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The Protection and Licensing of Music Rights in Sub-Saharan Africa: Challenges and Opportunities¹

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Abstract

Africa has given the world such wonderful tunes as “The Lion Sleeps Tonight,” and Ladysmith Black Mambazo’s “Homeless.” It inspired the 2010 FIFA World Cup official song, “Waka Waka,” so beautifully rendered by Shakira. Africa is a wonderful, massive source of great talent and creativity waiting for an opportunity to express itself. Nevertheless, the business aspects of this rich cultural heritage still, to a large extent, needs to be cultivated. A lot still needs to be done in many parts of the region to ensure that Africa can effectively compete in the elaborate, exquisite, and well-oiled machinery termed “the global music industry.” Many parts of Sub-Saharan Africa still display a dearth of the skills, knowledge, and expertise that are crucial to a successful, globally-oriented industry. However, in spite of gross financial constraints, there is no lack of entrepreneurial and creative endeavors in the region—and the industry is a lively hub of adventurous activity. The sheer resolve of participants in this industry demonstrates the fact that the situation can only get better.

Keywords: Sub-Saharan Africa, music licensing, collective management, authors’ rights, sound recordings, performers’ rights, music business, music industry

Introduction

Africa is a huge continent teeming with people—a vast sea of over one billion souls. Sub-Saharan Africa, which this research focuses on, boasts the majority of this population.² All things being equal the region should have one of the biggest and most-thriving entertainment business sectors in the world. It is clear however that, to a large extent, the entertainment sectors in the region remain largely underdeveloped—at least in the conventional sense. In many instances it may be difficult to even clearly delineate an entertainment “industry,”³ despite a recognition of the great potential of the entertainment or creative sectors in spurring economic development in the region.⁴ The music industry is no exception in

this regard.

Even so, a lot of activity is in fact taking place, albeit largely on a low-scale, amateurish, or subsistence level with not much impact on GDP growth. Importantly, there have also been many success stories over the years. This makes the African music licensing environment at once enigmatic, interesting, and bemusing for the practitioner working in this market. Enigmatic because of the many activities in the industry that do not conform to the conventional understanding of how the industry “works” or how it should work; interesting because of the feeling of adventure and exhilaration arising from having to work with impassioned artist entrepreneurs delving into hitherto untapped areas; and bemusing because sooner or later the practitioner will have to face the fact that certain rough “survival tactics,” including the “big-fish-eat-little-fish” syndrome referred to by some earlier,⁵ may still be prevalent.⁶

What will immediately be evident to one seeking to work in this market is the difficulty in finding any reliable information on the African music industry, both at a regional or national level. It is this lack of information that the Music in Africa project, an initiative of the Siemens Stiftung Germany and the Goethe-Institut, seeks to address.⁷ In this regard Edington Hatitye, Project Manager for the initiative, explained that the aim of the initiative is to foster a well-informed and African-driven music community and to facilitate an inter-African exchange, through creating an online-based portal for the dissemination of knowledge.⁸ Amongst others the project aims to have a directory of the various players in the African music industry, to have a section for useful resources about the industry (whether in the areas of entertainment law, the music business, music technology, or other relevant areas), and to have a section on education in which all information relating to music education and institutions will be reported. At this point, in the absence of this information this research had to depend on information gleaned from limited key players in the industry, as well as information available through research.

The lack of a harmonized legal framework in the area of copyright and related rights protection on a pan-African basis, especially in the area of digital exploitation, may be another reason why the licensing of music rights in Africa poses some difficulties. Progress with regard to the African Economic Community formed in terms of the Abuja treaty of 1991 has been rather slow. This naturally affects regional integration and hampers any attempt at the harmonization of laws. The Southern and Eastern Af-

rican Copyright Network (SEACONET), an ambitious non-governmental organization comprised of copyright offices, collective management organizations, rights holder organizations, and other organizations interested in copyright and related rights, was formed in 2008 with the support of a number of governments in Southern and Eastern Africa. One of the objectives of this organization is to harmonize the laws relating to copyright and related rights in this sub-region, especially in the area of enforcement and cross-border measures.⁹ In 2012 the organization adopted a model copyright law with rather noble ideals. Whether this model law will be widely utilized by the governments concerned is something that remains to be seen.

Because of a lack of harmonization in the various legal systems, Africa does not offer a uniform or homogenous system of music rights administration. This may however, have less to do with different legal systems and more to do with the fact that, as someone put it, we are involved with “an industry that’s perpetually emerging.”¹⁰ The African music scene thus clearly presents a potpourri of licensing possibilities, ranging from the more established and Western-style market in South Africa; to the licensing wilderness of Tanzania where the crisp answer of a prominent musician to the question whether artists are signed to record companies in Tanzania was, “There are no record companies here”¹¹; to the Wild West of Nigeria,¹² a country which offers “a context in which most Western artists would stumble and fall.”¹³ In a snapshot we could say that the development of the African music business has been overtaken by events. By this is meant the fact that the digital revolution, which has inarguably changed and continues to change the nature of the global music business, came at a time when Africa was still trying to get to grips with the traditional music business model.

On the other hand, since a universally accepted model of the new digital music business has yet to be agreed upon, Africa is, as it were, in a similar footing with many with regard to its involvement in the new music business experiment. Of course in this regard Africa finds herself with serious limitations such as limited access to the internet, low broadband infrastructure,¹⁴ and limited access to personal computers. Generally however, the digital environment is presenting Africans, especially solo entrepreneurs in markets where the old music business was not strong, with a platform to stretch their imaginations wider and to “grab the bull by the horns” by taking advantage of the opportunities that present themselves.

In this regard the fast emergence of a burgeoning legitimate music scene, sparked, *inter alia*, by “digital startups helping to leapfrog infrastructure weaknesses [and] making major African cities emerge as not only sources of great local talent that can go global in a meaningful way, but also markets and venues for U.S. and other global artists touring and selling their music,” has been noted.¹⁵

Christopher Kirkley reports how he went to Africa “in hopes of capturing sounds rarely heard by the rest of the world,” only to find a “new, wholly modern” music tradition disseminated through “cellphones, specifically of the cheap, off-brand variety...”¹⁶ Rob Hooijer, a veteran music rights consultant with vast experience in collective management and as African Director for CISAC, and who has travelled extensively in Africa helping fledgling societies, confirms the growing importance of cellphones in Africa.¹⁷ Rather than just the cheap brands referred to by Kirkley however, Hooijer speaks of the growing use of smartphones in countries like Kenya in the dissemination of music, particularly as ringtones. USB sticks and SIM cards are also increasingly being used. In fact, Hooijer remarks, “They are designing their own models. Some of these models are used for short periods and get out of use, but they would have made money out of it. In this environment cash is king.”

