracts, often the record label makes the offer to the artist, and the artist, for whom the goal is getting the contract concluded and signed, agrees without giving further thought to the terms. She thinks she understood them, only to realise at a later stage that the terms were unfairly against her.²⁴ False consensus bias entails the belief that one has understood the terms of the contract and that one's interpretation of the contract is the true and correct interpretation. When parties to a contract are faced with scenarios that have led to differences of opinion among the courts, the parties' understanding of the contract and the terms therein is not the same and, because the parties are subject to false consensus bias, they believe that their individual interpretations are the normal interpretation, even when they are not.²⁵ This leads to the parties to a contract having differing understandings of the terms and obligations of the contract, while not realising they understood them differently until a

²¹ Lawrence Solan, Terri Rosenblatt & Daniel Osherson 'False consensus bias in contract interpretation' (2008) 108 *Columbia Law Review* 1268-1300.

²² Ibid.

²³ Ibid.

²⁴ Joachim Krueger & Russell W Clement 'The truly false consensus effect: An ineradicable and egocentric bias in social perception' (1994) 67 *Journal of Personality and Social Psychology* 596-610.

²⁵ Lawrence Solan *supra* at 1269.

dispute ensues.²⁶ The issue of the belief that the minds have met on certain terms by each of the parties works differently for each one of them. The deciding factor would be the words used in the contract and how the court interprets the contract, which in some cases would bring in a third interpretation and understanding of the same contract.

The concept of false consensus bias has not been specifically captured under South African law. However, South African law does recognise and make provision for improperly obtained consent, obtained by, among others mistake or misrepresentation. Where mistake is entirely on the part of the party, such mistake may not render the contract invalid.²⁷ Where the mistake in the terms of the contract or material part of the contract was induced by misrepresentation by the other party, such mistake must render the contract invalid at the party's discretion.²⁸

In an interview on the Real Goboza TV show on SABC1, Amanda Black, who was formerly signed to the Ambitious Records label, stated that the contract was not the reason why she left, but when she looked at it after she had left, she realised that the contract was wrong because it never favoured her, as the artist, but only favoured the record label.²⁹ The artist also said that she had signed the contract, so even though she later understood the contract was not in her favour, she could not resile from it. She, however, made the decision to sign to the label before even seeing the contract,³⁰ which is proof that the parties to a music contract are never at the same level at the negotiation table. The artist is desperate and vulnerable, looking for the closest contract that would assist them realise their dream. One would argue that, regardless of the circumstances, the right to the freedom to contract stands. This argument will be dealt with in ensuing paragraphs.

According to an entertainment lawyer, Ryan Tucker, 'Some of the artists that have come to me are from rural Eastern Cape. They don't have access to entertainment lawyers like people in the city do. They don't have access to the type of information that they need in order to make the proper decisions.'³¹ The artists that are new and that are not known in the industry do not have bargaining power against the record label because they have no fan base

²⁶ Ibid.

²⁷ Hutchison, Pretorius, Naude, et al *supra* at 146.

²⁸ Ibid.

²⁹ Amanda Black 'RGB S14 E34 – Studio Guest – Amanda Black' in Mudau, M (ed) *Real Goboza*, available at <https://www.youtube.com/watch?v=f77KneofsYA> (accessed 3 March 2021).

³⁰ Ibid.

³¹ Ibid.

nor music sales that back up their worth at that moment.³² The intention of the record labels may not be to take advantage of the vulnerable and desperate artist, but they usually draft contracts that favour the label more.³³ The Chairperson of the South African Music Awards and manager of the record label Mabala Noise Thobela Dlamini said that the common thing that he noticed with new artists was that all that was important to them was being famous; they did not pay much attention to the terms of the contract and what their implications were.³⁴ They prioritise becoming famous so that they can sell more records and escape poverty. With the contracts being drafted in favour of the record labels, and the artists being in this desperate state to become successful, it is easy to have them sign the contract without even thinking twice about some of the terms that are unfair.

3.3 Freedom to contract *v boni mores*

South African contract law affords parties to a contract the freedom to contract under their own terms and they may include any clauses of their choice, provided that the terms are legal and enforceable.³⁵ This freedom means that the person is free to choose to enter or not to enter into contracts and any person can contract with any other person who has the legal capacity to enter into a binding contract.³⁶ When entering into a contract, each party exercises their freedom and it is this freedom that may be used against a person who has entered into an unscrupulous contract. However, the freedom to contract may promote the existence of contracts that are unfair towards parties who were desperate and vulnerable when they signed the contract.

The unfairness of a contract does not automatically render it invalid. It is a question that needs to be addressed based on the merits of that specific case and the depth of the unfairness.³⁷ A contract's invalidity is tested against the set requirements listed above. If the contract meets these requirements, it is valid and enforceable.³⁸ With this being the case, contracts that favour one party while prejudicing the other enjoy full recognition of the law as being valid. Very little consideration is given to public policy such as *boni mores*.

³² Tuulikki Pietilä 'Whose work and what kind of rewards' (2009) 12 *Information, Communication & Society* 229–250 at 234.

³³ Black *supra*.

³⁴ Thobela Dlamini 'Discussion: Role of the record label in music industry, pt 1', available at <https://www.youtube.com/watch?v=FXMViNa1EPc> (accessed 20 March 2021).

³⁵ Tromp *supra* at 1.

³⁶ *Ibid*.

³⁷ Hutchison, Pretorius, Naude et al *supra* at 50.

³⁸ Tromp *supra* at 4.

In *Barkhuizen v Napier* it was stated that ‘few issues seem to have united academic commentators as much as a jointly perceived need to ensure that courts refused on grounds of public policy to enforce contracts, or contractual terms, that were unfair or unconscionable’.³⁹ Some of the leading academics in contract law believe that the manner in which standard contracts are operating under the current laws is unfair.⁴⁰ The principle of *boni mores* holds that a contract must be in line with public policy and the conviction of society.⁴¹ In this case, the contract that was entered into while one party deliberately made the terms of the contract unreasonable and took advantage of the other party’s inferior position, may be an unfair contract and contrary to public policy.

For the purpose of this dissertation, the terms ‘*boni mores*’ and ‘public policy’ will be used interchangeably to mean the legal convictions of the community and the values of the public as envisaged in the Constitution. The principle of *boni mores* or public policy is founded in the Constitution and it seeks to promote and protect the right to dignity, equality and freedoms as stipulated in s 1(a) of the Constitution.⁴² Section 39(2) also requires any court, tribunal or forum to promote the spirit and objects of the Bill of Rights when interpreting any legislation or developing common law.⁴³ In addition to that, s 8(2) of the Constitution binds both the natural and juristic persons, together with all law and the authoritative spheres of the country to the applications of the Bill of Rights.⁴⁴ It is safe to state that all laws derive from the Constitution, it is the cornerstone against which every law and conduct must be tested and be in line.⁴⁵ Copyright work also enjoys protection under s 25 of the Constitution, which prohibits arbitrary deprivation of property. In order to determine whether a term in a contract is contrary to public policy, one needs to align it against the principles set out in the Bill of Rights. Terms of a contract that are not in line with the Bill of Rights are unenforceable.⁴⁶ In *Barkhuizen v Napier*, Ngcobo J held that:

The proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the

³⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 157.

⁴⁰ *Barkhuizen* *ibid*.

⁴¹ Ann Strode, Jacintha Toohey, Priya P Singh et al ‘Boni mores and consent for child research in South Africa’ (2015) 8 *South African Journal of Bioethics and Law* 22-25 at 23.

⁴² Constitution of the Republic of South Africa, 1996.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ *Ibid* s 2.

⁴⁶ *Barkhuizen* *supra* para 29.

doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.⁴⁷

The testing and application of the terms of the contract against public policy does not exclude the principle of *pacta sunt servanda*. The parties are still obligated to keep their end of the agreement, except for those that are illegal and contrary to public policy. The Supreme Court of Appeal in *Afrox Health Care Bpk v Strydom*⁴⁸ did concur that unequal bargaining power between the parties during the conclusion of the contract is a factor in the consideration of public policy.⁴⁹

One may hold the same viewpoint as was stated by the Supreme Court of Appeal in *Brisley v Drotzky* where it applied the *Shifren* principle, which provides that ‘contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject matter of a contract, which they may alter only by again resorting to writing’.⁵⁰ In its judgment, the court held that ‘the enforceability of a contract cannot be made dependent on the *boni mores* as this would cause unacceptable chaos and uncertainty’.⁵¹ Olivier J in a concurring judgment, while recognising that overturning the principle of non-variation clause may result in uncertainty in contract law, held that the values enshrined in the Constitution should be upheld and whether the non-variation clause should be upheld should depend on the *boni mores*.⁵² The uncertainties that may arise would be addressed by precedent that will take into account the values in the Constitution and the *boni mores*, as this has always been the case with other principles of law.⁵³ The courts ought to be more proactive in protecting parties to a contract who are in a comparatively weak negotiating position.⁵⁴ The judgment in *Brisley v Drotzky* was not well received by contract and constitutional law lawyers.⁵⁵ The lawyers were mostly dissatisfied with the court’s unwillingness to consider that contract law, as is the case with other branches of law, needed

⁴⁷ Ibid para 30.

⁴⁸ 2002 (6) SA 21 (SCA).

