



Intellectual Property for Business Series

# CREATIVE EXPRESSIONS

an Introduction to Copyright for Small and Medium-sized Enterprises



**the dti**

Department:  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

towards full-scale **industrialisation** and  
**inclusive growth**



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## 1. Preface

This is the fourth in a series of guides developed under the World Intellectual Property Organisation (WIPO) Development Agenda project to assist small and medium-sized enterprises (SMEs) to navigate and optimally utilise the South African intellectual property (IP) rights system. The guide provides a user-friendly overview and explanation of South African copyright law. It makes use of practical examples to introduce copyright and related rights to SMEs in South Africa. SMEs are encouraged to utilise the guide to ensure their copyright is optimally protected and that they do not unintentionally infringe the copyright of others.

This guide has been adapted to the national context by the Department of Trade and Industry (**the dti**). Readers are invited to contact **the dti** or the WIPO SME Section for further information on the use of IP rights.

## 2. Copyright and related rights

### What is copyright?

Copyright law grants authors, composers, computer programmers, website designers and other creators legal protection for their literary, artistic, dramatic and other types of creations, which are usually referred to as “works”.

Copyright law protects a variety of original works, such as books, magazines, newspapers, music, paintings, photographs, sculptures, architecture, films, computer programs, video games and original databases.

Copyright law gives an author or creator of a work a diverse bundle of exclusive rights for a limited but rather lengthy period of time. These rights enable the author to control the economic use of his/her work in a number of ways and to receive payment. Copyright law also provides moral rights, which protect an author's reputation and integrity.

## **What are related rights?**

“Related rights” refer to the category of rights granted to performers, phonogram producers and broadcasters. In some countries, such as the United States (US) and United Kingdom (UK), these rights are simply incorporated under copyright. Other countries, such as Germany and France, protect these rights under a separate category called “neighbouring rights”.

In South Africa, related rights are incorporated under copyright, and protected under the Copyright Act 98 of 1978 and the Performers Protection Act 11 of 1976.

### **There are three kinds of related rights:**

**Rights of performers** (e.g. actors, musicians etc.) in their performances. A performance includes any mode of visual or acoustic presentation of a work (including any such presentation by the operation of a loudspeaker, radio, television or diffusion receiver) or by the exhibition of a cinematograph film or the use of a record or by any other means, and in relation to lectures, speeches and sermons, including the delivery thereof. Notably, a performance does not include broadcasting, rebroadcasting or transmitting a work in a diffusion service. The work performed need not be previously fixed in any medium or form, and may be in the public domain or protected by copyright. The performance may also be an improvised one, whether original or based on a pre-existing work.

**Rights of producers of sound recordings** (or phonograms) in their recordings (e.g. compact discs). A sound recording includes 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.

**Rights of broadcasting organisations** in their radio and television programmes transmitted over the air. A broadcast refers to a telecommunication service of transmissions consisting of sounds, images, signs or signals that –

- a. takes place by means of electromagnetic waves of frequencies of lower than 3 000GHz transmitted in space without an artificial conductor; and
- b. is intended for reception by the public or sections of the public, and includes

the emitting of programme-carrying signals to a satellite and, when used as a verb, shall be construed accordingly.

Copyright and related rights protect works of different categories of right holders. While copyright protects the works of the authors themselves, related rights are granted to certain categories of people or businesses that play an important role in performing, communicating or disseminating works to the public that may or may not be protected by copyright.

### Example

In the case of a song, copyright protects the music of the composer and the words of the author (lyricist and/or writer). Related rights would apply to:

- a. performances of the musicians and singers who perform the song;
- b. sound recordings of the producer in which the song is included; and
- c. broadcast programmes of the organisation that produces and broadcasts the programme containing the song.

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### How are copyright and related rights relevant to your business?

Copyright protects the literary, artistic, dramatic or other creative elements of a product or service, whereby the copyright holder can prevent those original elements from being used by others. Copyright and related rights enable a business to:

- **control commercial exploitation of original works** such as books, music, films, computer programs, original databases, advertisements, content on websites, video games, sound recordings, radio and television programmes or any other creative works. Works protected by copyright and related rights may not be copied or exploited commercially by others without the prior permission of the rights holder. Such exclusivity over the use of copyright and related-rights-protected works helps a business to gain and maintain a sustainable competitive edge in the marketplace.
- **generate income** – the owner of copyright or related rights in a work may use it or give it away by way of sale, gift or inheritance. There are different ways to commercialise copyright and related rights. One possibility is to make and sell multiple copies of a work protected by copyright or related rights (e.g. prints of

a photograph), while another is to sell (assign) your copyright to another person or company. Finally, a third, often preferable, option is to license, that is, permit another person or company to use your copyright-protected-work in exchange for payment, on mutually agreed terms and conditions (see page 62).

- **raise funds** – companies that own copyright and related-rights assets (e.g. a portfolio of distribution rights to a number of movies/films) may be able to borrow money from a financial institution by using such a bundle of rights as collateral to allow investors and lenders to take a “security interest” in them.
- **take action against infringers** – copyright law enables right holders to take legal action against anyone encroaching on the exclusive rights of the copyright holder (called infringers in legal parlance) for obtaining monetary relief, destruction of infringing works and recovery of attorneys’ fees. In South Africa, criminal proceedings are also available in certain instances.
- **use works owned by others** – using works based on the copyright and related rights owned by others for commercial purposes may enhance the value or efficiency of your business, including enhancing its brand value. For example, playing music in a restaurant, bar, retail shop or airlines adds value to the experience of a customer. In most countries, including South Africa, prior permission must be obtained from the rights holder by means of a licence to use the music for a specified purpose. Understanding copyright and related rights laws will enable you to know when authorisation is required and how to go about obtaining it. Obtaining a licence from the copyright and/or related-rights owner(s) to use a work for a specific purpose is often the best way to avoid disputes that may otherwise result in potentially time-consuming, uncertain and expensive litigation.

### **How is copyright and related rights obtained?**

Practically all countries have one or more national laws concerning copyright and related rights. There are important differences among the copyright and related rights laws of different countries and so it is advisable to consult the relevant national law(s) and/or take legal advice from a competent professional before taking any key business decision involving copyright and/or related rights.



In South Africa, copyright and related rights are protected by the Copyright Act 98 of 1978 and the Performers' Protection Act 11 of 1967. It is important to bear in mind that since the duration of copyright can be quite extensive, some older works may be protected under the older copyright Acts. These are the Copyright Act 9 of 1916 and Copyright Act 63 of 1965.

A large number of countries, including South Africa, are signatories to several important international treaties that have helped to harmonise the level of copyright and related-rights protection among countries. South Africa is a member of the Berne Convention and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement. It has signed, but not yet, ratified the WIPO Copyright Treaty. This has made it possible for works to benefit from copyright protection without any formalities or requirement of registration. A list of the main international treaties is provided in Annexure III.

### **Are there other legal means for protecting original creations?**

Depending on the nature of your creation, you may also be able to use one or more of the following types of IP rights to protect your business interests:

- A **trademark** provides exclusivity over a sign (such as a word, logo, colour or combination of these) that helps to distinguish the products of a business from those of others. Exclusivity over the aesthetic or ornamental features of a product may be obtained through protection as a **registered design**. It is also possible in South Africa to obtain protection for functional designs.
- **Patents** may protect inventions that meet the criteria of novelty, inventive step and industrial applicability.
- Confidential business information of commercial value may be protected as a **trade secret**, as long as reasonable steps are taken by its owner to keep the information confidential or secret. While South Africa does not provide for the registration of trade secrets and there is no dedicated legislation protecting undisclosed information or so-called trade secrets, an action for disclosure of a trade secret may be based on breach of contract and/or delict.
- **Unfair competition** law provides a measure of protection against unfair business behaviour by competitors and could provide protection over



and above the protection under copyright law. An action based on unfair competition requires that the rights holder stand in a competitive relationship with the infringer and that the infringer has achieved an unfair advantage as a result of the infringement. However, protection under specific IP laws is stronger than the protection available under unfair competition law.

### 3. Scope and duration of protection

#### **What categories or types of works are protected by copyright?**

In most countries, the history of copyright law is one of gradual expansion of the types of works that are protected by it. While national copyright laws do not generally provide an exhaustive list of works, they list a number of categories of works that are often broad and quite flexible. The categories or types of works protected in South Africa include the following:

- literary works, e.g. books, magazines, newspapers, technical papers, instruction manuals, catalogues, tables and compilations of literary works;
- musical works, a work consisting of music exclusive of any words or actions;
- dramatic works, including not only plays but also sales training programmes, for example, that have been captured on video cassettes;
- artistic works, such as paintings, sculptures, drawings, engravings and photographs;
- works of architecture;
- buildings or models of buildings or works of craftsmanship, not falling within any of the above;
- photographic works, both on paper and in digital form;
- computer programs;
- some types of databases;
- maps, globes, charts, diagrams, plans and technical drawings;
- advertisements, commercial prints and labels;
- cinematographic works, including motion pictures, television shows and webcasts; and
- multimedia products.

Copyright protects works that are expressed in print as well as those created or stored in electronic or digital media. The fact that a work in its digital form can only be read by a computer because it consists only of ones and zeros does not affect its copyright protection.

#### **4. Protecting your original creations**

##### **Protection of computer programs and software**

From a digital point of view, there is absolutely no distinction between text, sounds, graphics, photographs, music, animations, videos and software. But one vital difference separates computer programs from the rest. While text, sounds and graphics etc. are generally passive in nature, programs are active. There is therefore much debate about the suitability of copyright law for the protection of computer programs. In practice, however, there are many ways to protect different elements of a computer program.

Apart from literary, musical and artistic works, the South African Copyright Act specifically recognises computer programs as works eligible for copyright. The Act defines a computer program as a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result. This means that any code that can be used to operate a computer qualifies as a computer program and would be protected by copyright law.

Examples of elements of computer programs that can be protected in South Africa include:

- copyright residing in the source code;
- copyright residing in the on-screen layout; and
- copyright residing in any characters or animation forming part of the program.

However, it is likely that South African courts will be guided in their interpretation by international case law that has in certain instances recognised patents on computer programs. Some countries provide the possibility to protect software-related inventions under patent law. However, the South African Patents Act specifically excludes a program for a computer from the definition of an invention. In the

absence of case law in South Africa, it is not clear how this will be interpreted by the courts. It is likely, however, that South African courts may be guided in their interpretation by international case law that provides instances in which patents on computer programs have been accepted.

It is furthermore common practice to keep the source codes of computer programs as a trade secret, in addition to copyright protection.

Certain features created by computer programs, such as icons on a screen, may be protected in some countries, including South Africa, as registered designs.