Having indicated the above, the question as to whether the digital revolution has brought changes to musicians with regard to providing more opportunities for exploitation of their music was answered more positively by respondents from Nigeria, than it was by respondents from Kenya. Tabu Osusa from Ketebul Music in Kenya (<http://www.ketebulmusic.org/>) remarked that while this new mode of exploitation has benefited urban musicians, “this technology has not benefited or reached the majority of musicians based in the rural areas.”¹⁸ June Gachui¹⁹ sees the current role of the digital and online platforms as being more in the area of creating an opportunity for more visibility and marketing, with limited revenue generation. Ms Gachui believes that this situation arises from the lacunae in the Kenya Copyright Act, which “is still silent on digital exploitation.”

Notwithstanding this trend towards exploration of the online market, and despite the general decline in interest in physical formats of exploitation worldwide, another enigma concerning Africa is the fact that CDs, and even the outdated cassette, remain the standard form for dissemination of music in many parts of the region.²⁰ Even in more-developed South Africa the sale of CDs still takes precedence over digital sales, and retail

stores such as Musica, Reliable Music Warehouse, and Look and Listen appear unfazed by the official opening of the iTunes Store in South Africa in December 2012.²¹

The Individual Exploitation of Authors' Rights

What became clear in the interviews and research conducted is the fact that there is a general lack of understanding among authors/composers, of the rights involved with the exploitation of their musical works. In the interview with Rob Hooijer he reiterated this point. As a result, the practice of buy-out of rights and the big-fish-eat-little-fish trend alluded to above, is very prevalent, especially as one moves further from Southern Africa. Authors/composers are not aware of the bundle of rights that are involved in relation to their compositions (or where they are aware, they feel powerless to effectively exploit these rights on their own).

In many African countries the trend of the independent producers (rather than music publishers) owning all rights (in exchange for some form of up-front payment), seems to be prevalent. Chinedu Chukwuji, General Manager and CEO of the Copyright Society of Nigeria (COSON), acknowledged that music publishing is a very new (but growing) area in the Nigerian music industry, further remarking that record companies "double as publishing companies".²² Mayo Ayilaram, CEO of the rival Musical Copyright Society Nigeria (MCSN) affirms²³ that the publishing market "is an emerging market which has generally not been explored or properly understood." In Tanzania John Kitime confirmed there are no publishing companies and that the practice of buyout of rights (presumably from the record producers) is the norm.

Because of this situation the culture of payment of royalties with respect to authors' rights (whether mechanical, print, or synchronization) is virtually unknown or non-existent except at the collecting society level. In Kenya the veteran musician Tabu Osusa acknowledges that the majority of musicians "have very little or no knowledge at all [of] publishing and similar rights." He attributes this to lack of awareness of the rights, with the result that authors "don't engage [in] publishing deals." Osusa also made a very interesting observation regarding buy-out of rights, indicating that most musicians, especially those from rural areas, prefer buy-out of rights (in exchange for some form of payment), "since they don't have much faith on [the] royalties mode of payment." It is to be expected that this ignorance with regard to the rights involved would also play itself out

in the entrepreneurial terrain of online licensing—an area which clearly involves more complex issues than terrestrial licensing. Thus, without a supporting team of advisors the unwary authors are entering a minefield when they dabble with the online and digital.

The situation is somewhat different in Southern Africa, where buy-out of rights is not very widespread. It is submitted that this is less to do with a higher level of understanding of rights on the part of authors and more to do with the fact that the region boasts a more established publishing industry, which naturally operates from a tradition of entering into publishing deals with authors. There is no pressure in South Africa for composers/authors to sign with publishing companies.²⁴ It is also true however that it is publishers (especially the established publishers) that possess the necessary expertise and resources to carry out transactional licensing of rights (i.e., print, mechanical, and synchronization). In South Africa a good market for the licensing of print, mechanical, and synchronization rights does exist, albeit a tight one. Authors/composers signed to publishing companies share from royalties generated from these forms of licensing.

Among authors/composers, ignorance with regard to the finer details relating to copyright and music licensing is also evident, though it could be said that the general awareness of rights is better in Southern Africa than it is in West and East Africa. Some authors/composers form their own publishing companies and enter into administration deals with the more established companies. This should not however, be taken to imply that unscrupulous practice by some music publishers does not exist in Southern Africa. This practice can be detected, and there would be many publishers that can fit the description of “banking operation” publishers, i.e., publishers with no commitment to promote the works assigned to them but rather interested in acquiring ownership of rights as a way of ensuring that they can share in payment of royalties whenever the work gets exploited.²⁵ In this regard authors/composers do need to be made more aware of their rights and the true role of a music publisher, to enable them to make informed decisions.

The Collective Licensing of Authors' Rights

As hinted to above, collective management of rights represents the better known or better established system of royalty earnings in most parts of Africa. For many authors/composers in Africa collective management is

the only system from which they can ever hope to earn royalties.

Many of the countries in Sub-Saharan Africa have some form of collecting society, many of which are CISAC-affiliated.²⁶ This does not, however, imply that these societies are all successful. Many of the societies are still struggling and have not managed to break into the market with regard to licensing and collections. Many have high administration costs and are virtually living from hand to mouth, with the result that many of their members are not seeing much in the form of royalties.²⁷ According to Rob Hooijer, only a handful of African societies, notably in South Africa, Kenya, Senegal, Burkina Faso, Mauritius, and a few other countries make a significant contribution to total royalty collections in Sub-Saharan Africa, (with SAMRO, the Southern African Music Rights Organization, making the bulk of the contributions). Not all societies are affiliated with CISAC. In this regard Hooijer mentions the examples of societies in Botswana, Ethiopia, Zanzibar, Chad, Cape Verde, and a society in Cameroon.