⁴⁹ Hutchison, Pretorius, Naude et al supra at 210.

⁵⁰ Marie Sharp *A critical analysis of the role of the boni mores in the South African law of contract and its implications in the constitutional dispensation* (unpublished LLM Mini-dissertation, 2014) University of KwaZulu Natal.

⁵¹ *Brisley v Drotzky* 2002 (4) SA 1 (SCA).

⁵² Miranda Mayuri Pillay *The impact of pacta sunt servanda in the law of contract* (unpublished LLM Dissertation, University of Pretoria, 2015) at 38.

⁵³ Deeksha Bhana & Marius Pieterse ‘Towards a reconciliation of the contract law and the constitutional values: *Brisley* and *Afrox* revisited’ (2005) 122 SALJ 873 at 895.

⁵⁴ Pillay supra at 6.

⁵⁵ Ibid.

to re-establish its legitimacy in light of the constitutional values founded on dignity, equality and freedom, under the new constitutional dispensation.⁵⁶ In a more recent case, *Jordan v Farber*, the court stated that even though the applicant had signed the contract and acknowledged that the terms of the contract were reasonable and important for the benefit of the parties, the court saw it necessary to enquire whether, despite the signing of the contract, such contract was consistent with the Constitution, and was reasonable and not contrary to public policy.⁵⁷ This means that if the artist creates work, according to the standard that the record label requires, the greater part of the success of the work depends on how it is marketed and promoted.⁵⁸ Contract law, based on common law as it is, must also comply with the Constitution. As such the courts have the duty to uphold the Constitution and apply all the law and actions in accordance with the Constitution.⁵⁹ The Constitutional Court, when dealing with a similar matter in *Botha v Rich*, held that:

All law, including the common law of contract, derives its force from the Constitution and is thus subject to constitutional control. It is of public importance to determine whether cancellation of a contract, governed by the Act, and the resultant forfeiture of the payments – of more than half of the purchase price of the property – is fair and thus constitutionally compliant.⁶⁰

With the Constitution being the supreme law and public policy envisaged in its provisions, clauses of contracts ought to be in line with the Constitution. Section 2 of the Constitution requires every conduct or law to be in line with the rights and values enshrined in the Constitution.⁶¹

The principles of contract law, and the freedom and sanctity of contract, provide legal certainty, predictability and efficiency. However, they fall short in achieving and promoting the values set in the Constitution.⁶² These principles reflect the autonomous approach of contract law, which holds that everyone has the freedom to contract with whom they want and on their own terms, but in truth, this is more in theory than practice as both parties may

⁵⁶ Ibid.

⁵⁷ *Jordan v Farber* [2009] ZANHC 81 (15/12/2009)

⁵⁸ Ibid.

⁵⁹ Constitution of the Republic of South Africa, 1996 s 3.

⁶⁰ *Botha v Rich* NO 2014 (4) SA 124 (CC).

⁶¹ Constitution of the Republic of South Africa.

⁶² Marie Sharp 'A critical analysis of the role of the boni mores in the South African law of contract and its implications in the constitutional dispensation' (unpublished LLM Mini-dissertation University of KwaZulu Natal, 2014) at 12.

not be in a position to contract on their own terms.⁶³ The artists still seek to be signed by record labels and rely on record labels because record labels still control the majority of the music industry. Major record labels within the South African market control on average 85 per cent of album sales per month and 85 to 90 per cent of airplay and because of this dominance, most artists see their careers being realised only if they are signed to a record label. If the parties meet the general requirements of contractual validity, which include consent and capacity to contract, their contract is valid and enforceable. This is the case, even where the record label had more bargaining power than the artist, which may lead to exploitation.⁶⁴ The artists get signed and agree to carry their obligations under the contract to create works and to be available for performances and participate in the promotion of such work, while the record label commits to use its resources to promote and market the work, and organise promotions and interviews.⁶⁵

It is indeed correct that if a commercial enterprise is to invest a considerable number of resources, the other party should keep their promises and always be aware that if they fail to do so, the label can use services of the law to hold the artist to their part of the agreement.⁶⁶ The law provides assistance where a need to intervene in enforcing contractual agreements arises, provided that the circumstances are fair and reasonable.⁶⁷

The current principles take no regard of the *boni mores* or public policy, while it is argued that the *boni mores* encompass the values that can promote the transformation of the law of contract in the light of the Constitution and to a model that will reflect substantive fairness and contractual justice.⁶⁸

3.4 Introduction to music contracts

Parties in the South African music industry previously used to enter into two types of music agreements: recording agreements and licensing agreements.⁶⁹ In a recording contract, the

⁶³ Pillay supra at 6.

⁶⁴ Matzukis supra at 74.

⁶⁵ Ibid.

⁶⁶ Pillay supra at 7.

⁶⁷ Ibid

⁶⁸ Sharp supra at 23.

⁶⁹ Pietilä (2017) supra at 3.

artist and the record company enter into an agreement where the record company will cover all the recording costs and in return, the record company will own the copyright in the sound recording. Under this agreement, the artist is only eligible to receive the recording royalties after the company has deducted various production costs.⁷⁰ The production costs involved after the artist has written the song include arranging, racking, editing, mixing and mastering.⁷¹ Production also includes booking studio time for the artist to record his songs.⁷² Once the costs have been settled, the artists may be considered for royalties, which may be not that much to even make a difference. In this kind of an agreement, the artist has the lower bargaining power and usually there is no time frame given for the artist to start receiving the full or increased percentage of the royalties accruing from their work.

A licensing contract may exist between the artist and the record label, in which case the artist would be responsible for the production of the sound recording, and the label would be responsible for its promotion and distribution.⁷³ The advantage of this type of contract is that the artist gets a larger portion of the royalties and the ownership of copyright in the work is not (entirely) transferred to the record label.⁷⁴ Such a licensing contract puts the artist in a better position financially, as the copyright ownership remains with him or her and any income that accrues from the work belongs to the artist as the copyright owner.

3.4.1 Current music contracts

Over the years, other forms of agreements have been introduced into the music industry to govern the relationship between the artist and the record label. These are the exclusive recording agreement, the development agreement, the production agreement and the 360 agreement.⁷⁵ The exclusive recording agreement is a private and unshared agreement between the artist and the recording company that gives the recording company exclusive rights to reserve the control of the artist's journey throughout the creation of the relevant sound recording.⁷⁶ The agreement can be on a yearly or album basis.⁷⁷ The record label has control of all aspects of the creation of the musical content, and covers all the costs involved

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Matzukis *supra* at 276.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid 276.

in creating that work.⁷⁸ The exclusivity of the contract means that the artist cannot record with another label without permission, and the artist cannot leave the label before the term of the contract lapses.⁷⁹ The recording company may require exclusivity to ensure and strengthen the possibility of recouping its investments in the artist. The terms and conditions of the contract reflect the respective parties' negotiating power.⁸⁰ A provision that allows the artist to make guest appearances and features on other artists' works may be included in the contract.⁸¹ When the work makes income, the record label will take their portion and the remaining amount will be used to cover some of the costs incurred during the making of the album or song; the artist receives whatever is left.⁸²

The development agreement is a once-off contract that record labels use to try out artists in order to check if the artist would perform well and whether he stands a chance to succeed in the music industry.⁸³ With this agreement, the record label and the artist undertake to work on a specific project (album or electronic play) and the label would promote the project under its banner. The record label pledges a limited amount of financial support towards the project.⁸⁴ The contract could assist the artist to break into the industry and establish a fanbase and when the contract lapses, the label may decide to sign the artist on a different agreement.⁸⁵ This contract is different from the publishing agreement that artists as songwriters enter into with record labels, who may also be publishing companies. Songwriters and small-sized record labels often sign publishing contracts with publishing companies to help them expand their reach into new territories, and the ownership of the rights in the sound recording would not be affected under this contract.⁸⁶

A production agreement can be entered into by a recording company and a producer or the artist and the producer, wherein the producer would charge a once-off fee or a certain percentage from the royalties or both for the sound recording (beat).⁸⁷ The most common option in South Africa is the payment of a once-off fee.⁸⁸ When a production company and

⁷⁸ Ibid.

⁷⁹ Theo Papadopoulos 'Are music recording contracts equitable? An economic analysis of the practice of recoupment' (2004) 4 *Music & Entertainment Industry Educators Association* 83.

⁸⁰ Ibid.

⁸¹ Matzukis *supra* at 276.

⁸² Ibid.

⁸³ Ibid 277.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid 275.