An agreement governed by contract law remains a central form of legal protection, complementing or possibly even substituting for IP rights. Often, such additional protection through a contract or licence agreement is labelled as “super-copyright”. Most computer software packages are sold with licence documents contained therein that purport to bind the purchaser, even though the purchaser does not himself actually sign the licence agreement. In South Africa, these licences are known as shrink-wrap agreements. While these agreements are widely used, there is no precedent in South Africa of a shrink-wrap agreement having been enforced, but there is no reason why they would not be enforced under the general principles of contract law.

In recent years, many countries are increasingly using criminal law for regulating access to information technologies, including software. The dealing in infringing copies of computer software constitutes a criminal offence in terms of the South African Copyright Act. The penalties on conviction are a fine of up to R5 000.00 or imprisonment for a period of up to three years. These penalties are for a first conviction, with those for a second conviction being even higher. Notably, the fine or imprisonment relates to each infringing article.

Finally, beyond legal protection, a new facet in protecting software is provided by technology itself, for example, through lockout programs and use of encryption methods. Technology allows clever producers to craft their own extra legal protection. For example, a video game manufacturer might rely on lockout technology and/or copyright law to protect its object code.

At the same time, it must be noted that some aspects of software simply cannot be copyrighted. Methods of operation (e.g. menu commands) are generally not copyrightable unless they contain highly individualistic or artistic elements. Likewise, a Graphical User Interface (GUI) cannot be copyrighted unless it contains some truly expressive elements. South Africa, however, provides for the registration of functional designs, which may be protected under design law.

In summary, protecting expressive elements of computer software through copyright:

- does not require registration;
- is, therefore, inexpensive to obtain;
- lasts a long time;
- grants limited protection, as it only covers the particular way the ideas, systems, and processes embodied in software are expressed in a given program; and
- does not protect an idea, system, or process itself. In other words, copyright protects against the unauthorised copying or use of a source code, object code, executable program, interface and user instruction manuals, but not the underlying functions, ideas, procedures, processes, algorithms, methods of operation or logic used in software. These may sometimes be protected by patents or by keeping the program as a trade secret.

Whether one considers legal or technological measures, today's landscape affords software producers unprecedented protection over their products, provided they care to understand and use it as a part of their business strategy. There is an accompanying challenge too. A perfect copy of a digital work can be made and sent anywhere in the world with a few mouse-clicks or keystrokes on a personal computer and an internet account. It is important to note that, with today's large, complex computer programs, most copyright infringement consists of the word-for-word copying or unauthorised distribution of a computer program. In most cases, the question as to whether any similarities are expression (protected by copyright) or function (not protected by copyright) does not need to be considered.

## What criteria must a work meet to qualify for protection?

To qualify for copyright protection, a work must be **original**. An original work is one that originates in its expression from the author, that is, the work was independently created and not copied from the work of another or from materials in the public domain. The exact meaning of originality under copyright law differs from one country to another. In South Africa, the Copyright Act does not provide a definition for original, but the courts have considered factors such as “a substantial improvement on what preceded it” and “a lot of skill, labour, effort and time were extended” when deciding whether a work is original. In any case, originality relates to the form of expression and not the underlying idea.

Some countries, including South Africa, require that the work be **fixed in some material form**. Fixation includes a work being written on paper, stored on a disk, painted on canvas or recorded on tape. Choreographic works, improvised speeches or music performances that have not been notated or recorded are therefore not protected. The definition of fixation normally excludes transient reproductions such as those projected briefly on a screen, shown electronically on a TV or similar device, or captured momentarily in the memory of a computer. A work may be fixed by the author or under the authority of the author. Transmission of a work containing sounds or images is deemed fixed if a fixation is made simultaneously with the transmission. Such a work may be fixed in two types of material objects: phonograms or copies. Copies may be physical (in print or non-print medium such as a computer chip) or digital (computer programs and database compilations).

### Protection of databases

A database is a collection of information that has been systematically organised for easy access and analysis. It may be in paper or electronic form. Copyright law is the primary means to legally protect databases. However, not all databases are protected by copyright and even those that are may enjoy very limited protection.

In some countries, such as the US, copyright only protects a database if it is selected, coordinated or arranged in such a way that it is sufficiently original. Exhaustive databases and those in which the data is arranged according to basic

rules (e.g. alphabetically, as in a phone directory) are usually not protected under copyright law, but may sometimes be protected under unfair competition law.

In other countries, mostly in Europe, non-original databases are protected by a unique right called the database right. This gives much greater protection to databases. It allows makers of databases to sue competitors if they extract and reuse substantial (quantitatively or qualitatively) portions of the database, provided there has been a substantial investment in obtaining, verifying or presenting the data contents. If a database has a sufficient level of originality in its structure, it is also protected by copyright. Copyright protection extends only to the manner of selection and presentation of the database and not its contents.

In South Africa, the definition of a literary work under the Copyright Act includes tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer. This clearly includes electronic databases. As for other works enjoying copyright protection, databases must be original. In South Africa, the courts have interpreted the requirement of originality as satisfied when the contents of a particular compilation have been independently collected through the author's own skills or labour, and not copied from another. In contrast to some other countries, creativity is not a requirement for copyright in databases under South African law. This means that both original and non-original databases qualify for copyright protection.

In South Africa, a work shall not be eligible for copyright unless the work has been "written down, recorded, represented in digital data or signals or otherwise reduced to a material form". Broadcasts or programme-carrying signals, however, shall not be eligible for copyright until, in the case of a broadcast, it has been broadcast and, in the case of a programme-carrying signal, it has been transmitted by a satellite.

Copyright protects both published and unpublished works. Creating an original work involves labour, skill, time, ingenuity, selection or mental effort. Even so, a work enjoys copyright protection irrespective of its creative elements, quality or value and does not need to have any literary or artistic merit. Copyright also



applies to packaging labels, recipes, purely technical guides, instruction manuals or engineering drawings as well as to the drawings of, say, a three-year-old child.

### **What aspects of a work are not protected by copyright?**

- **Ideas or concepts:** Copyright law only protects the way ideas or concepts are expressed in a particular work. It does not protect the underlying idea, concept, discovery, method of operation, principle, procedure, process or system, regardless of the form in which it is described or embodied in a work. While a concept or method of doing something is not subject to copyright, written instructions or sketches explaining or illustrating the concept or method are protected by copyright.
- **Facts or information:** Copyright does not protect facts or information – whether scientific, historical, biographical or news – but only the manner in which such facts or information is expressed, selected or arranged.
- **Names, titles, slogans and other short phrases** are generally excluded from copyright protection. However, some countries allow protection if they are highly creative. The name of a product or an advertising slogan will usually not be protected by copyright, but may be protected under trade mark law or the law of unfair competition. A logo, on the contrary, may be protected under copyright as well as by trade mark law if the respective requirements for such protection are met. In South Africa, titles, names, short phrases, slogans and works consisting entirely of information that is common property and containing no original authorship cannot be protected by copyright. It may be possible, however, to protect these elements through trade mark law.
- **Official government works**, such as copies of statutes or judicial opinions, have no copyright protection in some countries. The South African Copyright Act provides that no copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or those delivered in the course of legal proceedings, or in news of the day that are mere items of press information.
- **Works of applied art:** In some countries, copyright protection is not available to works of applied art. In such countries, the ornamental aspects of the work may be protected as an industrial design under industrial design law. However,

copyright protection will cover the pictorial, graphic or sculptural features that can be identified separately from the utilitarian aspects of an article. In South Africa, any work that is included in the definition of artistic work will be protected by copyright.

### **What is an artistic work in terms of South African copyright law?**

An artistic work is defined in the South African Copyright Act 98 of 1978 to mean, irrespective of the artistic quality thereof –

- a. paintings, sculptures, drawings, engravings and photographs;
- b. works of architecture, being either buildings or models of buildings; or
- c. works of craftsmanship not falling within either (a) or (b).

### **Artistic works and reverse engineering**

Works of a technical nature (technical drawings, flow charts etc.) are protected as artistic works in South Africa as are works of craftsmanship (models, prototypes etc.). In 1983, a provision was included in the Copyright Act for where a three-dimensional version of an artistic work has been made available to the public with the consent of the owner of the copyright, then the copyright in the artistic work will not be infringed by a person who makes a three-dimensional copy of the authorised reproduction, provided that the article in question primarily has a utilitarian purpose and is made by an industrial process.

### **What rights does copyright protection provide?**

Copyright provides two sets or bundles of rights, namely economic rights, which protect the author's or owner's economic interests in possible commercial gain, and moral rights, which protect an author's creative integrity and reputation as expressed through the work.

### **What are economic rights?**

Economic rights give the owner/holder of copyright the exclusive right to authorise or prohibit certain uses of a work. Exclusive means no one may exercise these

rights without prior permission from the copyright owner. The scope of these rights, and their limitations and exceptions, differ depending on the type of work concerned and the relevant national copyright law. Economic rights are more than simply a “right to copy”; the emphasis is not solely on this right, but on several different rights to prevent others from unfairly taking advantage of the creative work of the original owner of the copyright. Generally, economic rights include the exclusive rights to:

- **reproduce a work** in various forms, for example, copying a CD, photocopying a book, downloading a computer program, digitising a photo and storing it on a hard disk, scanning a text, printing a cartoon character on a T-shirt, or incorporating a portion of a song into a new song. This is one of the most important rights granted by copyright;
- **distribute copies of a work to the public** – copyright allows its owner to prohibit others from selling, leasing or licensing unauthorised copies of the work. But there is an important exception: in most countries, including South Africa, the right of distribution comes to an end on the first sale or transfer of ownership of a particular copy. In other words, a copyright owner can control only the first sale of a copy of a work, including its timing and other terms and conditions. But once a particular copy is sold, the copyright owner has no say over how that copy is further distributed in the territory of the relevant country. The buyer can resell the copy or give it away, but cannot make any copies or prepare derivative works based on it;
- **rent copies of a work** – this right generally applies only to certain types of works, such as cinematographic and musical works or computer programs. However, the right does not extend to computer programs that are part of an industrial product, for example, the program controlling the ignition in a rental car;
- **make translations or adaptations of a work** – such works are also called derivative works, which are new works that are based on a protected work. For example, translating an instruction manual in English into other languages, turning a novel into a film (motion picture), rewriting a computer program in a different computer language, making different musical arrangements or making a toy based on a cartoon figure. In many countries, including South Africa, there are, however, important exceptions to the exclusive right to create

derivative works, e.g. if you lawfully own a copy of a computer program you may adapt or modify it only for its regular use;

- **publicly perform and communicate a work to the public** – these include the exclusive rights to communicate the work by means of public performance, recitation, broadcasting or communication by radio, cable, satellite or television or transmission by internet. A work is performed in public when it is performed in a place that is open to the public or where more than just the closest family and friends are present. The performance right is limited to literary, musical and audiovisual works, while the communication right includes all categories of works;
- **receive a percentage of the sale price if a work is resold** – this is referred to as resale right or *droit de suite*. It is available in some countries only and is usually limited to certain types of works (e.g. paintings, drawings, prints, collages, sculptures, engravings, tapestries, ceramics, glassware and original manuscripts etc.). Resale rights give creators the right to receive a share of the profit on the resale of a work, provided the resale occurs in a specified way. Such share generally varies from 2% to 5% of the total sales price. Resale rights do not currently exist under South African copyright law; and
- **make works available on the internet** for on-demand access by the public so that a person may access the work from a place and at a time individually chosen by him/her. It covers, in particular, on-demand interactive communication through the internet.