With a few exceptions, the norm is for all rights in respect of a musical work (i.e., reproduction and performing rights) to be administered by one society. A notable exception in this regard is South Africa, where mechanical rights and performing rights have traditionally been administered by two different organizations.²⁸ Mechanical rights licensing in South Africa has, however, had a tumultuous past culminating in the demise of the main society representing authors/composers.²⁹ SAMRO, traditionally confined to the administration of performing rights, took over the role once played by SARRAL (South African Recording Rights Association Limited), after the latter's demise, especially as many SARRAL members were also SAMRO members in respect of performing rights. NORM (National Organization for Reproduction Rights in Music) however continued to administer mechanical rights on behalf of its (mainly publisher) members (including the major publishers). The untenable environment created by SAMRO's entrance into mechanical rights licensing (in particular the conflict created by the fact that NORM's publisher members are also members of SAMRO in respect of performing rights), and the need to have a simplified system of mechanical rights licensing in South Africa led to the two organizations agreeing to form one body that will be responsible for mechanical rights licensing in South Africa, termed CAPASSO (the Composers, Authors and Publishers Association).³⁰

Another noteworthy aspect of collective management in Sub-Saharan Africa relates to the role of government in this system. There are some

societies that are part of government or rather double up as copyright offices, such as COSOTA in Tanzania (and COSOZA in Zanzibar), COSOMA in Malawi and MASA in Mauritius. What is more common however is the existence of societies that, while not part of the Copyright Office, are established under statute and operate under the regulatory supervision of the Copyright Office. While this system seems to work in some countries, it has also invoked some of the bitterest experiences in collective management in Sub-Saharan Africa, more particularly in Nigeria and Kenya. In Nigeria an almost endless wave of litigation and counter-litigation, spanning several years, has raged, primarily in relation to the continued recognition of the Musical Copyright Society of Nigeria (MCSN), the copyright society in existence prior to the introduction of a regulatory system for societies.³¹ In a similar situation in Kenya, the Kenya High Court overruled the decision of the Kenya Copyright Board with regard to the deregistration of the Music Copyright Society of Kenya (MCSK).³² Even SAMRO in South Africa, despite enjoying a relatively positive rating internationally,³³ and despite there being, generally, no regulatory framework for societies in South Africa,³⁴ has not been exempt from calls for government intervention in its affairs.³⁵

Many African countries have repealed the old colonial-era copyright laws and enacted modern laws. However a few other countries still have outdated copyright laws which need overhauling. The worst case in this regard is Swaziland, which still uses the colonial-era Copyright Act 36 of 1912.³⁶ Some other countries that still have old legislations include The Comoros, Seychelles, Sierra Leone, Somalia and in a rather strange twist, South Africa.³⁷ Copyright protection in South Africa is still provided for under the Copyright Act 98 of 1978 (as amended), and falls far behind with regard to the latest technological developments. In spite of not having acceded to the WIPO Internet Treaties, the revised copyright legislations of a number of countries make provision for the right of “communication to the public” which is crucial for the effective administration of performing rights in the digital era. A number of countries however, including South Africa, Zimbabwe, Namibia and those members of OAPI (the Organisation Africaine de la Propriété Intellectuelle) whose copyright laws have not been revised and are based solely on the Bangui Agreement of 1977 (as amended), do not make provision for the right of “communication to the public.” It is submitted that the omission of a right of communication to the public not only has the effect of hampering the licensing of perform-

ing rights at the national level in the countries concerned³⁸ but would also hamper cross-border or pan-African licensing.

The adverse effects of not having a “communication to the public” right have been felt in a drastic manner in South Africa, where SAMRO’s attempts to license new media users have often hit a brick wall. In this regard Nicholas Motsatse, CEO of SAMRO until the end of June 2013, answered my question as to whether he thinks there has been an exhaustion or maximization of music licensing avenues in South Africa, in the negative.³⁹ In this regard he remarked that, as a result of there being no right of “communication to the public” rights holders have lost out on hundreds of millions of rands⁴⁰ in unpaid royalties since the advent of digital exploitation of music in South Africa. He further indicated that the rights holders have completely lost out on the ringtone boom that swept South Africa in the late 1990s and the early 2000s. Many new media users, including the major cellphone companies and ISPs, have defiantly refused to procure licenses for the usage of musical works in their platforms, arguing coldly that the protection of performing rights under the South African Copyright Act is limited to terrestrial broadcasts and public performance and does not extend to the digital environment.

In a rather strange twist, the new media users in South Africa have been paying record companies in respect of the exploitation of sound recordings, while refusing to pay in respect of the authors’ performing rights. This strange situation arose as a result of the fact that while the South African Copyright Act makes no provision for a right of communication to the public in respect of musical works, it does make provision for such a right in respect of sound recordings. Section 9(e) of the Copyright Act clearly makes provision for the right of “communicating the sound recording to the public.” This right was introduced in amendments to the Copyright Act in 2002, which were primarily aimed at introducing “public play” (or rather “needle-time”) rights in South Africa. In introducing this new right, the legislator deemed it necessary to provide for the right of communication to the public in respect of sound recordings, while it did not somehow deem it equally necessary to introduce a similar right in respect of musical works. This has created the current anomaly where the exploitation of a sound recording without authorization constitutes infringement, while it would be well in order to exploit the underlying musical works without authorization. Consequently, whereas composers/authors and their publishers have continued to suffer loss, record companies (and presumably

the recording artists participating in the sound recordings) are being compensated.

It is submitted that if this situation were to change, government needs to take seriously the plight of rights holders in this regard. There is a perception within South Africa that government has allowed this state of affairs to continue unabated, has virtually turned a deaf ear to the pleas of rights holders, and has not sought to understand the gravity of the situation. The need to urgently address this situation and to amend South African copyright legislation in order to ensure adequate protection for authors/composers was equally echoed by the commissioners of the Copyright Review Commission⁴¹ set up to investigate nefarious activities in the music industry, in particular among copyright societies. It would probably be possible to interpret current South African copyright law⁴² as also covering the activities of new media users in respect of performing rights through a proper understanding of the definition of “broadcast” in the Copyright Act.⁴³ Such a construction would also assist in attempts to forge cross-border or pan-African licensing deals in respect of performing rights across jurisdictions that may not have a communication-to-the public regime.