⁸⁸ Ibid.

an artist enter into a production agreement, the company pledges to cover the production of the artist's sound recording, which includes the sourcing of beats where necessary, and in return, the company may be entitled to 50 per cent of the profits from sales and royalties.⁸⁹ The resources of a production company are limited and the support it provides to the artist is also limited. The main purpose of a production agreement is to help artists produce high quality records in order to sell the artists and get him or her signed to a major label.⁹⁰ In the South African music industry, record labels are categorised as major labels and independent labels. Major record labels are those that have an international status, while independent labels operate mostly within South Africa.⁹¹ The production company signs the artist in the hope they will sell them to a major record label, while it retains its entitlement to the work.⁹²

Another agreement is a 360 agreement, which is an all-rounder, wherein the record label and the artist share the profits generated from all avenues and endeavours of the artist.⁹³ The record label would invest in the artist in relation to recording, marketing and promotions and, in turn, any profit the artist makes would be shared with the record label.⁹⁴ These avenues include physical, digital sales, streaming, publishing, tours and shows, endorsements and merchandise.⁹⁵ The record label has a share of the artist as a brand so that they profit from anything the artist is involved in, whether music related or not. The nature of the 360 agreement is that the artist is signed to the label as both a musician and a businessperson because the agreement does not focus only on the music, which is the main business that brings the artist and record label together. Therefore, the artist under this agreement is not the sole recipient of profits from his or her non-music-related business ventures; the proceeds of those ventures are also shared with the record label.⁹⁶

In most of these contracts, after the artist is signed, the record label also pays her an advance. An advance is an upfront payment that the record label offers to the artist in anticipation of future royalties.⁹⁷ The record label pays an advance, which is a form of investment in the artist intended to help with costs associated with recording and to allow her

⁸⁹ Ibid 275.

⁹⁰ Ibid.

⁹¹ Ibid 28.

⁹² Ibid.

⁹³ Ibid 218.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

to concentrate on creating music without worrying about the costs associated with it.⁹⁸ The recording costs include the writing of songs, recording sessions, rehearsals and performances; the advance is recouped from the artist's royalties.⁹⁹ In this way record labels ensure that they recoup the advance they paid to the artist. From the perspective of the label, they are taking a risk with the artist and need a mechanism for recouping their investment.¹⁰⁰ If an artist has a manager and a band, they would all also have to receive a portion from that advance, which would further reduce it.¹⁰¹

3.5 Distinction between a contract agreement and patronage agreement

Music contracts can imitate the nature of a patronage agreement, especially those that include the payment of an advance to the artist. A patronage agreement refers to the support provided to an artist by a person or organisation.¹⁰² The person who provides support is not a record label, and is often referred to as a patron. They foster the artist's production, facilitate it, purchase it and participate in the artistic events.¹⁰³ The patron uses its connections and resources to promote the artist and his music.¹⁰⁴ It is important for the relationship to be clearly defined, as this will assist in eliminating any accusations and denials that may happen between the artist and the patron. In a patronage model, the patron owns the resources, which includes bands. The ownership of a band means that they manage the band's overall style and oversee its career, and that of the band members including securing proper accommodation for the band and advising on how they represent themselves to the public.¹⁰⁵ In return, the patron is entitled to collect percentage of the profits made from the band's work that is due to the band and distribute them in accordance with prior agreement among band members.¹⁰⁶ Some patrons who work as producers in the major record companies, with the assistance of the resources from those companies, are also able to further their control and ownership by using the copyright system of the music industry.¹⁰⁷

⁹⁸ Matzukis supra at 88.

⁹⁹ Ibid at 218.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Tuulikki Pietilä 'Continuities in arrangements in contracts, patronage and mediation' in *Contracts, Patronage and Mediation*, Palgrave Macmillan, (2015) 158–175.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Pietilä (2009) supra at 239.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

3.6 Issues surrounding contracts between record labels and artists

The contracts that the record label and artist enter into often provide a solution when there is a dispute. These contracts, subject to the interpretation of the terms, will reveal what the parties agreed to and, if they meet the test for validity, the dispute will be resolved according to the terms of the contract.

An examination of these contracts reveals that they act more as an indemnity to protect the label against possible risks than an agreement to indicate both parties' rights and obligations under the contract. The contracts tend to favour the record label in most of the cases where a dispute arises.¹⁰⁸ This is indicated by how most disputes over the unfair remuneration of artists have ended in favour of record labels.¹⁰⁹ Record labels earn interest on monies that remain with collecting societies waiting to be distributed; however, they do not make provision for the artists to be paid their money with interest when their share is finally distributed.¹¹⁰ While the record labels receive money throughout the year, some contracts indicate that the artists will be paid biannually.¹¹¹ The contracts award to the artist a relatively low percentage for live performances, while they do not specify the role played by record labels in live performances to justify the greater share going to the label.

The artists are often not given a share from the profits generated from the use of the music.¹¹² Instances where the song can be used include the use in advertisements and promotions. Some contracts provide unilateral termination of the contract: the label has the right to terminate the contract where they deem it necessary, but there is no similar provision for the artist.¹¹³ On the other hand, some contracts provide the record label with the option to renew the contract upon expiry, but they do not provide the artist with the option to negotiate the terms of the renewed contract where the artist still wants to work with the record label for ease of access to the resources the record label possesses.¹¹⁴

While the issue of distribution of profits has proven to be one of the biggest issues the music industry face, most contracts still do not make a provision for the auditing of the transactions made with regards to the works, to be made available to the artist to keep track of

¹⁰⁸ Copyright Review Commission Report *supra* at para 10.10.2.1..

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

the profits made, nor do they provide the option for the artist to request an audit to be carried out where the artist is not satisfied.¹¹⁵ The Copyright Review Commission, after having surveyed contracts entered into after 2002, found that the contracts made no provision for a detailed audit record to be provided to the artist so that the artist could trace all transactions.¹¹⁶ The contracts examined by the Commission only made provision for the artists to have access to statements of accounts, which provide less information than audit report as they do not reflect the source of the transaction.¹¹⁷ The artists who are also performers receive needletime royalties. However, contracts often make no provision for these royalties, those that do, make provision for an equal share between the record label and the performer.¹¹⁸

The contracts put more emphasis on the record label's benefits and protection. The contracts reflect the imbalance in the negotiating powers between the artist and the record label, with the party that has the higher negotiating power always having the more favourable terms.

3.7 South African music contract disputes

South African record labels do not make public the contracts they have with artists. The artists also never disclose what their contracts entail, unless they notice, during the term of the contract, that there is some unfairness in the relationship. Some musicians would say they had a verbal agreement with the label and no contract had been signed. After Emtee (formerly Mthembeni Ndlovu) had left his record label, he claimed that he had never received the sales and the royalties for his album that had reached platinum status.¹¹⁹ Amanda Black said that when she looked at the contract that she had signed, she realised that the contract was not in her favour, but at the time she did not realise that because she was more concerned about being signed.¹²⁰ Similarly, Zahara, in 2019 took to Instagram to announce her plans to sue her former record label for unpaid royalties and performance

¹¹⁵ Ibid para 10.10.2.11.

¹¹⁶ Ibid para 10.10.2.3.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Entertainment Reporter 2020 'Emtee determined to get outstanding royalty payments', available at <https://www.iol.co.za/entertainment/music/local/emtee-determined-to-get-outstanding-royalty-payments-47297434> (accessed 21 March 2021).

¹²⁰ Black supra.

wages.¹²¹ She said that she had been paid so little that she could not even afford to pay rent. She would go for months without being paid.¹²² After she raised her concern about being paid, she received an increase of R5000, which she believed was still less than what she should be receiving.¹²³

A notable case was the estate of the late Solomon Linda represented by the executor of the estate brought against Walt Disney Enterprises Inc. The dispute concerned a well-known song “*Mbube*” also known as “the Lion Sleeps Tonight” wherein Solomon Linda was the author and had assigned the rights to Gallo Music Records.¹²⁴ Pete Seeger heard the song and he liked it and did a remake of the record to his own song, which he called *Wimoweh*. The song became successful in the United States and was later reworked into another version by song writers George Weiss, Hugo Peretti and Luigi Creatore and titled as “The Lion Sleeps Tonight”.¹²⁵ Solomon Linda died in 1962 without receiving any form of royalties from the song. The Executor of the estate brought an application to the court to claim for reversion of rights and payment of royalties due to the estate.¹²⁶ The Executor relied on Section 5(2) of the Imperial Copyright Act¹²⁷ which provided that where a person assigned the copyright in the works they created, the ownership of the copyright in the work shall revert to the estate of the author 25 years after the author’s death.¹²⁸ The interpretation of this provision included an emphasis on the reversion to the estate of the author as this was important in this case after the heirs had assigned the copyright in *Mbube* further to Folkways without authority to do so.¹²⁹ The matter, however, did not go to trial as the parties reached a settlement agreement before the trial date that was set.

In these cases, artists have a common complaint: not being fairly compensated. The contracts that they sign serve the record labels. At the time of signing, the artists are not big, and therefore the unfairness of the contract is not visible. Once they make money and start selling huge quantities of records, they realise that the amount of work they do and the

¹²¹ Lesego Mkhize ‘Zahara plans to sue TS records for alleged unpaid royalties’, available at <https://www.news24.com/drum/Celebs/zahara-plans-to-sue-ts-records-for-alleged-unpaid-royalties-20190411> (accessed 23 March 2021).

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Owen Dean ‘Copyright in the Courts: The Return of the Lion’ available at https://www.wipo.int/wipo_magazine/en/2006/02/article_0006.html (accessed 10 April 2022).

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Imperial Copyright Act of 1911

¹²⁸ Owen Dean *supra*.