Any person or company wishing to use protected works for any of the purposes listed above must normally obtain prior authorisation from the copyright owner(s). Although a copyright owner's rights are exclusive, they are limited in time.

### **What are moral rights?**

These are based on the French *droit d'auteur* tradition, which sees intellectual creations as an embodiment of the spirit or soul of the creator. The Anglo-Saxon common law tradition regards copyright and related rights as property rights pure and simple, which means that any creation can be bought, sold or leased in much the same way as a house or a car.

Most countries recognise moral rights, but the scope of these rights varies widely and not all grant them in the copyright law itself. Most countries, including South Africa, recognise the following types of moral rights:

- **the right to be named as the author of the work** (authorship right or paternity right) – when the work of an author is reproduced, published, communicated or exhibited to the public, the person responsible for doing so must make sure that the author's name appears on or in relation to the work, whenever reasonable; and
- **the right to protect the integrity of the work** – this grants the author the right to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author.

Unlike economic rights, moral rights cannot be transferred to someone else, as they are personal to the creator, but they may pass on to the creator's heirs. Even when the economic rights in a work are sold to someone else, the moral rights remain with the creator.

The South African Copyright Act recognises moral rights in literary, musical or artistic works, cinematograph films and computer programs. The Act provides that despite the transfer of copyright in any of these works, the author shall have the right to claim authorship of the work and object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author, and provides that an author who authorises the use of his work in a cinematograph film or a television broadcast or an author of a computer program or work associated with a computer program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work. An author's moral rights are distinct from copyright in the work, as an assignment of the copyright does not affect an author's moral rights in a work. Notably, South African law does not recognise moral rights for other categories of works eligible for copyright such as sound recordings, programme-carrying signals, broadcasts and published editions.

In some countries an author or creator may waive his/her moral rights by written agreement, whereby he/she agrees not to exercise some or all of his/her moral



rights. South African law, however, provides that moral rights are akin to personality rights in that they attach to the author itself and cannot be transferred or inherited. Moral rights, however, can be waived and the author may elect not to enforce them. While not decided on by the courts, it would appear that moral rights can only exist in a work for which copyright subsists.

A small but increasing number of countries have provided moral rights for performers in their performances. The moral rights of performers persist after the transfer of the economic rights, and include:

- the right to claim to be identified as the performer of their performances, except where omission is dictated by the manner of the use of the performance; and
- the right to object to any distortion, mutilation or other modification of their performances that would be prejudicial to their reputation.

### **What rights do related rights provide?**

Performers (actors, musicians, dancers etc.) have the right to prevent the broadcast, fixation or reproduction of their performances in terms of the Rome Convention. In South Africa, the Performers Protection Act grants performers exclusive rights to prevent certain acts from being committed in relation to their performances without their consent.

The Act provides that a performer has the right to prevent anyone from broadcasting or communicating to the public his unfixed performance and from making a fixation of his unfixed performance. Furthermore, a performer's rights are also infringed if anyone makes a reproduction of a fixation of a performance where the original fixation was made without the performer's consent; the reproduction was made for purposes other than those for which the performer gave his consent originally; or the original fixation was made in accordance with the so-called "fair use" provisions and the reproduction thereof is made for purposes not included within these provisions. While the Act does not provide for specific types of rights, the rights provided for are in the nature of non-property and economic rights.

The Performers Protection Act also provides that no person may broadcast, cause to be transmitted in a diffusion service or cause to be communicated to the public a recording of a performance published for commercial purposes without payment of a royalty to the performer concerned. This right, which is commonly referred to as needletime, corresponds with a similar right accorded to copyright owners in terms of the Copyright Act. It entitles performers and copyright owners of sound recordings, such as recording companies, to receive a single royalty every time their recording is used by broadcasters, restaurants and shops etc. The amount payable is to be determined by agreement between the user, performer and the owner of the copyright, or between their respective collecting societies. The Southern African Music Rights Organisation (SAMRO) and the National Organisation for Reproduction Rights in Music (NORM) are accredited needletime rights collecting societies.

Notably, South Africa does not provide moral rights to performers.

Producers of phonograms (record producers or manufacturers) have the exclusive right to authorise or prohibit the reproduction, use or distribution of their recordings. The most important right is the right to control the reproduction of their phonograms. The other rights may include the right to receive a fair remuneration when the phonograms are broadcast, the making available right (available at a time chosen by individual members of the public) or the right to communicate to the public. In South Africa, the Performers Protection Act defines phonograms as any exclusively aural fixation of sounds of a performance or other sounds. The South African Copyright Act defines sound recordings as 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.

Copyright in a sound recording vests the exclusive right to do or to authorise the doing of any of the following acts in South Africa:

- making, directly or indirectly, a record embodying the sound recording;
- letting, offering or exposing for hire by way of trade, directly or indirectly, a reproduction of the sound recording;
- broadcasting the sound recording;



- causing 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; and
- communicating the sound recording to the public.

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 the last three bullets above, without payment of a royalty to the owner of the relevant copyright. 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 under the Performers Protection Act. The amount of such royalty shall be determined by agreement between the user of the sound recording, the performer and the owner of the copyright, or between their representative collecting societies. In the absence of an agreement, the user, performer or owner may refer the matter to the Copyright Tribunal or may agree to refer the matter for arbitration. The South African Music Performance Rights Association (SAMPRO) is a collecting society that represents the Recording Industry of South Africa (RISA). SAMPRO administers the rights to communicate sound recordings to the public, diffuse sound recordings and broadcast sound recordings.

Broadcasters enjoy exclusive rights in their wireless communication signal. In South Africa, copyright in a broadcast vests the exclusive rights to do or to authorise the doing of any of the following acts in the Republic:

- reproducing, directly or indirectly, the broadcast in any manner or form, including, in the case of a television broadcast, making a still photograph therefrom;
- rebroadcasting the broadcast; and
- causing the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster.

Copyright in a broadcast belongs to the person who first broadcasts it. Broadcaster rights are administered in South Africa by the National Broadcasters Association (NBA).

Broadcasters in some countries have the right to authorise or prohibit the on-demand transmission of fixations of their broadcasts to individual subscribers and the granting to the public of access to fixations of their broadcasts incorporated in computer databases via an online network. But many other countries do not consider internet audio and video streaming to be broadcast services within the current provisions of their copyright and related rights laws. The right to communicate a work to the public under South African copyright law addresses the transmission of works on networks as well as the streaming of content.

In some countries, broadcasters also have the right to authorise or prohibit cable transmissions of their broadcasts. But in some other countries, cable operators still have the ability to re-transmit broadcasters' signals by cable without authorisation or payment. In South Africa, broadcasters have the right to prohibit the reproduction of a broadcast in any form, to prevent any rebroadcasting of a broadcast and the transmission of a broadcast through a diffusion service. South African broadcasters can thus prohibit cable transmissions of their broadcasts.

In many countries, the broadcaster of a television communication signal has the exclusive right to authorise or prohibit communication to the public. The rights to authorise or prohibit the cable retransmission of a broadcast are generally exercised through a collective management organisation or CMO, except where they are exercised by a broadcasting organisation in respect of its own transmissions. In South Africa, copyright in programme-carrying signals vest the exclusive right to undertake or to authorise the direct or indirect distribution of such signals by any distributor to the general public. The NBA administers the rights of broadcasters.

As regards producing and streaming of content online, it is advisable to consult a copyright expert in the relevant country as this is a rapidly evolving area of law.

The exercise of related rights leaves intact and in no way affects the underlying copyright protection, if any, in the works being performed, recorded or broadcast on the internet.

## **Works of applied art – overlap between copyright and design rights**

Works of applied art are artistic works used for industrial purposes by being incorporated in everyday products. Typical examples are jewellery, lamps and furniture. Works of applied art have a double nature: they may be regarded as artistic works, however, their exploitation and use do not take place in the specific cultural markets, but rather in the market of general-purpose products. This places them on the borderline between copyright and design protection. The protection given to works of applied art differs greatly from one country to another. While the two types of protection may coexist in some countries, it's not the case in all countries. Therefore, it is advisable to consult a national IP expert to be sure of the situation in a particular country.

Drawings of a technical nature (e.g. engineering drawings) and works of craftsmanship of a technical nature (e.g. prototypes) enjoy copyright in South Africa, not only against reproduction of the drawings in two-dimension, but also against the reproduction of the works (e.g. machines, spare parts) in a three-dimensional form. However, if the copyright owner introduces three-dimensional reproductions to the market, which “authorised” reproductions are works that primarily have a utilitarian purpose and are made by an industrial process, their copyright protection against copying the authorised reproductions (so called “reverse engineering”) is lost.

The copyright in an artistic work of which three-dimensional reproductions were made available, whether inside or outside the Republic of South Africa, to the public by or with the consent of the copyright owner (authorised reproduction) is not infringed if any person, without the consent of the owner, makes or makes available to the public three-dimensional reproductions or adaptations of the authorised reproductions, provided the authorised reproductions primarily have a utilitarian purpose and are made by an industrial process. So-called “reverse engineered articles” copied from other articles in which artistic works copyright may subsist, therefore, do not infringe such copyright. It may be, however, that other rights, such as patents and designs may still apply and the common law actions of unlawful competition and passing off may also still be available.

## **Copyright in cinematograph films**

In South Africa, copyright in cinematographic films is a registerable right. It is the only form of copyright that can be registered. This registration is provided for in the Registration of Cinematograph Films Act 62 of 1977.

## **Rights of record manufacturers**

In many countries, record manufacturers cannot prohibit broadcasting of their records, but only have the right to receive a royalty from the broadcasters.

In countries where such a right is recognised, payment must be made by broadcasting organisations, not only to the composer for the right to broadcast a composition and to the record company for the purchase of the recording, but also to the record company for the right to broadcast the recording.

When a country joins the Rome Convention, the TRIPS Agreement or the WIPO Performances and Phonograms Treaty, it may make reservations so that broadcasters in that country do not have an obligation to pay any royalties to record manufacturers.

In South Africa, record manufacturers have the exclusive right to authorise or prohibit the broadcast of their records. For more information, see the discussion above on the producers of phonograms.