The aforementioned should not be construed to mean that there is no activity at all in South Africa with regard to the licensing of new media users. As Motsatse confirmed, there has been some licensing in this regard. However, many of the large new media users have continued to resist attempts at licensing them, and in fact it is the international newcomers who have shown keenness to procure licenses, because “they are concerned about their international reputation,” as Motsatse remarked. Motsatse further indicated that the presence of the international newcomers (such as iTunes) has paved a way for pan-African online and digital licensing of performing rights, as many of these international players would prefer having one single, multi-territorial or pan-African license rather than having to negotiate with each society in Africa. This, Motsatse quips, arises from the multi-territorial nature of digital offerings and the existence of multi-territorial satellite networks. Because of its success in collective management international entities prefer SAMRO as their licensing partner with regard to procuring a pan-African license. Stephenson Mhlanga, General Manager: Sales at SAMRO, confirmed⁴⁴ that SAMRO is in the process of negotiating with its African counterparts to enable it to act as their agent in the licensing of new media performing rights.

The licensing hurdles experienced in the area of performing rights in South Africa have generally not been experienced in the area of mechanical rights licensing. This is because the Copyright Act simply refers to “reproducing the work in any manner or form,” thus also including the digital environment. Seeing that most copyright legislations employ this type of language, it should be fairly easy to forge pan-African licensing deals in the area of mechanical rights.

The Individual Exploitation of Sound Recordings and Performers’ Rights

Sound recordings have traditionally been the domain of record companies. Even with the advent of the digital revolution and all the talk about the “long tail,”⁴⁵ it seems that a certain preference for established record companies persists, ensuring the continued existence and role of record companies. It appears that even where producer-artists start out in an entrepreneurial drive and achieve success on their own that is traditionally associated with being signed to a record company, many ultimately prefer to “settle down,” either by establishing a record label themselves and signing other artists, or by joining an established record label. Explaining this phenomenon, Nick Motsatse had this to say, “A record deal is aspirational, especially out of the need for support. Ultimately the artist would want to have someone with expertise to take care of their affairs. The record companies still have a reputation of being able to provide a service.” Upon being asked whether, in his opinion, successful artists whose contracts with recording companies expire would see that as an opportunity to “go independent,” Motsatse explained that in his experience many artists who were in record deals seem more reluctant to go independent and that artists generally aspire to have recording deals.⁴⁶ Because of this Motsatse firmly believes that the real need is for managers who will be able to take care of the artist’s business affairs and administration, “enabling the creator to create.” In this regard Motsatse further remarked that there is a dearth of good, competent artist managers in South Africa and the rest of Africa.

While the above scenario may be reflective of the situation in South Africa and many other parts of the world, it does not seem to be always true with regard to the rest of Sub-Saharan Africa. For one thing, apart from parts of Southern Africa, there is no established recording industry in the rest of Sub-Saharan Africa—at least not in the conventional sense.⁴⁷ Here the industry “learns as it develops.”⁴⁸ Speaking about the Kenyan

recording industry Eisenberg warns against using the West “as a ready-made model of how things are supposed to work,” and describes the industry as having always been highly multifarious, and even more so in the digital era.⁴⁹ By multifarious Eisenberg implies that the industry operates “upon multiple models of production, distribution, and propertization.” It is submitted that this description explains the *modus operandi* in other African markets beyond South Africa. As has been noted, the industry reflects an ongoing experiment and experimentation—one that is “perpetually emerging.”⁵⁰

In view of this, the music business practitioner advising clients in this environment needs to be prepared to be on a roller coaster of variegated, adrenalin-pumping “deal” scenarios, whose kaleidoscopic nature calls for the secretion of one’s best creative juices in order to forge a profitable deal for the client. Today the client may be a performing artist, tomorrow he may be a record company, the next day he may be acquiring rights in musical works in a buy-out deal (which does not have to involve a lot of money), or he may be staging a show at the market where he has managed to secure an open space where he, as a producer-artist, will be the main act, and the artists signed to his producer label will also be performing. It needs to be noted that even where record companies are involved, the artist often has to do a lot of work on his own to ensure that he can make a living. In this regard Ayilaram had this to say: “Since the demise of the majors...from Nigeria in the mid-90s there have emerged local recording labels who record artists, sell and promote recordings...in mix with the artists themselves pushing their products, mostly singles, into the market.” Gachui confirms this trend with regard to the Kenyan market, stating that though there are record companies, the majority of artists “push their product substantially and are also the author/composer/producer of their own recordings.” On the question as to whether artists signed to the record labels earn any royalties from sales Ayilaram responded, “The artists are paid some money upfront with some other [undisclosed] perks from the labels and that may be the end of that particular recording. ... The artists largely thereafter rely on appearances at shows and concerts.”

In South Africa a visible independent sector of the recording industry exists alongside the more traditional, major-dominated industry.⁵¹ Although the independents are arguably more organized or established in South Africa—at times achieving levels of success generally attributed to the majors—many of them are not without struggles and often have to re-

sort to many of the rugged entrepreneurial endeavors that are so common in other parts of Africa. A problem that nags many independents in South Africa (as also in many other parts of the world), which has prompted them to forge alternative distribution networks, is “the minuscule independent music retail industry.”⁵² Modiri Mochoari, owner of independent record company, Africo Beam, confirms this.⁵³ Mochoari mentioned access to resources (both distribution channels and retail stores) as a major handicap facing independent record companies. He argues that independents are “working against established links,” and experience blockage “at every point.”

Mochoari further indicated that even where the independents want to formally engage the services of the major distributors, this is not easy as one has to wait for up to three months at times “to get a decision.” This happens even where the independent undertakes its own pressing and printing. Mochoari added that this delay in finalizing distribution deals is compounded by the fact that even after concluding the deals the distributors do not actively push the material into retail stores. This results in loss of income for the independents and frustrates their marketing endeavors because when they refer fans to the retail stores, the fans often cannot find the records. This may be because the distributor has not dispatched the material to the retailer, or it may be because the material is still in the retailer’s warehouse. Thus the independents feel that the major-aligned distributors do not give priority to their material. As a result, independents often have to engage agents or representatives, at a cost, to police the distribution deal for them (in the sense of ensuring that the distributor does dispatch material to the retailers, that the retailers do not keep the material in their warehouses, and that there is enough stock of the material in the stores).