¹²⁹ Ibid.

money they make are not reflected on the payments they receive. For this reason the contracts must allow for both parties to negotiate their share depending on the performance of their work. When entering into a contract with the artist, the record label makes an offer that includes marketing the artist and the work he creates. The success of the artist largely depends on the marketing skills the record label deploys to promote the artist, which would include securing radio interviews for the artist, tours, and liaising with promoters to book the artist for their events.¹³⁰ The obligation of the artist under the contract is to create songs, depending on whether the agreement was for a period of years or for a certain number of albums.¹³¹ Being signed under a label could have more detrimental effects for the artist as they now have no viable means of profit unless they become commercially successful.¹³² In the cases where artists do become successful, many hardly see royalties commensurate with their success because they have to repay the expenses the record label incurred in promoting them. After those expenses have been settled, the record label makes a profit for itself as the artist is still bound by the same contract and the same entitlements are still very much applicable.¹³³

Considering the disputes that arise from the contracts that have been signed and the imbalances that exist between the parties indicated in the previous paragraphs, it is important to state that information asymmetry plays a role in disputes in the music industry. Information asymmetry refers to a situation where one party to a contract has more information and understanding than the other contracting party, which assists the party with more information to negotiate terms which are favourable to himself.¹³⁴ Artists tend to be affected by information asymmetry because they have less understanding of how the works they create make income and how the music industry operates, which gives the record label an advantage and more bargaining power.¹³⁵ New artists who have not broken into the commercial music industry at the time the contract is negotiated and entered into do not have sufficient knowledge of how the music industry business works to make informed decisions. This shortcoming is not the fault of the record label, as it is not obliged to provide knowledge

¹³⁰ Christopher Vito 'Just say no to 360s: Hip-hop's claim of economic exploitation', available at https://link.springer.com/chapter/10.1007/978-3-030-02481-9_3 (accessed 8 August 2020) 80.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Maya Baceche-Beauvallet, Marc Bourreau & Francois Moreau 'Information asymmetry and 360-degree contracts in the recorded music industry', available at <https://journals.openedition.org/rei/6446> (accessed 21 January 2022).

¹³⁵ Ibid.

about how copyright works. With the same understanding, the record labels benefit from the information asymmetry, since the artist is not able to negotiate from a well-informed position.

For the greater good, both parties must be fairly remunerated. The artist has to be recognised for his work and effort in creating the works. Contracts that unfairly deny the artist their profits are contrary to public policy and they should not be enforced.¹³⁶ Therefore, the contract must be drawn up in such a way that it is fair to both parties.

3.8 The shortfall of contract law in fairly carrying out the remuneration purpose of copyright law

Copyright provides protection to works that have been reduced to material form, and such protection is given to the author of the work and the copyright holder.¹³⁷ Copyright recognises the need for trade and makes provision for it to expand the possibility of copyright work reaching further and the owners receiving incentive for their work.¹³⁸ The Copyright Act has provisions that allow the trading of the work, where the owner may assign or license some of the rights in his work. As indicated in the previous chapters, where a contract is involved, copyright ownership may not vest in the person who is the author of the work. Copyright and contract law can work together without interfering with each other as the goal of copyright to provide incentive to creators requires full engagement in trade, while contract law regulates trade relationships between individuals.¹³⁹ Contracts also assist where there is more than one author/owner of the work in determining the entitlement of each author/owner on the work.¹⁴⁰

The Copyright Act recognises contract law and uses it as a tool to help parties decide their relationship and, in turn, help give an answer when the question of copyright ownership arises. Copyright law gives instructions to contract law for contracts to be drafted by setting up the requirements for the works, how ownership and assignment of the work should move.¹⁴¹ A good example is the regulation of ownership of the song where an artist features

¹³⁶ *Jordan v Farber* [2009] ZANHC 81 (15/12/2009).

¹³⁷ Copyright Act 21(1)(a).

¹³⁸ Guy A Rub 'Copyright survives: Rethinking the copyright-contract conflict' (2017) 103 *Virginia Law Review* 1141–1246.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ Martin Kretschmer 'Copyright and contract law: Regulating creator contracts: The state of the art and a research agenda' (2010) 18 *JIPL* 143–172 at 144.

another artist in a song. Section 21(1)(c) of the Copyright Act states that if a person commissions the making of a sound recording, the person shall be the owner of the copyright in the work. Contracts are common in the creation of copyright works; they establish relationships between co-authors and create obligations between artists and the record labels they are signed into.¹⁴²

However, another side of the relationship between copyright and contract law is where contract law overlaps and takes over copyright and determines how it is handled.¹⁴³ For example, a contract that excludes the author from benefiting from any form of royalties accruing to the work he or she authored would still be valid and enforceable because it meets the requirements for validity, without regard to the purpose of copyright protection. Whether or not the contract upholds and serves that purpose it does not make specific provision for this. It is agreed that contract is a way of facilitating copyright agreements, however, copyright is an easily exploitable form of property, and for this reason, contracts dealing with copyrighted works should have copyright-specific provisions. This gives rise to conflicts and disputes. The main purpose of copyright protection is to promote the development of the creation of original works by providing incentive to creators of copyright works.¹⁴⁴ While, on the other hand, a contract entails promises made by the parties to each other and places obligations on all the parties to ensure that, if any party fails to uphold their side of the contract, they are held to account because the contract is legally binding and enforceable.¹⁴⁵ This then causes a situation where if an artist agrees to terms of a contract that defeat the aim that copyright protection sought to provide to them, they are still bound by that contract. This even leads to artists completely forfeiting the right to benefit from their work and the right to receive the fruits of those works as they forever remain the property of the record labels.¹⁴⁶ Contract law tends to have the upper hand because of the assumption that the parties to a contract are the ones who decide which terms they want to include in their contract; therefore, since they are the ones who set obligations for themselves they cannot say they are unfair.¹⁴⁷ The doctrine of *pacta sunt servanda* gives no room for consideration of the prevailing circumstances that the parties were in, once they sign the contracts they are

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ note 28.

¹⁴⁵ Sharp *supra* at 23.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid at 27.

expected to keep their promises and keep to the terms thereof.¹⁴⁸ While on the other hand, freedom of contract is premised on the idea that ‘the contracting parties have equal bargaining power and thus have equal power to impose and reject contractual terms.’¹⁴⁹ Where a party successfully proves the existence of vitiating circumstances and an imbalance in the bargaining power which is influenced by the conduct or omission of the other party the contract cannot be enforceable and the principle of freedom to contract cannot be raised to enforce the contract.¹⁵⁰ Where the vitiating circumstances, for example mistake, misrepresentation, duress, and undue influence, are not proven or do not exist, the validity and enforceability of the contract cannot be questioned.¹⁵¹

The principle of *pacta sunt servanda* denotes that the obligations that are imposed by the contract that the parties signed must be fulfilled. Rightfully so, as the principle follows from the requirements of validity for a contract, which if met, the contract is valid, and the principle applies. While this dissertation argues for consideration of public policy for fairness in music contracts, South African contract law is based on common law, including the principle of *pacta sunt servanda*. The Constitution requires the courts to apply common law where necessary, to the extent that legislation does not give effect to that right when effecting the rights in the Bill of Rights.¹⁵² The principles of common law still apply and carry weight in our law. They must constantly be brought in harmony with the Constitution. In *Du Plessis and Others v De Klerk and Another*, the court, while making use of guidance applied in Canadian Law, held that ‘Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared.’¹⁵³ Contract law and its principles/doctrines have to be developed in order to give effect to the rights envisaged in the Constitution.¹⁵⁴

The principle of *pacta sunt servanda* should be applied in such a manner that it recognises fair and reasonable contracts that meet the requirements for validity as set out above. Cameron JA also stated that:

¹⁴⁸ Ibid.

¹⁴⁹ Pillay *supra* at 11.

¹⁵⁰ Ibid.

¹⁵¹ Duru Onyekachi Wisdom Ceazar "Vitiating Elements of Contract as a Source of Contractual Validity." Available at SSRN: <https://ssrn.com/abstract=2156749> or <http://dx.doi.org/10.2139/ssrn.2156749> (accessed 2 December 2021) at 2.

¹⁵² Constitution of the Republic of South Africa s 8(3)(a).

¹⁵³ *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) 61.

¹⁵⁴ Pillay *supra* at 10.

If we look at the law simply from the point of view of the persons on whom its duties are imposed and reduce all other aspects of it to the status of more or less elaborate conditions in which duties fall on them, we treat as something merely subordinate, elements which are at least as characteristic of law and as valuable to society as duty. Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They then appear as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator.¹⁵⁵

This then requires the courts to be careful in their enforcement of contracts to ensure they do not allow the ‘freedom to contract’ and the principle of *pacta sunt servanda* to be used to enforce unfair and unreasonable contracts. The vitiating circumstances considered are mistake and misrepresentation, which, when there is fault in any of these circumstances, would render the contract or some parts of it unfair and unreasonable.¹⁵⁶ Contract law, when applied in the copyright field, falls short of recognising the fact that, in a relationship between the parties that intend to contract, the parties are on unequal terms and the contract is drafted by the party that has higher negotiating power.

3.9 Concluding remarks

The South African music industry operates under several contracts, and many of these contracts are structured in a manner that gives the record label the upper hand. Considering that the artist is the most desperate party at the negotiating table, the record label is most likely to propose to him terms that completely favour the record label and the artist would end up agreeing to those because he does not have much of the negotiating power. The nature of the South African music industry also makes it hard for artists to have contracts that favour them, because while the artists have a low bargaining power, they have to enter into the contract in order to be exposed to the resources of the record label and the networks the record labels have. Also, the requirements for validity barely capture the issue surrounding music contracts, especially that the contracts are concluded between parties that do not have the same bargaining power: the one is desperate and the other is resourced. Upon signing they are bound by the contracts, which they have signed under the principles of freedom to contract and sanctity of contract.