## **Copyright and related rights for music**

A business may use music for various reasons to attract customers, create a positive effect on customer behaviour or for the benefit of its employees. This may help the business to obtain an edge over its competitors, provide a better working environment for its employees, help establish a core of faithful customers and even enhance people's perception of its brand or the company as a whole.

The licensed public performance or use of music is paid for by major television networks, local television and radio stations, cable and satellite networks and systems, public broadcasters, internet websites, colleges and universities, night

clubs, restaurants, background music services, fitness and health clubs, hotels, trade shows, concert presenters, shopping centres, amusement parks, airlines and music users in a wide variety of other industries, including the telephone industry (ring tones).

Copyright and related rights protection for music often involve layers of rights and a range of rights owners/administrators, including lyricists, composers, publishers of the scores, record companies, broadcasters, website owners and copyright collecting societies.

If the music and lyrics are composed by two different people then, most likely, a national law will treat the song as consisting of two works, a musical and literary work. However, in most cases, a licence can be obtained from one CMO for the broadcasting of the entire song. In South Africa, copyright will be recognised in both the literary work (the lyrics) and musical work (the music). SAMRO is a CMO that manages the licence for use of songs.

The music publishing rights include the right to record, perform, duplicate and include the work in a new or different work, sometimes called a derivative work. To facilitate commercial exploitation, most songwriters generally prefer to transfer the publishing rights to an entity identified as “the publisher”, pursuant to a music publishing agreement, that assigns the copyright or the right to administer the copyright to the publisher.

Among the many types of rights tied to works of music are performance, print, mechanical and synchronisation rights. These are briefly explained below:

- The **public performance right** is generally the most lucrative source of income for songwriters. In some countries, a public performance right is not available in sound recordings (or “phonograms”) but only for digital audio transmission. In such countries, notably the US, a licence is not needed to perform the non-digital sound recording, but is needed for the underlying song embodied in the recording. Notably South African law does recognise a public performance right in sound recordings.

- The right to print and sell a single song and multiple songs or copies of sheet music of musical compositions is the **print right**, which is licensed by the publisher.
- A **mechanical right** refers to the right to record, reproduce and distribute to the public a copyrighted musical composition on phone records, which includes audiotapes, compact discs and any other material object in which sounds are fixed, except those accompanying motion pictures and other audiovisual works. The licences granted to the user to exploit the mechanical rights are called mechanical licences.
- The right to record a musical composition in synchronisation with the frames or pictures in an audiovisual production, such as a motion picture, television programme, television commercial or video production, is called the **synchronisation (synch) right**. A synchronisation licence is required to permit the music to be fixed in an audiovisual recording. The grant of this licence permits the producer to incorporate a particular piece of music into an audiovisual work. This licence is traditionally obtained by the television producer, through direct negotiation with the composer and the lyric writer or, more commonly, their publisher. Apart from the licence needed to be obtained from a composer for the use of music in an audiovisual recording, a separate “sync” licence needs to be secured from the owner of the sound recording, which embodies or contains the musical work.
- The term master recording (or master for short) refers to the originally produced recording of sounds (on a tape or other storage media) from which a record manufacturer or producer makes CDs or tapes, which it sells to the public. **Master recording rights** or **master use rights** are required to reproduce and distribute a sound recording embodying the specific performance of a musical composition by a specific artist. The use of musical works as mobile ringtones has been a rapidly growing area of music use. It has become a fun and hugely popular way to personalise your cellphone. The popularity of ringtones has proved to be more widespread and enduring than many initially expected and has placed this new form of music use at the forefront of a predicted growth in “paid-for” content for mobile devices. A ringtone is a file of binary code sent to a mobile device via SMS or WAP.

The licence for ringtones usually covers the creation and delivery of both “monophonic” and “polyphonic” ringtones.

- **Digital rights management (DRM)** tools and systems play an important role in online management of music sales to prevent piracy. For example, Apple’s FairPlay technology and Microsoft’s Windows Media build restraints into digital music so that copyright holders are compensated for sales and the making of digital copies is curtailed.

### **How long does copyright and related rights protection last?**

For most works, and in most countries, protection of economic rights lasts for the lifetime of the author plus an additional period of at least 50 years. In a number of countries, this period is even longer (for example, 70 years after the death of the author in Europe, the US and several other countries).

It is therefore not only the author who benefits from the work but also the author’s heirs. If several authors are involved (work of joint authorship) then the term of protection is calculated from the death of the last surviving author. Once copyright protection over a work has expired, it is considered to be in the public domain.

In South Africa, the duration of the copyright protection depends on the type of work on which it is conferred.

- Literary or musical works or artistic works enjoy a copyright term of the life of the author plus 50 years.
- Cinematograph films, photographs and computer programs enjoy a copyright term of 50 years from the end of the year in which the work is made available to the public or is first published.
- Sound recordings enjoy a copyright term of 50 years from the end of the year in which the recording is first published.
- Broadcasts enjoy a copyright term of 50 years from the end of the year in which the broadcast first takes place.
- Programme-carrying signals enjoy a copyright term of 50 years from the end of the year in which the signal is emitted to a satellite.





- Published editions enjoy a copyright term of 50 years from the end of the year in which the edition is first published. and
- In the case of anonymous or pseudonymous works, the copyright is for 50 years from the end of the year in which the work is made available to the public with the consent of the owner of the copyright or from the end of the year in which it is reasonable to presume that the author died, whichever term is shorter.

The period of protection of moral rights differs. In some countries, moral rights are perpetual. In others, they expire at the same time as the economic rights, or on the author's death. In South Africa, the Act does not specify the term of moral rights but it appears as though the term will be co-terminus with the term of the copyright for the specific work. It is advisable to consult an attorney, however, to obtain a written opinion regarding the specific moral rights that may be applicable to your business.

The duration of protection for related rights is usually shorter than for copyright. In some countries, related rights are protected for a period of 20 years from the end of the calendar year in which the fixation was made or the performance or broadcast took place. Many countries, however, protect related rights for 50 years from the end of the calendar year after the performance, fixation or broadcast, as the case may be. In South Africa, the term of protection accorded to performers shall commence on the day the performance first took place or, if incorporated in a phonogram, when it was first fixed on such phonogram; and shall continue for a period of 50 years calculated from the end of the year in which the performance took place or was incorporated in a phonogram. Unlike many other countries, South Africa specifically provides that protection will commence with immediate effect as soon as the performance takes place, or from when it is first fixed in a phonogram. Copyright in sound recordings last for 50 years from the end of the year in which the recording is first published, and in broadcasts 50 years from the end of the year in which the broadcast first takes place.

## **Photographs**

In some countries, photographs are protected for only five or 15 years from the date of publication. In South Africa, however, photographs are protected for 50 years from the end of the year in which the photograph was either made available to the public or first published, whichever is the longer (or failing such an event 50 years from the end of the year in which the work was made).

### **What do you have to do to obtain copyright or related rights protection?**

Copyright and related rights protection is granted without any official procedure. A work is automatically protected as soon as it exists, without any special registration, deposit, payment of fee or any other formal requirement. In South Africa, it is possible to register copyright in cinematograph films. While registration eases the evidential burden in the case of a dispute, it is not a requirement for copyright to subsist in the work.

### **How do you prove that you are the owner of copyright?**

A system of protection without formalities may pose some difficulty when trying to enforce your rights in case of a dispute. Indeed, if someone claims that you have copied a work of his or hers, then how do you prove that you were the first creator? You can take some precautions to create evidence that you authored the work at a particular point in time. For example:

- Some countries have a national copyright office that provides an option to deposit and/or register your works for a fee (see Annexure II for a list of websites of some national copyright offices). Doing so provides evidence of the existence of a valid claim to copyright protection. In some of those countries, you can more effectively pursue a lawsuit for copyright infringement if you have registered the work at the national copyright office. South Africa, however, does not provide for registration of copyright in works other than cinematograph films. It is advisable, however, to register your copyright in a cinematograph film as it eases the evidential burden in the case of a dispute.
- You may deposit a copy of your work with a bank or lawyer. Alternatively, you could send yourself a copy of your work in a sealed envelope by special delivery

post (which results in a clear date stamp on the envelope), leaving the envelope unopened upon delivery. However, not all countries accept this practice as valid evidence. The matter has yet to be considered by the courts in South Africa.

- Works that are published should be marked with a copyright notice.
- It is also advisable to mark your work with specific standard identification numbering systems, such as the international standard book number (ISBN) for books, the international standard recording code (ISRC) for sound recordings, the international standard music number (ISMN) for printed music publications, the international standard musical work code (ISWC) for musical works of the kind that are within repertoires mostly controlled by collective management organisations, and the international standard audiovisual number (ISAN) for audiovisual works, etc.

### **Copyright protection for multimedia products**

A multimedia product typically consists of several types of works, often combined together in a single fixed medium, such as a computer disk or CD-ROM. Examples of multimedia products are video games, information kiosks and interactive web pages. The elements that can be combined into a multimedia product include music, text, photographs, clip art, graphics, software and full motion video. Each of these elements may be entitled to copyright protection in its own right. In addition, the compilation or consolidation of these works – the multimedia product itself – may receive copyright protection if this process results in a product that is considered to be original.

### **How do you protect your works in electronic or digital form?**

Works in electronic or digital form (e.g. CDs, DVDs, online text, music and movies) are particularly vulnerable to infringement because they are easy to copy and transmit over the internet, often without any significant loss of quality. The measures outlined above, such as the registration or deposit at the national copyright office, also apply to such works.

When businesses provide copyright-protected works online, such works are generally subject to a mouse-click contract (also called click-wrap contract or

shrink-wrap licence) that seeks to limit what the user can do with the content. Such restrictions typically limit use to a single user and allow that user only to read/listen to a single copy. Redistribution or reuse is generally prohibited.

In addition, many businesses employ technological measures to protect their copyright in digital content. Such measures are generally referred to as DRM tools and systems. They are used for defining, tracking and enforcing permissions and conditions through electronic means and throughout the content lifecycle. There are two ways in which DRM tools and systems can help control copyright in digital works:

- marking the digital works with information about its copyright protection, owner etc., which is called rights management information; and
- implementing technological protection measures (TPMs) that help to control (permit or deny) access or use of the digital works. TPMs, when used in relation to different types of copyright works, can help control the user's ability to view, hear, modify, record, excerpt, translate, keep for a certain period of time, forward, copy, print etc., in accordance with the applicable copyright or related rights law. TPMs also ensure privacy, security and content integrity.