Because of this reality, independents often find themselves compelled to engage in parallel distribution tactics that may contravene the terms of their distribution deal, such as selling the products themselves. One of the respondents mentioned a case where his independent label made more money through these side deals and endeavors rather than through retail store sales. The side endeavors involves guerrilla sales tactics such as conducting house sales,⁵⁴ going to taxi ranks,⁵⁵ and virtually “going to any place where there is a gathering of people.” Mochoari asserts that the age-old gremlin of payola remains a major concern for many independent record labels. According to Mochoari trying to receive airplay for one’s

music video or radio airplay for the sound recording “is a nightmare,” as the majors “have royalties.” The answer, Mochoari offers, is for the independents to also build loyal relationships of their own—something which can only be achieved over time. Another platform used by South African independent musicians to promote and sell their music, “which they do through mail orders or at gigs” is the use of social networks such as Facebook, Myspace, and Twitter.⁵⁶ Unlike in East and West Africa, ringtones do not seem to have taken off as expected for independent musicians and companies in South Africa. In contrast Chukwuji explains that in Nigeria artists sell music through cellphones (i.e., ringtones), USB sticks, downloads, etc. Both Kitime in Tanzania and Osusa in Kenya confirm the growing use of ringtones as a means of selling music in these markets.⁵⁷

The springing up of several digital music platforms in Africa will certainly create a legal minefield in respect of those countries that have not fully embraced the new digital technologies in their copyright laws. The fact that key jurisdictions such as Kenya, Nigeria, Namibia, and South Africa have not acceded to the WIPO Internet Treaties means that reciprocal protection in the digital environment cannot be easily achieved. As indicated, although South African legislation does not make provision for a right of communication to the public in respect of musical works, it does, rather strangely, provide for this right in respect of sound recordings (and performers’ rights). The launch of international online music retailers, in particular iTunes in South Africa, promises an increase in download music sales. Prior to this, Musica’s download service was the only legal download site in South Africa, apart from a site aimed at promoting the music of those not yet established in the industry.⁵⁸ Other new ambitious platforms are springing up in Africa, such as Nigeria’s iROKING and Spinlet, Africori, with offices in Cape Town, Lagos, and London, Kenya’s Mdundo and Waabeh.com.⁵⁹ There is also South Africa’s Content Connect Africa, with which Gallo Music Records, one of the major record companies in South Africa, has recently announced a mobile digital partnership which will see Gallo’s catalog being made available “through multiple mobile platforms.”⁶⁰

The Collective Licensing of Sound Recordings and Music Videos

In a number of jurisdictions in Africa the law provides for an equitable remuneration right in respect of the exploitation of sound recordings

and the performances embodied in them, when such are exploited through broadcasts and other forms of communication to the public (including public performance and transmission in a diffusion service). This right is generally administered collectively through accredited bodies—either bodies representing owners of sound recording copyright alone, performers alone, or both.

Section 28(1)(d) of the Kenya Copyright Act 12 of 2001 (as amended) provides for the right of communication to the public and broadcast of a sound recording, while section 30(1)(a) and (b) does so in respect of the rights of performers. In Kenya, record producers' rights are administered by the Kenya Association of Music Producers (KAMP), while performers' rights are administered by the Performers' Rights Society of Kenya (PRiSK). Section 30A of the Kenya Copyright Act provides for the payment of a single equitable royalty to the performer and the producer in respect of (i) a sound recording published for commercial purposes or (ii) if a reproduction of the sound recording is used directly for broadcast or other communication to the public. The royalties are to be paid through the performers' and producers' respective collecting society. While the practice of payment of an equitable royalty in respect of the broadcast or other communication to the public of a sound recording is well-established in many parts of the world, it is not clear whether the payment of such a royalty in respect of a sound recording "published for commercial purposes" is intended to replace the role of record companies in paying royalties to performers arising from recording contracts. Upon being asked whether artists earn a steady income from record companies by way of royalties in Kenya, Gachui answered in the negative and made reference to the payment of this equitable royalty by the performers' collecting society. She further remarked, "The previous arrangement of the record label getting paid and paying the artist is becoming less and less popular and will probably in my opinion, phase out eventually."

In South Africa the regime for the payment of an equitable royalty in respect of the broadcast and communication to the public of a sound recording—termed "needle-time" or "public play" rights—was introduced in an amendment to the Copyright Act in 2002. Relevant regulations were promulgated in 2006, and three collecting societies were accredited.⁶¹ This regime has, however, had a very tumultuous history in South Africa and has been a source of much controversy and ongoing litigation. The crisp issue has centered on the question as to which party is responsible for

payment to the performers of their performers' share of royalties. Since record companies own the copyright in respect of sound recordings, they have an exclusive right to license the usage of the sound recording (including in terms of the needle-time right). In view of this, section 9A(2)(a) of the Copyright Act requires the owner of a sound recording who receives a royalty in respect of needle-time rights, to share such royalty with the performer whose performance is embodied in the sound recording (without indicating whether this should be an equal share or not). Furthermore Section 9A(2)(d) provides that a user who pays a royalty to the owner of copyright in the sound record is deemed to have discharged his obligation to pay a royalty to the performer in terms of the Performers Protection Act 11 of 1967, (as amended).

On this basis SAMPRO (the body accredited to represent record producers in respect of needle-time rights) argued that it was required to pass on all royalties collected from users to record companies, and that the record companies would then determine how to pay the performers' share. SAMPRO further argued that there is no obligation on record companies to pay performers 50% of the royalties collected, because the Act is silent on this issue. In counterargument the Registrar of Copyright (who is responsible for supervising the activities of accredited societies), and SAMRO (on behalf of performers), expressed the position that SAMPRO was required to pay the performers' share to SAMRO, which would then distribute it among its performer members; and further that the share should be 50% of the collected license fees. The dispute has been one of the most protracted music business disputes in South Africa. Fortunately however, an announcement has just been made by the two parties that they have ended their longstanding dispute and have resolved to merge their operations into one society, which shall represent both performers and record companies.⁶²

The collective role of KAMP in Kenya also extends to the licensing of the broadcast and other communication to the public of music videos. In South Africa music video licensing is done through RiSA Audio Visual (RAV), an organization formed by the Recording Industry South Africa (RiSA) to undertake music video licensing for its members. RAV licenses broadcasters (such as the SABC, MNET and eTV), program makers, and video jukebox system suppliers.⁶³ RiSA membership is comprised of the majority of record companies in South Africa, including the major record companies. Independent record companies have organized themselves into

the Association of Independent Record Companies (AIRCO)⁶⁴ although a number of their members remain members of RiSA. AIRCO's licensing activities include the public exhibition of music videos, the use of music videos in webcasts, and simulcasts of broadcasts.⁶⁵ Recently a music video distribution agreement with the public broadcaster, the South African Broadcasting Corporation (SABC), which is linked with the SABC's drive to source local content, was announced.⁶⁶ The deal covers the use of music videos in broadcasts and digitally.