¹⁵⁵ *Brisley v Drotsky supra para 7.*

¹⁵⁶ *Ceazar supra at 2.*

CHAPTER 4: REGULATION OF THE MUSIC INDUSTRY AND RECOMMENDATIONS – RELATIONS BETWEEN RECORD LABELS AND ARTISTS

4.1 Introduction

The purpose of this chapter is to evaluate possible solutions that can address the imbalance in the negotiating powers of artists and record labels and misunderstanding of contracts, which often occurs when a dispute arises because of the contract. This chapter will address and provide possible solutions to the issues raised in chapters two and three, while not ignoring that a record label must benefit from the artist, as it is taking the risk of investing its resources in the artist without any guarantees of returns and making profits. The intention is to suggest solutions and a common ground for the disputes. As such, the duration of the contract plays a vital role, considering the nature of the entertainment industry, where the artist is remunerated inter alia based on her fan base and how the fans respond to the marketing strategies employed by the artist's managers. The demand for an artist sees her booking fees grow, for songs, performances, features and appearances. For this reason, the contract should anticipate such growth by providing for revision of its terms.

The purpose of copyright law is central to this dissertation because it helps identify if any shortfall exists or whether the intended purpose of the protection is no longer being met. Copyright protection has been regarded as the means of ensuring that, firstly, the rights of the creators are afforded respect and that they are adequately rewarded for their work.¹ The basic understanding of the South African copyright system is that it purports to motivate the creators to create more works.² In practice, the industry actors – record labels in this case – have been the ones most motivated to accumulate rights and channel profits to themselves.³ Under the copyright system, the control and ownership of the works created by artists is, by a considerable margin, in the record labels' possession, even long after the contracts have lapsed and the label has recouped its investment plus large profits.⁴ Although, the Copyright Act does not provide the purposes of copyright protection, the Copyright Review Commission did recognise that the protection of copyright works is mainly for the promotion

¹ Marisella Ouma 'Copyright and the Music Industry in Africa' (2004) 7 *Journal of World Intellectual Property* 919–932.

² Balganesch supra at 1577.

³ Ibid.

⁴ Ibid.

of literary, musical and artistic creativity, to offer essential incentive for the works, and to encourage the continued creation of related works.⁵ Recording artists, where the artist composes the music, writes the lyrics and produces the sound recording, are the ones who exercise their creativity and are the contributors to the state of art. From the previous chapters, one can note that the provisions of the Copyright Act that regulate how copyright works are handled allow for the work to be assigned and licensed, and provide guidelines for the assignment of works and how it affects ownership of the rights in the works. It should also be noted that copyright is an easily exploitable form of property. Contract law, as the facilitator of the agreements in relation to copyrighted works, then facilitates the exploitation of copyright works.

4.2 Primary legislation: The Copyright Act 98 of 1978, the Performers' Protection Act and the Collecting Societies Regulation.

The music industry has evolved and major improvements have taken place: it has stopped being a creative industry only and has become more of a business. As a result, most artists are businesspeople, and if not, other people use their work to create business relations.⁶ With the evolving of the music industry, it constantly requires laws that are going to fit in the current environment and address relations and the works with the understanding of the current industry. The Performers' Protection Act protects the rights and interests of performers whose copyright ownership of the works their performance is included in is governed by the Copyright Act. The Performers' Protection Act is not fully detailed to serve for the potential exploitation of that the performers may be exposed to as it currently. Though the Act gives the exclusive rights to the performer, it does not set out the nature of the agreement that must be entered into when the performer gives another party consent to perform his or her exclusive rights.⁷ The Act provides that if the author gives consent to the incorporation of his or her performance, his or her consent shall not be required for the fixation of the fixed performance. The Act, however, does not make explicit provision for the payment of royalties or remuneration of the performer.⁸

⁵ Mihaly Ficsor 'The Importance of Copyright and Related Rights for Economic Development with Special Reference to the Position of SME's', available at https://www.wipo.int/edocs/mdocs/arab/en/wipo_cr_krt_05/wipo_cr_krt_05_10.pdf (accessed 14 April 2021).

⁶ Matzukis supra at 20.

⁷ Performer Protection Act s 5(2).

⁸ Ibid s 8(1).

The Collecting societies are entrusted with the duty to collect funds and distribute them equitably to the right holders and the performers or authors. A proper distribution system needs to be adopted by the collecting societies in order to ensure an expeditious, equitable and fair distribution of the proceeds. As it stands, the Collecting Societies Regulations prove less effective. The collecting societies are required to distribute royalties at least once a year in accordance with its distribution plan.⁹ However, collecting societies, for example SAMPRO, in its financial statement for the year 2020 reflected a balance of over R463 million at the end of the year and an opening balance of R554 million at the beginning of the year which meant that an amount of R90 million was distributed.¹⁰ An enforcement mechanism needs to be included and established in terms of the regulations which will ensure that collecting societies distribute all the funds in accordance with the provisions of regulation 8.¹¹

The Copyright Act is outdated, considering that the last amendment was in 2002.¹² There is an urgent need for new and improved laws.¹³ The constant amendment of the laws is necessary to keep up with its mandate, as correctly affirmed by the Copyright Review Commission, that the purpose of copyright laws is to ‘give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works’.¹⁴ It is important to constantly emphasise the purpose of copyright law, so that when the purpose is no longer being fulfilled, steps can be taken to realign with the purpose.

In highlighting some of the issues, the subsistence of the protection in copyright in musical works as outlined in s 3(2) of the Act is based on the life of the author, not the owner, while in reality, the owner may not be the author, and the person who may benefit from the work may be another person for the remainder of the subsistence of that protection.¹⁵ If the contract fails to take this into account, while the artist benefits from the work for the duration

⁹ Copyright Act: Regulations: Establishments of Collecting Societies in Music Industry GN No. 517 GG No.28894 of 1 June 2006 available at <https://www.gov.za/documents/copyright-act-regulations-establishments-collecting-societies-music-industry> (accessed 08 April 2022) reg 8(1)

¹⁰ South African Music Performers Rights Association ‘Annual Review 2020’, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.groundup.org.za%2Fmedia%2Fuploads%2Fdocuments%2Fsampra_ar_2021.pdf&clen=10398297&chunk=true (accessed 09 April 2022) at 33.

¹¹ Copyright Act: Regulations.

¹² Copyright Act.

¹³ Matzukis supra at 407.

¹⁴ Copyright Review Commission Report supra at para 3.1.2..

¹⁵ Copyright Act (n 11) s 3(2)(a).

of the contract, the record label will continue to benefit beyond the term of the contract. The record label still has the author's lifetime plus 50 years to benefit from the profits of the work. The Act makes provision for the facilitation of needletime royalties in s 9A, from which the artist should benefit. However, it is hard to trace them as the Act grants a pre-authorised licence to the broadcaster.¹⁶ The provision allows the broadcaster to broadcast the sound recording, provided that they pay royalties to the owner.¹⁷ The agreement on the amount of royalties can be entered into between the user of the sound recording, the performer and the owner of the copyright, or between their representative collecting societies, and the latter is always the case.¹⁸

The Copyright Review Commission recommended that the Copyright Act be amended to state:

Give the copyright owner or collecting society notice of the intention to perform the act in question and ask the copyright owner or collecting society to propose terms of payment; After receiving the proposed terms of payment or the expiry of a reasonable period, give reasonable notice to the copyright owner or collecting society of the date when the potential user proposes to perform the act in question and the terms of payment in accordance with which the potential user intends do so; Give notice to the Copyright Tribunal of the intention to perform the act and the date on which it is proposed that this will be done.¹⁹

This shows that there is a shortfall in the Copyright Act in providing for the distribution of the profits of the sound recording created by artists, which means that when some broadcasters use protected works it is difficult to trace the accurate amount of royalties due. The Copyright Review Commission further recommended that the then Department of Trade and Industry, now the Department of Trade, Industry and Competition (hereafter referred to as 'the Department'), should draft standard contracts that are fair to both the artist and record label and that will be used between performers (artists) and recording companies.²⁰ The Department should also advise artists and record labels to use the contract.²¹

Given that the Constitution is the supreme law that every law and conduct needs to abide by, it is important to refer to it and how it would best deal with the issues that surround

¹⁶ Ibid s 9A(1)(a).

¹⁷ Ibid s 9A(1)(a).

¹⁸ Ibid s 9A(1)(b).

¹⁹ Copyright Review Commission Report *supra* at para 3.3.6.1..

²⁰ Copyright Review Commission Report *supra* para 10.12.5.