### **Rights management information**

There are various ways to identify your copyright-protected material:

- You may label the digital content, for example, with a copyright notice or a warning label such as, "May be reproduced for non-commercial purposes only". It is good practice to include a copyright statement on every page of your business website that spells out the terms and conditions for use of the content on that page.
- The digital object identifier (DOI) is a system for identifying copyright works in the digital environment. DOIs are digital tags/names assigned to a work in digital form for use on the internet. They are used to provide current information, including where the work can be found on the internet. Information about a digital work may change over time, including where to find it, but its DOI will not change (see [www.doi.org](http://www.doi.org)).
- A time stamp is a label attached to digital content (works) that can prove what the state of the content was at a given time. Time is a critical element when

proving copyright infringement: when a particular e-mail was sent, when a contract was agreed to and when a piece of IP was created or modified.

- **Digital watermarks** use software to embed copyright information into the digital work itself. The digital watermark may be in a visible form that is readily apparent, much like a copyright notice on the margin of a photograph, or it may be embedded throughout the document, just as documents are printed on watermarked papers. Often, it is embedded so that in normal use it remains undetected. While visible watermarks are useful for deterrence, invisible watermarks are useful for proving theft and on-line tracing of the use of a copyright work.

### **Technological protection measures**

Some businesses prefer to use technology to limit access to their works to only those customers who accept certain terms and conditions for the use of the works.

Such measures include:

- **encryption**, which is often used to safeguard software products, phonograms and audiovisual works from unlicensed use. For example, when a customer downloads a work, DRM software can contact a clearinghouse (an institution that manages the copyright and related rights) to arrange payment, decrypt the file and assign an individual key – such as a password – to the customer for viewing or listening to the content.
- **an access control or conditional access system**, which in its simplest form checks the identity of the user, the content files and privileges (reading, altering, executing etc.) that each user has for a particular work. An owner of a digital work may configure access in numerous ways. For example, a document may be viewable but not printable, or may be used only for a limited period of time.
- **releasing only versions of lower quality** – for instance, businesses can post photographs or other images on their website with sufficient detail to determine whether they would be useful, such as in an advertising layout, but with insufficient detail and quality to allow reproduction in a magazine.

### **Approach TPMS with care**

Businesses that offer digital content may consider implementing TPMS if there is

a need to protect against unauthorised reproduction and distribution of the digital works. The use of TPMs, however, should be balanced with other considerations. For example, TPMs should not be used in ways that violate other laws that may apply, such as laws of privacy, laws protecting consumers or laws against anti-competitive practices. Businesses that make use of other people's digital content are encouraged to obtain all licences or permissions necessary for the desired use (including authorisation to decrypt a protected work, if necessary). This is because a business or individual who circumvents a TPM and then uses the protected work may be liable for violating an anti-circumvention law as well as for copyright infringement.

### **What protection do you have abroad?**

Most countries are members of one or more international treaty to ensure, among other things, that a copyright work created in one country is automatically protected in all countries that are members of such international treaty. The most important international treaty on copyright is the Berne Convention for the Protection of Literary and Artistic Works. If you are a national or a resident of a country party to the Berne Convention (see list of members in Annexure III), or if you have published your work in one of the member countries, your work will automatically enjoy the level of copyright protection granted in the Berne Convention in all other countries that are party to it. South Africa is party to the Berne Convention. However, copyright protection remains territorial in nature. Your work will therefore only enjoy copyright protection if it meets the legal requirements of the copyright law of the relevant country. So while your work may automatically be protected by copyright in many countries (because of international treaties), you still have a separate copyright protection system in each country, which vary considerably.

### **Is a copyright notice on the work obligatory?**

In South Africa, a copyright notice or marking of a copyright work is not required for protection. Nevertheless, it is strongly advisable to place a copyright notice on or in relation to your work because it reminds people that the work is protected and identifies the copyright owner. Such identification helps all those who may wish to obtain prior permission to use your work. Placing a copyright notice is a very cost-

effective safeguard. It requires no significant extra expense, but may end up saving costs by deterring others from copying your work as well as facilitating the process of granting prior permission by making it easier to identify the copyright owner.

Also, in certain jurisdictions, most notably the US, including a valid notice means that an infringer is deemed to have known of the copyright status of the work. As a result, a court will hold him accountable for wilful infringement, which carries a much higher penalty than for an innocent infringement.

There is no formal procedure to put the notice on your work. It can be written, typed, stamped or painted. A copyright notice generally consists of: the word “copyright”, “copr.” or the copyright symbol ©, the year in which the work was first published and the name of the copyright owner. For example, Copyright 2006, ABC Ltd.

If you significantly modify a work, it is advisable to update its copyright notice by adding the years of each modification. For example, “2000, 2002, 2004” indicates that the work was created in 2000 and modified in 2002 and 2004.

For a work that is constantly updated, such as content on a website, it is possible to include the years from the time of first publication to the present: for example, © 1998-2006, ABC Ltd. It is also advisable to supplement the notice with a listing of acts that may not be performed without permission.

For protected **sound recordings**, the letter “P” (for phonogram), in a circle or in brackets, is used. Some countries, but not South Africa, require that the symbol and the year of first publication appear on copies of phonograms (e.g. on CDs or audio tapes) in order to be protected in that country.

Websites involve combinations of many different creative works, such as graphics, text, music, artwork, photographs, databases, videos, computer software, the HTML code used to design the website etc. Copyright may protect these elements separately, e.g. different articles on a website may have their own copyright. Copyright may also protect the particular way that these diverse elements are selected and arranged to create the total website. For further information see: [www](http://www).

## 5. Ownership of copyright

### Is the author always the owner of a copyright work?

Authorship and ownership are often confused. The author of a work is generally the person who makes or creates the work, but there are exceptions to this. If the work was created by more than one person, then all the creators are considered as co-authors or joint authors.

The South African Copyright Act determines that the author of a work is, in the case of:

- a literary, musical or artistic work, the person who first makes or creates the work;
- a photograph, the person who is responsible for the composition of the photograph;
- a sound recording, the person by whom the arrangements for the making of the sound recording were made;
- a cinematograph film, the person by whom the arrangements for the making of the film were made;
- a broadcast, the first broadcaster;
- a programme-carrying signal, the first person emitting the signal to a satellite;
- a published edition, the publisher of the edition;
- a literary, dramatic, musical or artistic work or computer program which is computer-generated, the person by whom the arrangements necessary for the creation of the work were undertaken;
- a computer program, the person who exercised control over the making of the computer program.

Notably, the South African courts have accepted that only a natural person can be the author of a literary, musical or artistic work. The issue of authorship is especially relevant in connection with moral rights and in order to determine the date on which



protection expires.

Copyright ownership is a different issue. The owner of the copyright in a work is the person who has the exclusive right to exploit the work, such as using, copying, selling and making derivative works. Generally, copyright in a work initially belongs to the person who actually created it, that is the author. The South African Copyright Act specifies that the ownership of copyright generally vests in the author, or in the case of work of joint authorship in the co-authors of the work, except:

- where a literary or artistic work is created in the course of employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, and is so made for the purposes of publication in a newspaper, magazine or similar periodical. In this case, the proprietor shall be the owner of the copyright in the work insofar as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of it being so published. In all other respects, however, the author shall be the owner of any copyright subsisting in the work;
- where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays for it in money or monies worth and the work is made in pursuance of that commission. In this case, the person who commissioned the work is the owner of the copyright in the work; and
- in any other instance than those mentioned above, where a work is made in the course of the author's employment under a contract of service or apprenticeship, that other person shall be the owner of any copyright subsisting in the work.

Note that in most countries, including South Africa, contractual agreements may alter or clarify the general results established by law in respect of ownership of copyright. Any assignment of copyright or exclusive licence must, however, be in writing to be valid under South African law. Where a work is made by or under the direction or control of the state or an international organisation, copyright will vest in



the state or international organisation.

### **Who owns moral rights?**

Moral rights always belong to the author of a work and in some countries to his/her heirs. Moral rights can, however, be waived in some countries and the author may elect not to enforce them. As mentioned earlier, South African law provides that moral rights are akin to personality rights in that they attach to the author itself and cannot be transferred or inherited. It is therefore only the author of a work who can own moral rights under South African law.

Example: A computer programmer is employed by a company. As part of his job, he makes video games, during normal working hours and using the equipment provided by the company. In South Africa, the economic rights over the software will belong to the company.

Juristic entities (e.g. companies etc.) generally cannot own moral rights to a work. For example, if the producer of a film is a company, then only the director and screenwriter will have moral rights in the film. However, as South African courts have taken the view that moral rights are akin to personality rights, it can be argued that South African law recognises moral rights for juristic persons. It is therefore possible for a company to own moral rights to a work in South Africa.

### **Who owns the copyright in works created by an employee?**

In South Africa, if a work was created by an employee within the course of his/her employment under contract of service or apprenticeship, then the employer automatically owns the copyright, unless otherwise agreed.

Disputes may arise in the event an employee does some work at home or after hours, or produces work not within the scope of the employee's ordinary employment. In order to avoid disputes, it is good practice to have employees sign a written agreement that clearly addresses all the relevant types of copyright issues that may arise.

## **Who owns the copyright in commissioned works?**

If a work was created by, say, an external consultant or creative service, that is, in the course of a commission contract, the situation is different. In South Africa, the person who commissions (and pays for the work) owns the copyright in the commissioned work, and the creator is the author. This is the default position for photographers, freelance journalists, graphic designers and website designers. The issue of ownership most often arises in connection with the re-use of commissioned material for the same or a different purpose.

As is the case with employer-employee context, it is important that you address copyright ownership issues in a written agreement, which should be entered into before commissioning external creative services.

## **Works created for governments**

In South Africa, where the work is made by or under the direction or control of the state or an international organisation, copyright is conferred and vests in the state or the relevant international organisation, unless otherwise agreed in a written contract. Small businesses that create work for government departments and agencies need to be aware of this rule and arrange, by written contract, to clarify copyright ownership.

## **Who owns the copyright in works created by several authors?**

The South African Copyright Act determines that copyright in a work of joint authorship shall vest in the co-authors of the work. A work of joint authorship is defined as a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from that of the other author or authors.

In the case of co-authorship, the rights are usually exercised on the basis of an agreement between all the co-authors. In the absence of such agreement, the following rules generally apply:

- When two or more authors agree to merge their contributions into an inseparable or interdependent combination of the individual contributions, a **joint work** is created. An example is a textbook in which two or more authors

contribute separate components that are intended to be combined into a single work. In a joint work, the contributing authors become the joint owners of the entire work. The copyright law of many countries, including South Africa, requires that all joint owners must consent to the exercise of copyright. In other countries, any one of the joint owners may exploit the work without permission of the other co-author(s) (but may have to share the profits generated from such use). A written agreement among the authors or owners is usually the best course of action, specifying such issues as ownership and use issues, rights to revise the works, marketing and sharing of any revenue, and warranties against copyright infringement.