Endorsements and the Live Performance Scene

In South Africa product endorsements and merchandising have been good alternative sources of income for successful musicians. According to both Ayilaram and Chukwuji, many Nigerian artists are beginning to earn income from product endorsements, mainly as brand ambassadors (e.g., with the telecoms). In Kenya, Osusa and Gachui confirm that some Kenyan artists earn endorsement income in respect of mobile phone brands, toilet cleaning products, deodorants, beverages, etc. Merchandising however, is still at a very low scale. On the other hand Kitime states that in Tanzania (where he argues, there are no record companies), very few incidents of product endorsements and merchandising exist, and the buyout of rights is prevalent.

The live music scene has always been a very important source of income for musicians in Africa—sometimes the main or only source of income, as a result of there being no formal recording industry and thus no recording advances or a steady source of income in the form of royalties. Even in South Africa where the record industry is more developed, live performances have always been an important source of income for artists. However, even though the South African live music scene is seen as being more lucrative (with some forty-three festivals and sixty-two venues comprising the “permanent features of the live music circuit”), it is still seen as being haphazard, irregular and seasonal, and centered in the large cities in the Gauteng and Western Cape provinces.⁶⁷ In Kenya Osusa remarked that though the few existing recording companies pay some royalties, because the sales “are so minimal...the artiste [*sic*] can only sustain themselves through live performance.” Gachui further comments that over the past five to eight years there has been a significant increase in the number of bands performing at regular venues and gigs, including corporate gigs, and there have been several successful concerts featuring local and inter-

national artists “and well attended.”

Notwithstanding the above, Osusa notes that although music promoters and club owners do facilitate opportunities, most of the artists have to seek their own opportunities. Gachui confirms, adding that because music promoters are yet to establish themselves, “most artists hire a team around them to seek opportunities to perform and make all the logistical, marketing, and other arrangements.” In Nigeria, Ayilaram paints a bleak picture of a live music scene that is on the downturn, in particular with regard to concerts, with the exception of some events organized by corporations. Chukwuji however counters this position, asserting that the live scene is in fact “very active as corporate organizations are also involved in this area of music promotion.” In the end it appears that this may be a question of whether the bottle is half full or half empty! In Tanzania Kitime indicates that there is a live music scene but that artists themselves have to create the opportunities.

Conclusion

It is clear that the African music licensing environment offers a lot of opportunities, albeit at times of a miniscule scale. Because of the grossly underdeveloped nature of the music industry, any hope of making a quick buck in the industry is likely to face frustration. The practitioner desiring to assist clients in this environment therefore needs to exercise patience and to take his clients along, with a view to building a long-term relationship. The practitioner, whether a lawyer or other advisor, may also find himself having to also fulfill the role of a personal manager or an agent, because of a dearth of professionals in these areas. A percentage-based deal, whereby the practitioner gets a percentage of the money earned by the client, may furthermore represent a more viable deal than an expectation for up-front payment for the services rendered. A practitioner with this frame of mind and attitude might just land upon a client who strikes gold. Thus in the end all the practitioner’s efforts will prove worthwhile and reap dividends. It needs to be remembered that although the African music industry may still be at a fledgling state, this is the region that has given the world “The Lion Sleeps Tonight” (a hit song which continues to entertain millions worldwide through the *Lion King* franchise); “Homeless,” which has wowed crowds the world over in Paul Simon’s Graceland tours; “Waka Waka,” inspired by African melodies and so beautifully rendered by Shakira at the 2010 World Cup; and many other beautiful melodies.

Endnotes

1. Research for this paper was originally prepared for inclusion in the 2014 International Association of Entertainment Lawyers (IAEL) book, titled *Licensing of Music—From BC to AD (Before the Change / After Digital)*. The research went beyond the scope required for the book and in the end only an abridged version was published in the book. The full research is published here with approval of the IAEL editorial team for the 2014 book.
2. Nearly 800,000,000 according to the World Bank. <http://www.tradingeconomics.com/sub-saharan-africa/indicators-wb>. Accessed 05 July 2013.
3. In the sense of “having strong domestic rivals, aggressive home-based suppliers, and demanding local customers” (Porter, M. E. “The Competitive Advantage of Nations,” *Harvard Business Review* 68, no. 2 (March-April 1990): 73-93). For a broader understanding of Porter’s concept of “industry clusters” see Porter M.E. *Competitive Strategy: Techniques for Analyzing Industries and Competitors*. New York: The Free Press, 1980.
4. This was recognized as early as the beginning of the 1990s in the so-called “Dakar Plan of Action,” available at http://www.acpcultures.eu/_upload/ocr_document/UNESCO-OAU_Cult%20Ind%20For%20Dvp%20in%20Africa_1992.pdf. Accessed 14 July 2013.
5. This phenomenon is explained by Penna, F.J., Thormann, M., and Finger, J.M., “The Africa Music Project,” in Finger, J.M. and P. Schuler. *Poor People’s Knowledge – Promoting Intellectual Property in Developing Countries*. Washington D.C.: World Bank / Oxford University Press, 2004: 102-103.
6. One well-known independent publisher is said to be on a drive to recruit composers in their hundreds, with no real purpose of finding exploitation for their works but as a way of acquiring ownership in order to benefit from a residual source of income in the event that these composers (many of whom are also recording artists), break through. See Baloyi J.J. “To Publish or not to Publish: A critical consideration of the role of the Music Publisher today.” *SA Mercantile Law Journal* 24, no. 2 (2012) for a critique of these “banking operation publishers.”
7. Available at <http://themusicinafricaproject.net/>. Accessed 05 August