²¹ Ibid.

musical works and sound recordings. The Copyright Act needs to improve on how it takes the constitutional approach to copyright works because, even though copyright works are movable properties, their ability to generate revenue is continuous, for a long period of time, as indicated above. The works can generate more profits with time, for the duration of the protection. Any performance and use of the work generates profit, which benefits the owner and should be shared with the artist. The Copyright Act must acknowledge the imbalance between the status of the artist and that of the record label, in that this imbalance allows the one party to express their wishes without holding back, while the other one expresses theirs with caution, so as not to lose the opportunity to be signed. While the imbalance in the status of the parties exists, there is also an imbalance in the control of the resources. Artists rely on record labels because record labels possess the necessary resources and networks and they control the market in the music industry.²² Since major record labels control between 80 to 90 per cent of airplay, success as an independent artist is very limited, hence the need for the Act to acknowledge and address this imbalance.²³

4.3 Contract revision rights

Contract revision rights can play a role in solving the problem of artists who do not benefit from their work. To be fair, the artist should benefit from the fruits of his work in the long run. Instead, record labels have been recouping their investments and making a profit, but still retaining the rights in the work and continuing to make a profit decades later. A popular example is the song *Mbube* by Solomon Linda. The song was recorded in 1939. It has been re-recorded by more than 150 artists worldwide, to date, and it still features in movies, the latest being *The Lion King*. In terms of the initial deal, Linda was paid his usual recording session fee, while the song belonged to the record company.²⁴ The author did not receive any profits beyond the session fee from the song, until one of the rights owners of its other version decided to reassign his right to Linda.²⁵

While the artist is expected to create work that is of marketable standard, the record label is entrusted with the duty to employ its resources and networks to promote the work to

²² Matzukis supra at 28.

²³ Ibid.

²⁴ Pietila (2009) supra at 232.

²⁵ Ibid.

ensure maximum profits are made from the work. For this reason each party must perform their role in ensuring that the work will generate enough profit to recoup the record label's expenses and to also fairly compensate the artist.²⁶ The Copyright Act could be amended to include the requirement, where copyright is assigned to the record label, to revisit and revise both parties' share in the work in terms of s 9A of the Act after a specific period. The revision will focus on each party's entitlement to benefit from the profits made from the work. Therefore, regardless of whether the duration of the agreement between the artist and the record label was for a two-year period or one album, any profits generated by the work would be distributed based on the agreement that was entered into. This provision will also allow artists to negotiate a fair percentage and assume the responsibility to promote and market the work, where the record label claims to still have not recouped its investments and is no longer promoting the work. As the work continues to generate profits for the duration of its protection, the parties should fairly benefit from the work.

The nature of the reward system in the music industry in relation to the right and rewards for the participants often results in complications due to the multiple streams of income and several receivers of income from that song or album.²⁷ These run for a long period of time and can at times make it impossible to trace the income. Therefore, it is important for the contracts to be revisited to ascertain a fair way for each party to benefit from the incomes of the work. Parties to a contract have the right to revise the terms of their contract at any time, as long as they are in agreement with each other and follow the requisite formalities, such as reducing the amendment to writing and having it signed by the parties. The argument here is that copyright law should be amended to provide for mandatory revision of contractual terms, to facilitate the fair distribution of the profits made from the work, in terms of the percentages agreed on after the revision. The rules that adequately consider the contractual position of the authors should be preferred over general contractual principles that do not deal specifically with the issues faced by authors.²⁸ This is not an argument for the reversion of copyright to the author or artist.

²⁶ Ibid 247.

²⁷ Ibid.

²⁸ Séverine Dusollier, Caroline Ker, Maria Iglesias et al 'Contractual arrangements applicable to creators: Law and practice of selected member states', available at https://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/contractualarrangements_/contractualarrangements_en.pdf (accessed 2 January 2022) 10.

The duration of exclusive ownership for copyright works and their protection in relation to benefiting from the fruits of the work, at present, exists for the life of the author plus 50 years after their death and for a sound recording for 50 years starting from the end of the year in which the sound recording was published.²⁹ The duration of the protection of the copyright in a musical work is measured from the life of the author, while ownership determines the right to benefit from the work. This means that the record label, as the owner of the copyright, will receive the profits made from the work even after the contract between the label and the artist has lapsed, as ownership does not revert with the lapsing of the contract period. The record label contributes its resources towards the artist as an investment which it intends to recoup, and the label after having recouped its investments, the contract should be set out in such a manner that it allows both parties to fairly benefit from the work including after the contract has lapsed. The contracts that are signed detail the rights and rewards that each of the parties is entitled to, for the existence of the contract, regardless of whether the artist's music sells higher than the set target.³⁰ For example, some artists receive a fixed monthly salary only. The promulgation of a provision which provides for the revision of profit sharing rights provision or term to be included in the contract would also prevent many disputes where the parties would say they had a verbal agreement, because the parties will now have to agree on a date to revisit the terms of the contract and have that date written in their contract.

4.4 The Copyright Amendment Bill and Performers' Protection Amendment Bill

As part of implementing the recommendations and addressing the findings made by the Copyright Review Commission, the Department of Trade, Industry and Competition drafted the Bills which, among others, sought to provide for the fair remuneration of artists and performers.³¹ The Bills suggests amendments and the insertion of sections that provide for the sharing of royalties in copyright works, and the payment of royalties in respect of literary or musical works, sound recordings, artistic and audio-visual works, performance, fixations and resale rights. The Copyright Amendment Bill inserts s 6A which makes it compulsory for the author to receive a fair share of royalties from the literary and musical works they created for the performance of the acts described by s 6 of the principal Act.³² The Copyright

²⁹ Copyright Act s 3.

³⁰ Copyright Review Commission Report *supra* at para 10.10.2.2..

³¹ *Ibid*.

³² *Ibid* clause 6A(2)(b).

Amendment Bill adopts the definition of performer provided in the Performers Protection Act, to refer to the artist. Section 9A of the Act is substituted by s 9A, which provides for royalties regarding sound recordings. The clause emphasises the right of the performer of a sound recording to receive their share of the royalties.³³ The copyright owner of a sound recording and the collecting society have to ensure that any performer whose performance is featured in the sound recording receives their equal share of the royalties or their share in accordance with an existing agreement.³⁴ Any person who broadcasts, causes transmission of the sound recording, or plays the sound recording shall submit a report to the collecting society, copyright owner and the performer for purposes of royalty calculation.³⁵ The suggested amendment will also provide transparency in as far as the distribution of royalties is concerned. The onus is on the user to ensure that the report is submitted to the collecting society, the owner and the performer; a failure to submit the report will be an offence.³⁶

The Performers' Protection Amendment Bill proposes amendments that attempts to deal with the issue of unscrupulous contracts in the music industry, payment of royalties, and the ownership interests of the performer of the rights to the performance. The Bill grants the performer the moral rights to have a claim to be identified as the performer of his or her performance and to object to any distortion, mutilation or other modification of his or her performances that would be prejudicial to his or her honour or reputation.³⁷ If the performer consents to the fixation of his or her performance in an audiovisual fixation or sound recording, such consent should amount to the transfer of the performer's exclusive rights.³⁸ The Bill further proposes that the consent must be accompanied by an agreement between the performer and the producer.³⁹ The Bill also includes compulsory terms that the agreement must reflect, which are, standard contract terms as may be prescribed, agreement on royalties payable to the performer or equitable remuneration and that the agreement shall be valid for a period of 25 years after which, the ownership rights will revert to the performer.⁴⁰

The suggested provisions of the Bills seek to address the issue of remuneration of artists and authors, which has been a point of concern for years. The inability to trace the

³³ Ibid clause 9A(2)(a).

³⁴ Ibid.

³⁵ Ibid clause 9A(1)(aA)(ii).

³⁶ Ibid clause 4(a).

³⁷ Performers' Protection Amendment Bill clause 3(2)(a) &(b).

³⁸ Ibid clause 3A(1).

³⁹ Ibid clause 3A(2).

⁴⁰ Ibid clause 3A(3)(a)-(c).

remuneration of artists or provide proof of distribution of royalties has meant that remuneration has been largely theoretical rather than practical.⁴¹ The author's right to remuneration applies regardless of the assignment of the work and whether or not the artist chooses to receive the royalties.⁴² The Bills stipulate that the agreement between the copyright owner and the author that determines the author's royalty share shall be in writing.⁴³

A notable change that the Bill intends to introduce is that it does not provide an option for the author to receive a lump sum or to be bought out of benefiting from the work.⁴⁴ Instead, the author is entitled to receive royalty payouts regularly, as would be prescribed either in the agreement or regulations published by the Minister.⁴⁵ The Bill considers that parties may disagree without reaching a common ground as to the amount of royalties the author should be entitled to. As such, the Bill provides that the matter can be referred to the Tribunal by any of the parties for determination of the royalty share of the author.⁴⁶ The Bill also seeks to address the disputes that usually arise around payment of royalties, with artists claiming to never receive any. It does this by suggesting a provision that would allow the Tribunal to decide on the fair royalty the author should receive. This would assist in mitigating the uneven negotiating powers between the parties. The author must receive royalties from the work, regardless of whether he or she elects to; this agreement will bind any subsequent assignment of the copyright in the work by the copyright owner.⁴⁷

The Bill takes into account the different genres in the music industry, and addresses some of the issues by making provision for a fair remuneration mechanism for composers of musical works and sound recording artists.⁴⁸ However, as the President expressed reservations on the Bill and returned it to the National Assembly for reconsideration, its implementation is further delayed. If s 6A of the Bill makes it past the National Assembly's reconsideration and the Bill is passed, it will bring about a change and a direction on how to deal with music industry agreements for a fair distribution of profits made from the copyright works.

⁴¹ Sharp *supra* at 7.

⁴² *Ibid.*

⁴³ Copyright Amendment Bill Clause 6A(3)(a). see also Performers' Protection Amendment Bill clause 3A(3)(b) & 4(e).