- If the authors do not intend the work to be a joint work and would like their contributions to be used separately, then the work will be deemed to be **collective**. An example of a collective work is a CD, which is a compilation of songs by various composers, or a magazine containing articles by freelance authors. In that case, each author owns the copyright in the part he/she created.
- A **derivative work** is based on one or more pre-existing works, such as a translation, musical arrangement, art reproduction, dramatisation or motion picture version. Making derivative works is an exclusive right of the copyright owner. However, a derivative work itself can qualify for separate copyright protection, although the copyright extends only to those aspects that are original to the derivative work.

In practise, it is not always easy to distinguish a joint work from a collective or derivative work. The various authors of a joint work often make their respective contributions independently and at different times, so there may be “earlier” and “later” works. In most countries, including South Africa, it is the mutual intent of the co-authors to be or not to be joint authors that will determine whether the work is joint, collective or derivative. Joint authorship requires intent – without the intent to create a joint work, two or more authors producing inseparable or interdependent works will produce a derivative or collective work.

## 6. Benefiting from copyright and related rights

**How can you generate income from creative works?**

If your company owns copyright in a work, you automatically have a complete bundle of exclusive rights. This means that only your company may reproduce the protected work, sell or rent copies of the work, prepare derivative works, perform and display the work in public or do other similar acts. If others want to use or commercialise your copyright material, you may license or sell a part of one, various or all of your exclusive rights in exchange for payment(s). The payment(s) can be once-off or recurring. This will often add to greater profits for your business than direct exploitation of your copyright.

The exclusive rights can be divided and subdivided and licensed or sold to others in just about any way you can imagine. Thus, these may be sold or licensed limited by territory, time, market segment, language (translation), media or content. For example, a copyright owner may assign the copyright in a work completely or sell the publishing rights to a book publisher, the film rights to a film company, the right to broadcast the work to a radio station and the right to adapt the work dramatically to a drama society or television company.

There are many ways to commercialise creative works:

- You may simply sell the works that are protected by copyright, or make copies and sell the copies; in both cases, you retain all or most of the rights arising out of copyright ownership.
- You may allow someone else to reproduce or otherwise use the works. This can be done by licensing your economic rights over the works.
- You may sell (assign) your copyright over the works, either entirely or partly.

Remember that in order for any assignment or exclusive licence to be valid under South African law, it has to be in writing and signed by the assignor or licensor. See more information on this below.

### **If you sell your work, do you lose copyright over it?**

Copyright is distinct from the right of possession of the physical object in which the work is fixed. Merely selling a copyright work (e.g. a computer program or manuscript) does not automatically transfer copyright to the buyer. Copyright in a work generally remains with the author unless he expressly assigns it by a written

agreement to the buyer of the work.

In some countries, including South Africa, if you sell a copy of a work or the original (e.g. a painting), you lose some of your exclusive rights out of the bundle of rights associated with copyright. For example, the buyer of the copy has the right in South Africa to further dispose of the copy but not to reproduce it or make an adaptation of the work. What rights will be lost or kept varies significantly from country to country and it is advisable to check the applicable laws before selling copies of a work in a particular country.

### **What is a copyright licence?**

A licence is a permission that is granted to others (individuals or companies) to exercise one or more of your economic rights over a work protected by copyright. The advantage of this is that you remain the copyright owner while allowing others to make copies, distribute, download, broadcast, webcast, simulcast, podcast or make derivative works in exchange for payment. Licensing agreements can be tailored to fit the parties' specific requirements. Thus, you may license some rights and not others. For example, while licensing the right to copy and use a computer game, you may retain the right to create derivative works from it (e.g. a movie).

### **What is the difference between exclusive and non-exclusive licences?**

A licence may be exclusive or non-exclusive. If you grant an exclusive licence, the licensee alone has the right to use the work in the ways covered by the licence. In most countries, including South Africa, an exclusive licence must be in writing and signed by the assignor to be valid. An exclusive licence may also be restricted, for example, to a specified territory, for a period of time or for limited purposes, or the continuation of the exclusivity may be conditional upon other types of performance requirements. In South Africa, exclusive licences can be restricted to only some of the acts that the owner of the copyright has the exclusive right to control, or to a part of the term of the copyright, or to a specified country or other geographical area. Exclusive licences are often a good business strategy for getting a copyright product distributed and sold on the market if you lack the resources to effectively market your work yourself.

On the other hand, if you grant a non-exclusive licence to a company, you give that company the right to exercise one or more of your exclusive rights, but this does not prevent you from allowing others (including yourself) to exercise the same rights at the same time. Thus, you may give any number of individuals or companies the right to use, copy or distribute your work. Non-exclusive licences may also be limited and restricted in different ways. In most countries, including South Africa, a non-exclusive licence may be oral or in writing. However, a written agreement is preferable.

### **What happens when you sell your copyright?**

An alternative to licensing is to sell your copyright in the work to someone else, who then becomes the new copyright owner. The technical term for such a transfer of ownership is an “assignment”. Whereas a licence only grants a right to do something, which in the absence of the licence would be unlawful, an assignment transfers the total interest in your right(s). You may either transfer the entire bundle of rights or just part of it. In many countries, including South Africa, an assignment must be in writing and signed by the copyright owner to be valid.

In a few countries, copyright cannot be assigned at all. Also, remember that only the economic rights may be transferred, as moral rights always remain with the author.

### **Licensing strategy**

By granting a licence, you give the licensee the permission to do certain things as specified in the licence agreement that otherwise would not be permissible. It is therefore important to clearly define the scope of the activities permitted under the licence agreement as precisely as possible. Generally, it is better to grant licences that are limited in scope to the specific needs and interests of the licensee. Granting of a non-exclusive licence makes it possible to grant any number of licences to other interested users for identical or different purposes on identical or different terms and conditions.

Sometimes, however, absolute control over a work represents a business security for the licensee or an essential part of its business strategy. In such situations, an exclusive licence or an assignment of all your rights in exchange for a one-time



fee may be the best deal. But you should consider such negotiations only after having exhausted all other possible alternatives and make sure that you are paid adequately for it. Once you assign the copyright in a work, you lose all its future income-earning potential.

### **What is merchandising?**

Merchandising is a form of marketing whereby an IP right (typically a trade mark, design or copyright) is used on a product to enhance the attractiveness of the product in the eyes of customers. Strip cartoons, actors, pop stars, sports celebrities, famous paintings, statues and many other images appear on a whole range of products, such as T-shirts, toys, stationary items, coffee mugs or posters. The merchandising of products by relying on copyright may be a lucrative additional source of income.

For businesses that own copyright works (such as strip cartoons or photographs), licensing copyright to potential merchandisers can generate lucrative licence fees and royalties. It also allows a business to generate income from new product markets in a relatively risk-free and cost-effective way.

- Companies that manufacture low-priced mass produced goods, such as coffee mugs, candies or T-shirts may make their products more attractive by using a famous character, artistic work, or other appealing element on them.
- Merchandising requires prior authorisation to use the various rights (such as a copyright-protected work, design or a trademark) on the merchandised good. Extra caution is necessary when celebrities images are used for merchandising, as they may be protected by privacy and publicity rights.

### **How do you license your works?**

As a copyright or related rights owner, it is up to you to decide whether, how and to whom you may license the use of your works. There are various ways in which licensing is managed by copyright holders.

One option is to handle all aspects of the process of licensing yourself. You may negotiate the terms and conditions of the licensing agreement individually with

every single licensee or you may offer licences on standard terms and conditions that must be accepted as such by the other party if it is interested in exploiting your copyright or related rights works.

Administering all your rights yourself will most frequently involve considerable administrative workload and costs to gather market information, search for potential licensees and negotiate contracts. You may therefore consider entrusting the administration of some or all of your rights to a professional licensing agent or agency, such as a book publisher or a record producer, who will then enter into licensing agreements on your behalf. Licensing agents are often in a better position to locate potential licensees and negotiate better prices and licensing terms.

In practise, it is often difficult for a copyright or related rights owner, and even for licensing agents, to monitor all the different uses made of their works. It is also quite difficult for users, such as radio or TV stations, to individually contact each author or copyright owner in order to obtain the necessary permissions. In situations where individual licensing is impossible or impracticable, joining a CMO may be a good option, if available for the specific category of works involved. CMOs monitor the uses of works on behalf of creators of certain categories of works and are in charge of negotiating licences and collecting payment. You may join a relevant CMO in South Africa and/or in other countries where such an organisation exists.

### **How do collective management organisations work?**

CMOs act as intermediaries between users and a number of copyright owners who are members of the CMO. Generally, there is one CMO per type of work and per country. However, CMOs exist for only some types of works, such as film, music, photography, reprography (all kinds of printed material), television and video and visual arts. On joining a CMO, members notify the CMO about the works that they have created or own.

The core activities of a CMO include:

- documentation of works of its members;

- licensing and collecting royalties on behalf its members;
- gathering and reporting information on the use of works;
- monitoring and auditing; and
- distribution of royalties to its members.

The works included in the repertoire of the CMO are consulted by persons or companies interested in obtaining a licence for their use. To enable the copyright or related rights owners to be represented internationally, CMOs enter into reciprocal agreements with other CMOs throughout the world. The CMOs then grant licences on behalf of their members, collect the payments and redistribute the amount collected, based on an agreed formula, to the copyright owners.

The practical advantages of collective management are as follows:

- Collective licensing has many benefits for users and rights-holders. A one-stop shopping greatly reduces the administrative burden for users and rights-holders; not only does collective management provide right-owners access to economies of scale with respect to administration costs, but also to making investments in research and development for creating digital systems that allow a more effective fight against piracy. Further, collective licensing is a great equaliser; without a collective system in which all market operators participate, small and medium-sized right-holders and small and medium-sized users would be locked out of the market.

It also allows owners of protected works to use the power of collective bargaining to obtain better terms and conditions for the use of their works as a CMO is able to negotiate on a more balanced basis with numerous, more powerful and often dispersed and distant user groups. Businesses that want to use others' copyright or related rights are able to deal with only one organization and may be able to get a blanket license. A blanket licence allows the licensee to use any item in the CMO's catalogue or repertoire for a specified period of time, without the need to negotiate the terms and conditions for the rights of each individual work.

- It offers a useful tool for businesses that want to license material in digital form, while making it simpler to obtain those rights.

- Many CMOs play an important role outside of their immediate licensing business. For example, they are involved in enforcement (anti-piracy), provide education and information dissemination services, interface with legislators, stimulate and promote the growth of new works in different cultures through cultural initiatives, and contribute to social and legal welfare of their members. In recent years, many CMOs are actively developing DRM components for managing rights. Also, many CMOs are actively participating in international fora to promote the development of common, interoperable and secure standards that respond to their needs for managing, administering and enforcing the rights they represent.