2013. This is a newly-formed initiative.
8. In an interview with the author.
 9. See for further information in this regard www.seaconet.org accessed on 09 September 2013.
 10. See <http://www.hypebot.com/hypebot/2013/01/africas-music-industry-building-with-cassettes-mp3s-in-an-underdeveloped-terrain.html>. Accessed 8 October 2013. The same commentator remarks, “The African music industry is fascinating less for the sectors that appear similar to U.S. or European sectors of the industry and more for what is unique about emerging African nations.”
 11. This was communicated to the author by Mr. John Kitime, a Tanzanian musician, in response to a questionnaire interview.
 12. The expression “Wild West of Nigeria” is the author’s coinage used not with a negative connotation but rather admiringly at the entrepreneurial prowess of Nigeria, a country that birthed “Nollywood,” the world’s second largest film market in terms of number of productions (ahead of Hollywood and trailing behind Bollywood)—and this largely from make-do resources.
 13. See supra note 10.
 14. The problem of low broadband differs from country to country, or sub-region to sub-region. Rob Hooijer, Music Rights Consultant and former CISAC Africa Director, noted in an interview with the author (on 2 July 2013) that broadband is much cheaper in East Africa (e.g., Kenya) and parts of West Africa than it is in Southern Africa, which places these countries in a better position to explore digital online opportunities than their counterparts in Southern Africa.
 15. See *Billboard* at <http://www.billboard.com/biz/articles/news/digital-and-mobile/1488307/digital-startups-developing-market-establishing-new?page=0%2C0>. Accessed 14 October 2013.
 16. See http://www.wweek.com/portland/article-19788-africa_high_tech.html. Accessed 15 October 2013.
 17. This was communicated to the author in a face-to-face interview with Mr. Rob Hooijer in South Africa.
 18. This was communicated to the author by Mr. Tabu Osusa in response to a questionnaire interview.
 19. General Manager of the Kenya Association of Music Producers (KAMP), in response to a questionnaire interview.

20. It has, for example, been reported that the audio cassette is experiencing a boom in Zimbabwe, Mozambique, and Botswana, garnering more sales than even the CD. In Zimbabwe, where the cassette is preferred to the CD because of considerations of affordability, durability, and the belief that it is more difficult to pirate than the CD, a record company has opened a cassette plant in Harare in order to meet this growing demand. See <http://edition.cnn.com/2011/BUSINESS/06/07/cassette.culture.zimbabwe/index.html>. Accessed 17 October 2013.
21. This situation is often attributed to low internet penetration and costly bandwidth. See <http://www.bdlive.co.za/business/technology/2012/12/16/music-retailers-unfazed-by-sa-itunes>. Also <http://enitiate.me/2011/12/30/are-digital-music-downloads-a-better-deal-for-artists/>. Accessed 23 October 2013.
22. This was communicated to the author in response to a questionnaire interview.
23. In response to a questionnaire interview.
24. Perhaps this arises from the fact that authors/composers can be a member of the Southern African Music Rights Organisation (SAMRO), the South African performing rights organization (PRO) and the most important royalty administration body, without having to be associated with a publisher. Consequently there are many authors/composers that are members of SAMRO that are not signed to any publishing entity.
25. The term “banking operation publisher” is borrowed from Passman, D.S. *All You Need to Know about the Music Business*. (6th U.K. ed.) London: Penguin Books, 2008: 256. See further in this regard Baloyi, JJ. “To Publish or not to Publish” (supra note 6). Thus a banking operation publisher would be able to earn performing royalties from a PRO such as SAMRO, without having done anything with regard to the broadcast or public performance of the musical works. The songs may have received airplay as part of the record company’s promotion of its recordings (in which the songs feature), or the singer-songwriter signed to the publisher may have, through his own initiative or that of his manager, performed the work in public.
26. Countries in which societies do not exist include Lesotho, Swaziland, the DRC, Somalia, Gabon, Eritrea, and a number of the other

smaller states. In countries such as Rwanda, Burundi, Comores, and Central African Republic either infrastructure is being established or there is no significant activity taking place. In Ghana legislative changes in 2012 resulted in the demise of the Copyright Society of Ghana and its replacement by the newly-formed Ghana Music Rights Organisation, whose effectiveness remain to be seen.

27. In Kenya there has been an on-going conflict between the Kenya Copyright Board (the body entrusted with the supervision of collecting societies) and the Music Copyright Society of Kenya (MCSK), which resulted in the former deregistering the latter, and the latter obtaining a court order to nullify the deregistration. See in this regard <http://ipkenya.wordpress.com/2013/05/16/lessons-for-mcsk-from-nigeria-music-copyright-society-of-kenya-must-administer-rights-even-without-government-license/>. Accessed 25 October 2013. The deregistration was apparently motivated by allegations of high operational costs as opposed to the royalties actually paid to members, with it being alleged that MCSK used Sh 137 million for operational purposes, against revenues of Sh 185 million, thus leaving only 25% of collections available for distribution. See <http://ipkenya.wordpress.com/2012/01/09/the-fate-of-music-copyright-society-of-kenya-mcsk/>. Accessed 25 October 2013.
28. SAMRO has traditionally administered performing rights, with SARRAL (the South African Recording Rights Association Limited) and NORM (the National Organisation for Reproduction Rights in Music in Southern Africa) administering mechanical rights. SARRAL, a member of BIEM and CISAC until its liquidation in 2009 arising from litigation instituted by prominent members (see <http://colinshapiro.co.za/truthaboutsarral/> for full information in this regard), was the main organization administering mechanical rights until NORM was formed as a breakaway body to focus mainly on the interests of music publishers. NORM has never been a member of either BIEM or CISAC.
29. Ibid.
30. See in this regard <http://capasso.co.za/>.
31. See for more in this regard Ola, O. *Collective Management of Copyright in Nigeria: Lessons for Africa*. Heidelberg: Springer-Verlag Berlin and Heidelberg GmbH & Co. KG, 2013.
32. <http://ipkenya.wordpress.com/2011/09/28/ip-crammer-2011-the->