⁴⁴ Sharp *supra* at 9.

⁴⁵ *Ibid.*

⁴⁶ Copyright Amendment Bill clause 6A(4).

⁴⁷ *Ibid* clause 6A(3)(b).

⁴⁸ *Ibid* clause 6A and 9A.

4.5 Shift from the old royalty calculation system to the new

In trying to minimise the disputes surrounding royalty payments and distribution, it is important that the royalty system be reconsidered. The old formula used to calculate the amount of royalties due to each party, especially the artist, may also result in many claims of exploitation. The old formula is (royalty base price [PPD x Uplift] – packaging deduction) x royalty rate.⁴⁹ The royalty base refers to the retail price, the PPD (Publisher Price to Dealer) refers to the price at which the record was sold to the dealer, uplift means that the royalty rate was raised above what it would be to take into consideration the lower royalty base price, and the deductions are the costs of packaging the work: singles 7 per cent, albums 15 per cent, tapes 20 per cent or CDs 25 per cent.⁵⁰ This system includes a deduction of packaging which is made before the artist's share is calculated. The deductions are considerably more than what the record labels actually pay for packaging.⁵¹ The new system provides an even simpler and more accurate royalty calculation formula. The system excludes the uplift and also calculates the royalty as the percentage of the PPD.⁵² The benefit of the new system is that the reported packaging costs are less, and it makes it easier to calculate the royalties with a simpler formula.⁵³

Another point of consideration are the digital streams, which are a new and growing medium through which people access musical works and sound recordings. The artists mostly receive a very low share from the digital streams and downloads, as the streaming platforms first deduct their own share and then the record label would make their own deductions.⁵⁴ As the digital streams are paid as royalties, and not sales, in order for the artist to receive a fair share, he or she would need to negotiate a higher royalty rate.⁵⁵ For example, Spotify has no fixed rate for payment per stream for different artists: it usually ranges between \$0.001 per stream to \$0.004 per stream.⁵⁶ The payment also differs for artists signed to a major record label. The platform pays \$0.00029 per stream to the label which then pays the artist.⁵⁷ This further prolongs the process and results in more deductions being made, which leaves the artist with very little, making the income made from digital streams tiny. In the agreement

⁴⁹ Ibid 235.

⁵⁰ Ibid 235–236.

⁵¹ Ibid 236.

⁵² Ibid 237.

⁵³ Ibid.

⁵⁴ Ibid 99.

⁵⁵ Ibid 100.

⁵⁶ Ibid 101.

⁵⁷ Ibid 101.

between the artist and the record label, each party's share in the income made from digital streams and downloads must be explicitly stated in the contract. Since different streaming platforms charge different rates for their streams, each streaming platform envisaged at the time of the execution of the contract, must be named in the agreement and the artist's and record label's share must be indicated.⁵⁸ The contract determines the artist's share in the revenue made from streams and digital downloads.⁵⁹ During the negotiations, the artist can negotiate for an agreement which will exclude sharing income made from streaming platforms and that the artist should receive full share. However, the label may resist agreeing to this term as it would argue that it needs to recoup investments that will be made to the artist from all sources of income. At present, streaming platforms have different payment mechanisms and some are based on the size of the record label which represents the artist, major or minor.⁶⁰ Therefore, if excluded, artist who are still upcoming and small would receive less income from streams due to having low streams, but they would receive the full amount as opposed to a share as per the agreement with the record label. On the other hand, big artists would receive a higher income as the full amount will be going to the artist and also the artist's fan base would result to high streams.

Most artists often refer to their royalty entitlement as a percentage, without having clear knowledge of how much that would be in cash. Therefore, it is important that a professional represents them in the drafting of the contract and explains the meaning of these percentages.⁶¹

4.6 Music contracts: Necessary provisions, the termination of music contract and the position of parties

The aim is to improve the current status of contracts, to promote fairness between the parties and fair distribution of the proceeds made from musical works and sound recordings. While contracts guide the relationship and determine each party's entitlement to the work, they are also capable of excluding the creator of the work from benefiting from the profits made from the work.⁶² The Copyright Review Commission also recognised the shortfall of music contracts in upholding fairness between the parties, as recording contracts usually favour the

⁵⁸ Ibid 239.

⁵⁹ Ibid.

⁶⁰ Ibid 101.

⁶¹ Ibid.

⁶² Ibid.

record label and say less about the interests of the artist; this can be seen from the results of most disputes – record labels nearly always win.⁶³ There is a considerable need for improved contracts between artists and record labels: these should clearly capture all the sources of royalty income and the entitlement of each party.⁶⁴ The contract must be transparent, provide access to all the incomes, and allow the artist to have access to the financial statements for the works he created, as further elaborated in the discussion of clause 9A.⁶⁵

The contracts usually provide for the payment of a fixed salary to the artist, while others also include the payment of royalties.⁶⁶ The record label charges a fee from promoters when they book the artist to perform at their event. This booking fee is paid per show the artist performs at, which makes it unfair if the artist performs in 29 shows in a month, for example, yet still receives only a fixed monthly salary. The contract must also outline the entitlement of the artist from the income made from bookings, together with the value added by the record label to the performances.⁶⁷

These provisions should take into account the duration of the copyright in the work, which in turn reflects the period during which the owner stands to benefit from the work. Thus, if the record label remains the owner and they are not giving the artist her fair share, it would amount to unjustified enrichment, especially if the artist was a big hit or her music was selling. Intellectual property and copyright works should be seen as an investment made by the artist, which will continuously provide for them and their descendants after the artist has died. As such, upon termination of the contract, the entitlement to royalties should be revisited as well, in order to balance the artist's benefit and avoid having the work profit the record label only.⁶⁸

4.7 Recommendations

Copyright works are a growing field for investment by both artists and record labels and as such, each party wants to get the best of profits out of the industry. The Copyright Review Commission has set out recommendations to solve the disputes that often face the music industry. These recommendations seek to curb the problem and come to the rescue of artists,

⁶³ Copyright Review Commission Report *supra* para 10.10.2.

⁶⁴ *Ibid* para 10.11.16.

⁶⁵ *Ibid* para 10.10.2.9.

⁶⁶ *Ibid* para 10.10.2.2.

⁶⁷ *Ibid* para 10.12.10 .

⁶⁸ Matzukis *supra* at 20.

while promoting a fair trade between the artists and record labels.⁶⁹ The recommendations are in line with this dissertation, except for those for whom a different solution is recommended, as highlighted below.

As contract law facilitates the relations between the parties who handle copyright works and enter into relations with regards to these works, it needs to acknowledge that the unrestricted application of the principle of freedom to contract is premised on the understanding that the parties have the right to freely set out the terms and conditions of their contract. While this is the principle, the reality in most negotiations is that the contracting parties have unequal bargaining power, unequal skills and imperfect knowledge of the relevant market conditions to maximise individual gain and promote a fair allocation of the resources; they are not both in a position to negotiate in accordance with that understanding.⁷⁰ Contract law needs to be developed so that it promotes equality between the contracting parties by introducing a mechanism wherein authors who were not fairly compensated or were not given their share have the right to retrospective variation of contractual terms from the date the contract was entered into.⁷¹ The Copyright Act needs to set out requirements for the agreements between the artists and record labels to provide for the revision of profit-sharing terms. Taking into account information asymmetry that exists between the artist and record label and the role it plays in decision making and influencing during the negotiating process, it is paramount that proactive regulations are introduced that seek to prevent contracts that reflect this imbalance.

The European Union has enacted Directives, which seek, among other things, to promote fair remuneration of creators, which is premised on the understanding that the artist is in the weaker contractual position in negotiations.⁷² The European Union Directives address the imbalance caused by information asymmetry and set an obligation for record labels to provide artists with information when they are transferring rights and during the use of the transferred rights, and to have explained to them the adequacy of the remuneration

⁶⁹ Ibid at 178.

⁷⁰ Carolyn Edwards 'Freedom of contract and fundamental fairness for individual parties: The tug of war continues' (2009) 77 *MKC Law Review*.

⁷¹ Martin Kretschmer 'Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda' (2010) 18 *JPL* 143-172 at 160.

⁷² Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJL130/92.

being offered and the possibility of revocation of the licence or assignment.⁷³ Similarly, in South Africa, the Department will adopt and publish regulations which will provide guidance and accountability to the contracting parties. Together with these regulations, the Department can also provide seminars to educate artists about the implications of recording contracts and how the music industry works. Attending these seminars must be compulsory to ensure that the artist is exposed to the information before entering into the agreement with the record label.

As artists establish full careers in the music industry, the Department should establish a retirement fund, wherein a determined amount would be deducted from the royalties and paid into the fund and when the artist reaches retirement age or after a certain period of years, which would be determined, the artist has not participated in the music industry either by creating a song, performing or being featured in another artist's song, he or she can claim the retirement fund. As opposed to the recommendation made by the Copyright Review Commission that unclaimed royalties older than five years should only be used for social-related activities and cultural projects that will benefit local artists, it is recommended here that after a period of five years, unclaimed royalties should be transferred into the retirement fund and distributed equally among the artists who are members.

The record labels and the collecting societies should also be required to compile audit records/reports every five years and make available upon request by the artist or the artist's representative the audits and a statement of payment of royalties.