Details of the relevant CMOs in a country may be obtained from an international federation of CMOs (see Annexure I) or from a national copyright office (see Annexure II), from the relevant industry association or from one of the international non-governmental organisations listed in Annexure I. In South Africa, information on CMOs can be obtained from SAMRO at [www.samro.org.za](http://www.samro.org.za) or the National Organisation for Reproduction Rights in Music in Southern Africa (NORM) at [www.norm.co.za](http://www.norm.co.za). Alternatively, interested parties can contact the CIPC at [www.cipc.co.za](http://www.cipc.co.za) for advice.

### **Managing copyright and related rights**

The rights granted by copyright and related rights may be managed by:

- the owner of the rights;
- an intermediary, such as a publisher, producer or distributor; or
- a CMO. In some cases, management by a CMO may even be mandated by law.

### **Collective management in the music industry**

Collective management of rights plays a central role in the music business due to the different types of rights in the business chain. Mechanical rights collected on behalf of authors, composers and publishers; performance rights collected on behalf of authors, composers and publishers; and performance rights collected on behalf of performers and phonogram producers. No wonder, thousands of small and

medium-sized record companies, music publishers and artists in their respective countries rely on local and/or distant collective licensing organisations to represent their interests and negotiate with powerful users of music (large communication groups, radio, TV, telecom groups or cable-operators) to ensure an adequate reward for their creative activities. At the same time, all licensees, regardless of size, have access to all repertoires without having to negotiate with a large number of individual rights-holders.

CMOs of performers (music and audiovisual) have been managing rights on the internet since the beginning, mainly simulcasting and webcasting, and from now on will also address the “making available right”.

In most countries, a broadcasting corporation must pay for the right to broadcast music. The payment is made to the composer, but generally in an indirect way. In practise, the composer assigns his or her rights to an organisation (CMO) that negotiates with all those interested in publicly performing music. The CMO, representing a membership of a large number of composers, pays royalties to its members in accordance with the number of times a particular work is performed in public. Broadcasting organisations negotiate an overall annual payment to the CMO and provide the CMO with sample returns from individual stations, which allow the calculation, for the purpose of paying royalties to composers, of the number of times a record has been played. This CMO can be any performing right society. For example, for Commonwealth broadcasters, the most relevant are the Australasian Performing Right Association (APRA), or the Performing Right Society, based in the UK. Both societies are in a position to give licences to broadcasters for virtually any music composed anywhere in the world. APRA, for example, controls not only the music that its own members assign to it within Australia, New Zealand and the South Pacific, but also the music written by UK composer and publisher members of the Performing Right Society. Similar agreements give control to APRA in Australia and New Zealand over musical works written by the various composer members of the US Societies, as well as societies in such countries as France, Germany, Italy, Spain, Holland and Greece.

In South Africa, NORM licenses many areas of music usage, where music is transferred from one format. Upon transference, a mechanical copyright is raised



# LICENSING



Form fields represented by horizontal lines:

- Line 1
- Line 2
- Line 3
- Line 4
- Line 5
- Line 6
- Line 7
- Line 8

and a license or permission from the copyright owner must be obtained prior to transfer. NORM facilitates that procedure by having a mandate from its members to issue licences on their behalf. NORM therefore acts as a licensing body for production houses and record companies that do not distribute their product through the major record companies. NORM also has blanket licensing arrangements with the South African broadcasters. The South African Music Performance Rights Association (SAMPRO) is a collective licensing society of copyright owners of music sound recordings. Its mandate is to collect and distribute royalties to the members of the Recording Industry of South Africa (RiSA) whenever their recordings are broadcast, diffused or communicated to the public. SAMPRO issues licences to South African radio broadcasters, which use sound recordings (records, tapes, CDs) in their transmissions. SAMPRO also licenses shops, restaurants, pubs and clubs and other music users who play sound recordings to the public.

A public performance licence is necessary for any broadcast of a television programme that contains music. The performance right must be licensed from the copyright owners or publishers of the composition and the sound recording used. A blanket licence is traditionally secured, usually from a performing rights society.

### **Collective management in reprography**

Businesses make massive use of all types of copyright-protected printed material. For example, they may need to photocopy articles from newspapers, journals and other periodicals and disseminate them to their employees for information and research purposes. It would be impractical for companies, if not impossible, to ask for permission directly from authors and publishers all over the world for such use.

In response to the need to license large-scale photocopying, authors and publishers have established in many countries Reproduction Rights Organisations (RROs) – a type of CMO – to act as intermediaries and facilitate the necessary copyright authorization whenever it is impracticable for right holders to act individually. On behalf of its members, licences are issued by RROs whereby permission is granted to make reprographic or scanned copies of a portion of a published work (including books, journals, periodicals, etc.), in limited numbers of copies, for use by employees

of institutions and organisations (including libraries, public administrations, copy shop, educational institutions, and a wide variety of businesses in trade and industry). Some RROs are also permitted to license other copyright uses, such as those related to electronic distribution via networks.

The South African Reproduction Rights Organisation (SARRO) manages the complex and time-consuming licensing process that exists between publishers and organisations that wish to copy and share content from South African newspapers, magazines and online publications. SARRO has been mandated to perform collective copyright management on behalf of South African publishers. This means that SARRO can authorise users to copy and share content from member publications, without infringing copyright. The Dramatic Artistic and Literary Rights Organisation (DALRO) is mandated by visual artists to license the reproduction of works for royalties, such as in print publications and other print-based products (e.g. calendars, greeting cards, brochures, posters and catalogues) as well as digital reproductions on websites for promotional purposes, or as part of e-catalogues or image banks.

## **7. Using works owned by others**

### **When do you need permission to use the works of others?**

Businesses often need to use works protected by copyright or related rights to support their business activities. When using the work of others, you must first determine if copyright permission is required. In principle, you will need authorisation from the copyright owner if:

- the work is covered by copyright and/or related rights law(s) (see section 2);
- the work is not in the public domain; and
- your planned exploitation implies the use of all or part of the rights granted to the copyright and/or related rights owner.

Remember that you may need specific permission for using other people's content outside your business premises (investor roadshows, company website, annual report, company newsletter etc.), and inside your business premises (distribution to



employees, product research, in-house meetings and training etc.). Even if you use just a part of a copyright-protected work, you will generally need prior permission.

Current technology makes it easy to use material created by others – film and television clips, music, graphics, photographs, software, text, etc. – on your website. The technical ease of using and copying works, however, does not give you the legal right to do so.

### **Do you need prior permission to make electronic or digital use of the works of others?**

You will need prior permission from copyright owners to scan or post their works on an electronic bulletin board or website, save their digital content on your enterprise's database or publish their works on your website. Most websites list the e-mail address of a contact person, making it relatively easy to request permission to reproduce images or text.

### **If you have bought a work protected by copyright, are you free to use it as you wish?**

Copyright is separate from the right of possession of the work (see page 61). Buying a copy of a book, CD, video or computer program does not give the buyer the right to make further copies or play or show them in public. These rights remain with the copyright owner, whose permission you would need to do such acts. Prior permission is needed when photocopying or scanning a work to produce an electronic copy as well as downloading a copy of a work that is in an electronic format.

### **What content or material are you entitled to use without permission?**

Authorisation from the copyright owner is not needed if:

- you are using an aspect of the work that is not protected under copyright law. For example, if you are expressing the facts or ideas from a protected work in your own way, rather than copying the author's expression; or
- the work is in the public domain.

### **When is a work in the public domain?**

If no one has copyright in a work, that work belongs to the public domain and anyone may freely use it for any purpose whatsoever. The following types of works are in the public domain:

- a work for which the copyright protection period has expired;
- a work that cannot be protected by copyright (e.g. title of a book); and
- a work for which the copyright owner has explicitly abandoned his rights, for example, by putting a public domain notice on the work.

Absence of a copyright notice does not imply that a work is in the public domain, even if the work is available on the internet.

### **How do you find out whether a work is still protected by copyright or related rights?**

In accordance with moral rights, an author's name will normally be indicated on the work, whereas the year in which the author died may be available in bibliographic works or public registers. If that search does not give clear results, you may consult the copyright register by contacting the CIPC to check for any relevant information, or you may contact the relevant collective management organisation or the publisher of the work. Remember that there may be several copyrights in one product, and these rights may have different owners and periods of protection. For example, a book may contain text and images that are protected by several and separate copyrights, each expiring on a different date.

### **When can you use a work under a limitation or exception to copyright or under the concept of 'fair use' or 'fair dealing'?**

All national copyright laws include a number of limitations and exceptions, which limit the scope of copyright protection and allow for either free use of works under certain circumstances or use without permission but against a payment. The exact provisions vary from one country to another, but generally exceptions and limitations include the use of a quotation from a published work (that is, to use short excerpts in an independently created work), some copying for private and personal use (e.g. for research and study purposes), some reproduction in libraries and archives (e.g. of works out of print, where the copies are too fragile to be lent to the general public),

reproduction of excerpts of works by teachers for use by the students in a class or the making of special copies for use by visually handicapped persons.

Numerous other limitations or exceptions for the benefit of various groups exist in different countries. Quite often, the limitations and exceptions are described exhaustively in the national law, which should be consulted for guidance. Otherwise seek expert advice.

In common law countries, such as Australia, Canada, India, the UK, the US and South Africa, works are subject to “fair use” or “fair dealing”. Here, the description in the copyright law is less specific.

“Fair use” recognises that certain types of use of other people’s copyright-protected works do not require the copyright holder’s authorisation. It is presumed that the use is sufficiently minimal that it will not unreasonably interfere with the copyright holder’s exclusive rights to reproduce and otherwise use the work. It is difficult to describe any general rules about “fair use” because it is always very fact-specific. However, private individuals who copy works for their own personal use generally have much greater “fair use” rights than those who copy for commercial uses. Examples of activities that may be permitted as “fair use” include distributing copies of a picture from a newspaper in class for educational purposes, imitating a work for the purpose of parody or social commentary, making quotations from a published work, and reverse engineering software to achieve compatibility. The scope of “fair use” varies from one country to another. Note that, even if you use other people’s work under these provisions, you still need to cite the name of the author.

The South African Copyright Act determines that copyright in a work shall not be infringed by any “fair dealing”. The fair dealing exceptions in the Copyright Act apply to literary (which includes dramatic) and musical works, artistic works, cinematographic films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programs. The conduct permitted by the fair dealing provisions in the Act include research and private study, personal or private use, criticism and review, and reporting current events.

Fair dealing is not defined under South African law, so would have to be determined on a case-by-case basis, but it is generally understood to mean that such dealing should not be to the economic detriment of the copyright owner. The following factors will play a role in determining whether use is fair:

- the purposes and character of the use, including whether such use is of commercial nature or is for non-profit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

In order to constitute fair dealing, the Act requires that the source of the work shall be mentioned, as well as the name of the author if it appears on the work.

