POSA
Performers' Organisation of South Africa

Summary of Lacunae (Legal Loopholes): Needletime Rights

1. Deeming Provisions

1.1 Deeming Provision in the Performers' Protection Act

Section 5(4)(a) of the Performers' Protection Act provides as follows:
"A performer who has authorised a fixation of his or her performance shall, in the absence of any agreement to the contrary, ***be deemed*** *to have granted to the person who arranges for such fixation to be made the exclusive right to receive the royalties contemplated in subsection (1)(b) in respect of any broadcast, transmission or communication of such fixed performance:* ***Provided that the performer is entitled to share in any payment received by the person who arranges for the fixation, in the manner agreed upon between the performer and the person who arranges for such fixation, or between their representative collecting societies.****"* [Emphasis added].
The afore-mentioned situation has created a situation where the right given to the performer to receive payment in respect of the usage of his recorded performance through Needletime has, while clearly given in terms of Section **5(1)(b)**, effectively been taken away by the provisions of Section **5(4)(a)**, which gives the record company an almost automatic right to receive the performer's share of the Needletime Rights royalty, without regulating the manner in which this has to be done and further without indicating the share that would be due to the performer in this regard. The performer is therefore left at the mercy of the record company with regard to what he ultimately gets (if any[1]), in respect of Needletime Rights royalties.

The fact that the payment due to the performer has, in terms of Section 5(4)(a), to be determined in a manner agreed upon between the performer and the record company does not assist the performer in that it is trite knowledge that artists have less bargaining power regarding the conclusion of recording agreements than the labels do. In the majority of cases artists

[1] The performer may ultimately not get anything at all, as anything due to him may be offset against advances that he may owe in respect of the recording agreement.

(especially those just commencing their careers) are forced to accept the terms of a recording agreement because that is the only way in which they can "get a record deal". They are therefore likely to accept unfavourable terms with regard, *inter alia*, to the share of royalty given to them in respect of Needletime Rights remuneration, in particular because of the record companies' clear position that they are not obliged to pay performers 50% of the royalties.[2]

The above-mentioned situation is clearly not calculated to assist the performers who were intended to benefit most from the re-introduction of Needletime rights royalties when this was first discussed and introduced. Leaving the fate of performers in the hands of record companies in this manner does not solve the problem (the poverty of many performers), it exacerbates it. This has therefore become a human rights issue[3], in particular because of the record companies' manifest and unashamed intentions to recoup their expenses from performers' needletime (a legal right), where they already (generally) have the right to do so by way of deduction from sales royalties (a contractual right). The latter is controversial and has been for many years; the former is simply unacceptable.

It would have been more equitable to make it mandatory for the societies representing record companies and performers to determine the manner in which royalties have to be shared between the record companies and performers, as this determination can be assessed against fairness by the Registrar of Copyright (who has regulatory authority over accredited collecting societies, but not record companies).

1.2 Deeming Provisions in the Copyright Act

Section 9A(2)(a) of the Copyright Act provides that the owner of the copyright in the sound recording *"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*

[2] Despite the 50/50 share split between record company and performer having always been the commonly-understood share split in respect of Needletime rights royalties.
[3] In particular with regard to the Constitution's role to redress the ills of the past and to help persons who were vulnerable to unfair practices in this regard.

Performers' Protection Act …". This section therefore gives effect to the provisions of Section 5(4)(a) of the Performers' Protection Act, which gives the record company the **deeming right** to receive, on behalf of the performer, his share of royalties (although it does impose the obligation to "share" – but it does not state in what proportions.)

Furthermore, Section 9A(2)(d) of the Copyright Act provides that *"any payment made by the user of the sound recording in terms of this subsection shall be **deemed** to have discharged any obligation which that user might have to make any payment in respect of his or her use of a corresponding fixation in terms of section 5 of the Performers' Protection Act ".* Thus, while Section 5(1)(b) of the Performers' Protection Act requires a user to pay the performer in respect of its usage of the performer's fixated performance, this section provides that where the user has paid this royalty to the owner of the copyright in the sound recording, in this case the record company, the user shall be **deemed** to have discharged its obligation to pay a royalty to the performer.