- good-the-bad-the-ugly-of-intellectual-property-in-kenya/. Accessed 25 October 2013.
33. SAMRO pays millions of rands in royalties to foreign societies every year, and its senior managers have often served in various committees and organs of CISAC, including its board.
 34. Except in respect of public play (i.e., the so-called “needle-time”) rights.
 35. These calls culminated in the establishment of a copyright review commission to look into the practices of copyright societies and other music businesses, which has recommended the introduction of a regulatory regime in respect of copyright societies. See in this regard www.gov.za/documents/download.php?f=173384. Accessed 13 September 2014.
 36. It has recently been reported that the Swaziland cabinet approved a bill that is aimed at modernizing the Swaziland legislation. <http://afro-ip.blogspot.com/2010/05/swaziland-cabinet-approves-new.html>. Accessed 14 October 2013.
 37. Except for South Africa and the Comoros, the other countries mentioned here are not, as on the date of writing this, members of the Berne Convention.
 38. Countries that do not have a “communication to the public” right would, in respect of performing rights, have to rely on provisions in copyright legislation that deal with the broadcasting of a work, the transmission of the work in a diffusion service and/or the public performance of a work—all of which are not adequate to deal with digital forms of exploitation.
 39. In a one-on-one interview prior to his stepping down as SAMRO CEO.
 40. The South African monetary unit.
 41. See *supra* note 35. See in particular page 38 of the report.
 42. And, depending on the definitions employed, also the copyright laws of the African countries that have not incorporated a right of communication to the public but deal with performing rights in the traditional manner of seeing it as involving either (i) a public performance, (ii) a transmission in a diffusion service, or (iii) a broadcast.
 43. One of the arguments made by the new media users is that the transmission of musical works through digital platforms does not

constitute a “broadcast” and thus does not constitute infringement of the copyright in the musical works. The circumstances are in many ways akin to those that prevailed in the Australian case of *Telstra v APRA (Music on Hold)* 146 ALR 649 (1997), a case which involved music-on-hold used in both traditional telephones (diffusion service) and mobile phones (broadcast). Although the relevance of this case in Australia may have been overtaken by developments, it is submitted that it would still have persuasive relevance in jurisdictions that still define performing rights solely in respect of broadcasts, diffusion service, and public performance with respect to digital exploitation of copyright works.

44. In interactions with the author.
45. The “Long Tail” is a theory for the digital music business first popularised by Chris Anderson in an October 2004 *Wired* magazine article, which morphed into his popular book, *The Long Tail: Why the Future of Business is Selling Less of More* (New York: Hyperion, 2006). The theory essentially postulated that the online era had rendered obsolete the era of the making of a few hits, paving the way for many more artists to earn income, albeit less income than the few used to earn. The theory has however, received criticism from others as not reflective of reality. See in this regard “The Long Tail of P2P,” <http://www.prsformusic.com/creators/news/research/Documents/The%20long%20tail%20of%20P2P%20v9.pdf>. Accessed 27 October 2013.
46. Motsatse mentions the possible exception of the musician Spোক Mathambo, a self-made artist entrepreneur who has attained international acclaim, “rewriting any artistic laws in his way.” See <http://www.artistdirect.com/artist/bio/spোক-mathambo/4912532>. Accessed 26 October 2013.
47. With the exception of South Africa, the major record companies no longer have a presence in the rest of Africa. Recently it was reported that Universal Music is considering setting up offices in Kenya again. See <http://www.capitalfm.co.ke/lifestyle/2013/02/08/kenyan-music-built-on-talent-part-2/>. Accessed 27 October 2013.
48. See http://strictlyentertainmentgroup.com/Music_Week_Africa_Report.pdf. Accessed 25 October 2013.
49. A.J. Eisenberg, “The Kenyan Recording Industry in the Digital Age,” working paper, accessed 27 October 2013, <http://www>.

academia.edu/2222556/The_Kenyan_Recording_Industry_in_the_Digital_Age_Preliminary_notes_and_findings_from_research_in_Nairobi_Working_paper_2012.

50. See supra note 10.
51. <http://www.hypebot.com/hypebot/2013/01/africas-music-industry-building-with-cassettes-mp3s-in-an-underdeveloped-terrain.html>. Accessed 29 October 2013.
52. <http://mg.co.za/article/2011-04-21-uncovering-south-africas-indie-spirit>. Accessed 29 October 2013.
53. In a one-on-one interview with the author.
54. Mochoari explained this phenomenon by giving the example of using churches as a distribution channel for gospel records. The records would be advertised at church home cells, and persons interested in earning a commission would be invited to take CDs and to sell them to their friends or acquaintances—meaning visiting homes—in return for earning a commission. Thus if the CD retails for R60, the salesperson may be allowed to sell it for R65. Mochoari reported great success through the use of this strategy.
55. For more information on how South African musicians use the taxi industry to promote their music see <http://www.vice.com/allthewrongplaces-2/south-africa-taxi-hit-squad>. Accessed 29 October 2013.
56. <http://mg.co.za/article/2011-04-21-uncovering-south-africas-indie-spirit>. Accessed 29 October 2013.
57. This is to be contrasted with the general decline in the ringtone market in the major markets as well as in South Africa.
58. See <http://www.balancingact-africa.com/news/en/issue-no-240/top-story/south-africa-leads-t/en>. Accessed 29 October 2013.
59. See <http://www.balancingact-africa.com/news/en/issue-no-658/top-story/music-to-the-ears-af/en>. Accessed 29 October 2013.
60. <http://www.timeslive.co.za/thetimes/2013/06/04/gallo-music-goes-mobile>. Accessed 29 October 2013.
61. The one society, SARRAL, which was accredited to represent both performers and owners of sound recordings, has since been liquidated. The remaining societies are the South African Music Performance Rights Association (SAMPRA), on behalf of owners of sound recordings, and SAMRO, on behalf of performers (through the Performers Organisation of South Africa—POSA—Trust, a

- trust formed specifically to deal with performers' rights).
62. See in this regard <http://citizen.co.za/238773/samro-sampra-reach-agreement-music-royalties/>. Accessed 15 September 2014. For more on the dispute between the parties see the very informative article by Adv. Nick Matzukis at http://preditor.mio.co.za/assets/articles/attachments/00247_the_great_south_african_needletime_debacle.pdf. Accessed 29 October 2013.
 63. See <http://www.rav.org.za/>. Accessed 30 October 2013.
 64. <http://www.airco.org.za/>. Accessed 30 October 2013.
 65. See the AIRCO music video Distribution policy at <http://airco.org.za/images/pdf/aircodistributionpolicy.pdf>. Accessed 30 October 2013.
 66. <http://www.buanews.gov.za/rss/12/12020215451001>. Accessed 30 October 2013.
 67. See <http://www.citypress.co.za/lifestyle/sa-live-music-lucrative-but-has-a-long-way-to-go-20110822/>. For the actual report see www.moshito.co.za/attachment_view.php?_id=124. Accessed 30 October 2013.

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