In addition, the Copyright Review Commission detailed a number of recommendations for the Department to consider in trying to improve the music industry, especially the relations between the artists and record labels. The Copyright Act provides for how the parties will be entitled to the work, while contracts will be the tool used to determine what each party's entitlement will be. As discussed above, the principles of contract law, the freedom to contract, always play a role to hold each party to the contract because it is a general belief that they had all the freedom to object to the contract, and now that they have signed, they must uphold the contract, commonly known as *pacta sunt servanda*.

There is no express provision for accountability that requires record labels to be audited annually or otherwise. As the music industry is a business, artists are businesspeople. The Copyright Review Commission recommended that the Department 'should each year, for at

⁷³ Ibid arts 18–22.

least five consecutive periods, initiate and fund an audit on behalf of at least 10 randomly selected artists'.⁷⁴ The audit would examine the financial transactions that the record label processed for these artists.⁷⁵ This would assist in keeping the relationships fair as the artists would be selected randomly and the record labels would always want to keep their books in order and the artists would be duly paid their shares. The requirement for auditing is one that is long overdue because even where the contract is fair, payments to the artist may not be honest. This requirement will also hold the collecting societies to account as they would need to account for the royalties that are outstanding and make payment to avoid the current situation where many funds have not been paid and the beneficiary is untraceable.⁷⁶

The Copyright Review Commission has also acknowledged that during the negotiation of a contract, between the record label and the artist, the negotiating powers are not the same because the artists are mostly desperate to make money, and they end up not taking copyright matters into account.⁷⁷ As a result of this uneven negotiating power, the artists end up assigning a considerable amount of royalties to the record labels and the artists lose a significant amount of royalty distributions.⁷⁸ The record labels can recoup their investments from the works within a period of 20 years.⁷⁹ Therefore, the legislation should be amended to provide for the reversion of the rights to the author after 25 years. Twenty-five years is a reasonable time from the date of the assignment of the rights.⁸⁰ A period of 25 years is reasonable on the basis that the assignees would have had reasonable time to recoup the investments made in a period of 20 years, after which, the artist or their heirs should also be afforded the opportunity to recover from the unfavourable decision made under the conditions highlighted above.⁸¹ The reversion of rights means that copyright ownership in the work is returned to the primary creator of the work.⁸² The reversion of copyrights can be based on two grounds, non-use of the work and the lapse of prescribed term of assignment.⁸³ The assignment of rights affords the assignee the chance to use the work and make profits. This means that the assignee needs to make means to have the work make profits – to market

⁷⁴ Copyright Review Commission Report *supra* para 10.12.6

⁷⁵ *Ibid.*

⁷⁶ Matzukis *supra* at 20.

⁷⁷ Copyright Review Commission Report *supra* para 10.12.10.

⁷⁸ *Ibid* para 10.12.10.

⁷⁹ *Ibid* para 10.12.10.

⁸⁰ *Ibid* 10.12.10.

⁸¹ *Ibid* 10.12.10.

⁸² Martin Kretschmer & Rebecca Giblin 'Getting creators paid: One more chance for copyright law' (2021) 43(5) *European Intellectual Property Review* 279–282.

⁸³ Pietila (2015) *supra* at 11.

the work, promote the work, liaise with event organisers to host the work, among other things. The contracts that assign these rights cover all the economic rights and the contracts remain effective and valid for the duration of the copyright protection.⁸⁴ The termination of the contracts only terminates the relationships between the creator/artist and the copyright owner. Where the record label has not used the work for a specified period, for any purpose other than only receiving royalties for airplay, the author should be eligible to reclaim ownership. The reversion of ownership will allow the author to use the work and make new reproductions and adaptations in order to keep the work alive and profitable without first having to require permission from the record label. The period of assignment of the rights in the work should be limited to 25 years. If the assignee fails to recoup whatever investments he or she made on the work in this time, such failure should not adversely affect the artist. This will also motivate the assignee to use the work enough to recoup its expenses towards the work and also make a profit. It will prevent the record label from holding on to the work by claiming not to have made its investments back.

4.8 Concluding remarks

The Copyright Act, as the primary legislation in the protection and facilitation of copyright works, should play its part in expressly protecting the interests of creators and constantly be up to date with changes, as the world is growing at a fast pace. The Copyright Act and general contract law, as they are currently, fall short in ensuring that the artists are not just rewarded for their work but are adequately and fairly rewarded.⁸⁵ Copyright works play a major role in the preservation of the creative culture and improving the economy. Thus, the people who are responsible for creating these works should be fairly rewarded. With the music industry being so competitive, one needs to have the required resources, from recording to marketing and promoting, to become successful in the industry. As such, the role played by record labels in providing those resource is important. However, problems arise when the record labels take advantage of the desperation of the artists and take from them more than their fair share.

Thus, the Copyright Act needs to be amended to provide for the payment of royalties to the artist and expressly provide that the artist should benefit from all the royalties the work accrues at a percentage to be determined. The Copyright Act should also provide for the

⁸⁴ Ibid.

⁸⁵ Pietila (2015) *supra* at 13.

reversion of the rights on the work after a certain period so the artists and their descendants could benefit from the work's future income.

CHAPTER 5: CONCLUSIONS

This concluding chapter reflects on the arguments made in the previous chapters. It provides a specific answer to the research questions outlined in the first chapter. The role played by record labels in terms of granting access to the artists to the resources that are necessary for them to create the works and maximise profits is acknowledged. Considering the status of the South African economy, most artists begin their music careers without any resources, and conclude agreements with record labels to access resources they need to reach their potential. It is important that these agreements should always be fair and honest, without either party taking advantage of the other.

The dissertation evaluated how copyright law provides a fair mechanism for ownership and benefit sharing that protects artists from exploitation. Relevant provisions of the Copyright Act were considered. The Copyright Act provides for the transfer or assignment of the exclusive rights in the work to another party and provides for the owner of the exclusive right to be the only person who can authorise the exercise of the exclusive rights by third parties. Though s 9A of the Act provides for payment of royalties, the emphasis is on the user, the performer and the owner. The provisions of the Act remain attached to the copyright owner and much less consideration is given to the author by an express provision. The Act only requires that the distribution of royalties be made according to a prior agreement between the user, performer, and the owner. The Act, as it is, does not provide a fair mechanism for a fair distribution of profits made from the works between the artist and the record label.

Having considered the adequacy of the Copyright Act in ensuring fair remuneration of artists and protecting them against exploitation, the dissertation evaluated how the Department of Trade, Industry and Competition can propose amendments to existing legislation and promulgate regulations to close the gap that exists in the current law which has opened the way for exploitation in the copyright market. The Department should take into account the important role contract law plays in the facilitation of copyright works and also take into consideration the complexity of copyright works, how the assignments affect parties and introduce draft industry specific contracts which record labels will have to use, which will reflect and protect the interest of both parties. While understanding the purpose of copyright protection, the Department needs to promulgate regulations which seek to supplement the Copyright Act, to promote fair remuneration as defined herein.

The issue of exploitation in the music industry is not peculiar to the South African jurisdiction. Other jurisdictions, like the European Union, have taken a similar approach which seeks to promote fair remuneration for creators. They have published directives for their member states to follow in dealing with the problem of exploitation. The dissertation further noted that there is a considerable amount of information asymmetry in the music industry where the artist is the party with less information which places him in a weaker negotiating position. The department further needs to organise seminars for artists, which are intended to provide knowledge of how the music industry works. They must also require record labels to furnish artists with full details of the implications of the proposed contract and projections before the transfer and during the use of the work in order to bridge the imbalance.

Having noted that part of the purpose of copyright protection is to remunerate the creators for their works, the dissertation considered how the Act provides for this purpose. The Act provides guidelines for handling of copyright protected works. The author is the initial owner of the works he creates, with the exception of where he transfers the rights to the work or assigns the work to another party. Where the author transfers or assigns the work, there should be an agreement that will determine royalties payable to the parties involved. In the absence of such an agreement, the Act authorises the Copyright Tribunal to decide on the payment of royalties. The Act makes provision for procedures to be followed when assigning work, the implications of the assignments, and transfer of exclusive rights. These provisions, however, fall short in promoting the purpose while maintaining fairness towards all the parties involved.

The dissertation further looked into the fairness of standard terms that record labels and artists enter into. This was done by examining the findings of the Copyright Review Commission, which evaluated contracts entered into between artists and some of the record labels who participated in the review. The Commission found that most of the contracts contained unilateral terms that favoured only the record label, right of renewal, and termination rights. Some contracts made no provision for access to audit reports. Some scholars have concurred with the view that the bargaining powers between the artist and record label are uneven; these powers play a role at the negotiating table and influence the direction of the contract. The Supreme Court of Appeal in *Afrox Health Care Bpk v Strydom* also stated that the unequal bargaining powers between contracting parties is an issue that should be taken into account. This inequality could be the result of two or more

circumstances, identified for purposes of this dissertation: information asymmetry and desperation on the part of the artist. With little understanding of how the copyright market works and how the music industry business is run, the artist is most likely to enter into contracts that are unfavourable to him. The record label possesses more bargaining power, and has the resources and networks that provide the label with an advantage over the artist. The Department needs to provide artists with information necessary to assist them during contract negotiations, and disseminate this information using different methods, such as audio and audio-visuals, in all the official languages to ensure that it is available to every artist.

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