We find therefore, in the Needletime rights legislation, two *deeming* provisions (one in terms of Section 5(4)(a) of the Performers Protection Act, and another in terms of Section 9A(2)(d) of the Copyright Act), which both have the effect of jeopardising the position of performers by leaving their fate with regard to the payment of their Needletime rights royalties, in the hands of record companies. This issue should have been dealt with in a different way, to ensure that performers, who as indicated, were intended to benefit from the Needletime rights system, are not unfairly disadvantaged.

There is no equal bargaining strength between record companies and performers. Performers will therefore, always be the losers in this process. It could never have been the intention of the Legislator that the position of performers would be jeopardised in this manner. On the contrary, the Legislator's intention was to improve to the position of performers – not to weaken it by a law further strengthening the financial powers of the labels over the performers.

2. 50/50 Split

While the Performers Protection Act and the Copyright Act are alarmingly silent with regard to the performers' share of the Needletime royalty, very strangely the Regulations provide, with regard to a collecting society accredited to administer the Needletime royalty of both copyright owners and performers, that the money collected in this case has to be distributed equally between the copyright owners and the performers. This is provided for in Section 8(5)(b) and clearly describes the Legislator's general intention.

This provision with regard to the payment of Needletime rights royalties on an equal basis to performers and copyright owners is in line with the understanding that has always prevailed with regard to the sharing of Needletime royalties. It is strange however (i) that the enabling statutes (namely the Copyright Act and the Performers Protection Act) do not make any provision with regard to the basis of sharing of Needletime rights royalties between performers and copyright owners, and (ii) that it is the Regulations that make provision in this regard, but when they do so they limit this situation to a collecting society accredited to represent both copyright owners and performers.

There is no logical reason why only performers that are part of a collecting society representing *both* owners of copyright and performers (particularly since such a society does not exist in South Africa) should be guaranteed an equal share from royalties payable in respect of Needletime rights (of course, as indicated, *subject to any contrary agreement!*).

Despite the Registrar of Copyright thinking otherwise, SAMPRA, has argued that the provisions of Section 8(5)(b) do not apply to it as it is not a society accredited to represent both copyright owners and performers but only copyright owners. This provision therefore needs to be extended to the collecting society that represents only record companies, as indicated above, and should not only apply to a society representing both copyright owners and performers.

3. Conclusion and Recommendations

It goes without any doubt that the existing Needletime Rights legislation and regulations are not favourable to artists and in fact have a number of provisions that would result in artists not benefitting from the system. Record companies, through SAMPRA, have made it very clear that they have every intention to use the loopholes in the Needletime rights legislation and Regulations to benefit themselves to the detriment of performers.

Section 5(4)(a) of the Performers' Protection Act should be amended by:

- removing the deeming provision provided therein and by specifically providing that the royalty payable in respect of Needletime rights shall be divided equally between copyright owners and performers;
- making it clear that where performers are members of an accredited collecting society royalties due to such performers need to be paid directly to the performers' representative society by either the user or the society representing record companies, without deduction (ie SAMPRA may charge administration fees only in respect of its own members' share of the royalty);
- stating that where the performer is not a member of a collecting society the payment should be made by the collecting society representing record companies, directly to such performer, or by the record company concerned, provided that the performer's share, even in this case, remains an equal share of the royalty and further that no deductions of whatever nature are to be made by the record company;

The Collecting Society Regulations should be amended by:

- amending section 8(5)(b) of the Regulations by removing the words "subject to any agreement to the contrary" and extending the provisions relating to a collecting society representing both copyright owners and performers, to the collecting society representing record companies, where such society is responsible for paying the performer's share (in view of the fact that the society representing record companies has the exclusive right to license the usage of sound recordings for Needletime rights purposes);

Section 9A of the Copyright Act should be amended by:

- amending section 9A(1)(a) to read that the royalty is payable to the collecting society representing the copyright owners, which society shall within thirty days pay the performer concerned or such performer's collecting society;
- deleting section 9A(1)(b);
- amending section 9A(2)(a) to indicate clearly that the owner of the copyright who receives payment of a royalty in terms of this section **shall share such royalty *equally* with the performer;** and
- amending section 9A(2)(b) to indicate that the performer's share of the royalty shall be determined in accordance with [the new] section 5(4)(a) of the Performers' Protection Act by way of default, and that any variation of this share quantum shall only be made by way of industry agreement between the representative collecting societies of the performers and the owners of copyright, which collecting societies shall be representative by way of membership and shall not require assignment of rights to so agree.