### **What is a levy system for private copying?**

Individuals copy large amounts of copyright material for their own personal and non-commercial use. Such copying creates a profitable market for the manufacturers and importers of recording equipment and media. However, private copying cannot by its very nature be managed by contract: private copies are made spontaneously by people in the privacy of their own homes. Therefore, in some countries, copying for private use is simply permitted under an exception and no prior permission needs to be sought. However, in exchange, a number of such countries have set up a payment system of levies to reimburse artists, writers and musicians for such duplication of their works. A levy system may be composed of two elements:

- **equipment and media** – a small copyright fee is added to the price of all sorts of recording equipment, ranging from copying and fax machines to CD and DVD burners, video cassette recorders and scanners. Some countries also provide for a levy on blank recording media, such as photocopying paper, blank tapes, CD-Rs or flash cards;
- **operator** – a user fee is paid by schools, colleges, government and research institutions, universities, libraries and enterprises making a large volume of photocopies.

CMOs usually collect levies from manufacturers, importers, operators or users, and then distribute them to the relevant rights owners. No blank media levies have to date been implemented in South Africa.

### **Licensing software**

Standardised packaged software is often licensed to you upon purchase. In this scenario, you purchase the physical package, but only receive a licence for certain use of the software contained therein. The terms and conditions of the licence (known as a shrink-wrap licence) are often contained on the package, which you may return if you do not agree with them. However, by opening the package you are deemed to have accepted the terms and conditions. In other cases, the licensing agreement may be included inside the packaged software.

Often, the licensing of software takes place online by means of click-wrap licences. In such licences, you accept the terms and conditions of the agreement by clicking on the relevant icon on a webpage. If you need a particular software for a number of computers within your company, you may be able to receive significant discounts by purchasing software licences in quantity.

In recent years, there has been increasing debate concerning the validity of software licences as many manufacturers try to extend the boundaries of their rights through additional contractual provisions that go beyond what copyright and/or related rights laws permit.

In all such cases, you should carefully go through the licensing agreement to find out what you may and may not do with the software you have bought. In addition, there may be exceptions in your national copyright law that allow you to make certain uses of the computer program without needing permission, such as making interoperable products, correcting errors, testing security and making a backup copy.

The South African Copyright Act determines that the copyright in a computer program shall not be infringed by a person who is in lawful possession of that program, or an authorised copy thereof, if:

- he makes copies thereof to the extent reasonably necessary for back-up purposes;
- a copy so made is intended exclusively for personal or private purposes; and
- such copy is destroyed when the possession of the computer program in question, or authorised copy thereof, ceases to be lawful.

### **Can you use works protected by technological protection measures?**

The South African Copyright Act does not protect TPMs. However, the Electronic Communications and Transactions Act of 2002 provides protection against the circumvention of TPMs applied to digital data. The Act creates a new cyber offence relating to the unauthorised access to, interception of or interference with data. This is, in essence, an anti-circumvention prohibition, which applies to data messages, namely electronic representations of information in any form. A person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item to contravene the Act, is guilty of an offence. The Act thus provides for the criminal offence of “hacking” and outlaws the production, distribution and use of devices and applications designed primarily for the purpose of overcoming data protection security measures.

### **How can you get authorisation to use protected works over which rights are owned by others?**

There are two primary ways to go about obtaining permission to use the copyright or related rights-protected work:

- using the services of a CMO; or
- contacting the copyright or related-rights owner directly if contact details are available.

The best way is to first see if the work is registered in the repertoire of the relevant CMO, which considerably simplifies the process of obtaining licences. CMOs generally offer different types of licenses, for different purposes and uses. Some CMOs also offer digital licences.

If copyright or related rights in the work are not managed by any CMO, you will have to contact the copyright or related rights owner or his/her agent. The person named in the copyright notice is probably the person who was the initial copyright owner, however, over a period of time, the economic rights of copyright or related rights may have been transferred to another person. By searching the national copyright register you should be able to identify the current copyright or related rights owner in countries that provide a voluntary system of copyright registration. In case of written or musical works, you can contact the work's publisher or the record producer, who often owns the right to reproduce the material. In South Africa, it is possible to approach the CIPC to consult the copyright register for information on copyright in cinematograph films.

Just as there can be several layers of rights, so can there be several different right owners from each of whom licences would be required. For example, there may be a music publisher for the composition, a recording company for the recording of music, and then the performers.

It is advisable to obtain expert advice before negotiating the terms and conditions of your licence agreement, even when a licence is initially offered on so-called standard terms and conditions. A competent licensing expert may help to negotiate the best solution to meet your business needs.

### **How can your business reduce the risk of infringement?**

Litigation for copyright infringement can be an expensive affair. It would therefore be wise to implement policies that help avoid infringement. It is recommended that you:

- educate the staff employed by your company so that they are made aware of the possible copyright implications of their work and actions;
- obtain written licences or assignments, where needed, and ensure that staff are familiar with the scope of such licences or assignments;

- mark any apparatus that could be used to infringe copyright (such as photocopiers, computers, CD and DVD burners) with a clear notice that the apparatus must not be used to infringe copyright;
- prohibit your staff explicitly from downloading any copyright-protected material from the internet on office computers without authorisation; and
- develop policies to ensure that employees do not circumvent TPMs without authorisation from the copyright owner, or do not exceed the scope of the authorisation.

Every business should have a comprehensive policy for copyright compliance, which includes detailed procedures for obtaining copyright permissions that are specific to its business and usage needs. Creating a culture of copyright compliance within your business will reduce your risk of copyright infringement.

### Summary checklist

- **Maximise your copyright protection** – register your works with the national copyright office, where such voluntary copyright registration is available. Put a copyright notice on your works and employ digital rights management tools to protect digital works.
- **Ascertain copyright ownership** – have written agreements with all employees, independent contractors and other persons to address the question of ownership of copyright in any works that are created for your company.
- **Avoid infringement** – if your product or service includes any material that is not entirely original to your company, find out whether you need permission to use such material and, where needed, get prior permission.
- As a rule of thumb, **get the most out of your copyright** – license your rights, rather than selling them. Grant specific and restrictive licences so as to tailor each one to the particular needs of the licensee.



## 8. Enforcing copyright

### When is your copyright infringed?

- Any person who engages without the prior permission of the copyright owner in an activity that the copyright owner alone is authorised to do or prohibit is said to have violated the owner's copyright and infringed copyright.

The economic rights may be infringed if someone, without authorisation:

- does an act that you alone have the exclusive right to do; or
- permits a place of entertainment to be used for a public performance of a literary or musical work, where the performance constitutes an infringement of copyright.

The South African Copyright Act determines that copyright in a work is infringed by any person who, without the authorisation of the owner, does any of the acts reserved exclusively for the owner, for example, making a reproduction of the work.

The Act also provides for copyright to be infringed indirectly:

- by any person who, without the authority of the copyright owner, imports, sells, lets, by way of trade offers or exposes for sale or hire, or distributes for purposes of trade, an article in the Republic if he/she knew that the making of the article constituted an infringement of copyright or would have constituted an infringement if made in the Republic; or
- by any person who permits a place of entertainment to be used for a public performance of a literary or musical work, where the performance constitutes an infringement of copyright, unless the person was not aware and had no reasonable grounds to suspect that the performance was an infringement.

There may be copyright infringement even if only a part of a work is used. An infringement will generally occur where a substantial part (an important, essential or distinct part) is used in one of the ways exclusively reserved for the copyright owner. So both the quantity and quality matter. However, there is no general rule on how much of a work may be used without infringing copyright. The question will be determined on a case-by-case basis, depending on the actual facts and circumstances of each case.



The moral rights may be infringed if:

- your contribution, as author of the work, is not recognised; or
- your work is subjected to derogatory treatment or is modified in a way that would be prejudicial to your honour or reputation.

There may also be a (copyright or independent) infringement if someone makes, imports or commercially deals in devices that circumvent TPMs that you have put in place to protect your copyright content against unauthorised uses. Moreover, there may be infringement if someone removes or alters rights management information that you have attached to a copyright work.

One single act may violate the rights of many rights holders. For example, it is an infringement of the right in the broadcast to sell tapes of broadcast programmes. Of course, this action would also infringe the copyright of the composer of the music and the record company, which produced the original recording. Each right holder may take separate legal actions.

### **What should you do if your rights are likely to be or have been violated?**

The burden of enforcing copyright and related rights falls mainly on the right owner. It is up to you to identify any violation of your rights and to decide what measures should be taken to enforce your rights.

A copyright lawyer or law firm would provide information on the existing options and help you to decide if, when, how and what legal action to take against infringers, and also how to settle any such dispute through litigation or otherwise. Make sure that any such decision meets your overall business strategy and objectives.

If your copyright is infringed, then you may begin by sending a letter of demand to the alleged infringer informing him/her of the possible existence of a conflict. It is advisable to seek the help of a lawyer to write this letter. In South Africa, in cases where someone has infringed your copyright on the internet, you may have the option to:

- send a special letter of demand to an internet service provider (ISP) requesting

that the infringing content be removed from the website or that access be blocked (“notice and take-down”); or

- notify the ISP, which in turn notifies its clients of the alleged infringement and thereby facilitates resolution of the issue (“notice and notice” approach).

### **Sometimes surprise is the best tactic...**

Giving an infringer notice of a claim may enable him/her to hide or destroy evidence. If you consider the infringement to be wilful, and you know the location of the infringing activity, then you may wish to go to court without giving any notice to the infringer and ask for an *ex parte* order that allows for a surprise inspection of the infringer’s premises and the seizure of relevant evidence.

Court proceedings may take a considerable period of time. To prevent further damage during this period, you may take immediate action to stop the allegedly infringing action and to prevent infringing goods from entering into the channels of commerce. The law in most countries, including South Africa, allows the court to issue an interdict by which the court may order, pending the final outcome of the court case, the alleged infringer to stop his action and preserve relevant evidence.

Bringing legal proceedings against an infringer is advisable only if:

- you can prove that you own the copyright in the work;
- you can prove infringement of your rights; and
- the value of succeeding in the legal action outweighs the costs of the proceedings.

The remedies that a South African court may provide to compensate for an infringement include:

- damages;
- an interdict;
- delivery-up of infringing copies or plates used for making infringing copies; and/or
- in lieu of damages, at the option of the plaintiff, an amount calculated on the basis of a reasonable royalty that would have been payable by a licensee.

The infringer may also be compelled to reveal the identity of third parties involved in the production and distribution of the infringing material and their channels of distribution.

The copyright law may also impose criminal liability for making or commercially dealing with copies of infringing works. The penalties for infringement may be a fine or even imprisonment.

In South Africa, certain acts are declared criminal offences when done without the permission of the copyright owner. These acts include, but are not limited to:

- making for sale or hire;
- selling or letting for hire by way of trade;
- exhibiting in public or distributing by way of trade;
- importing into South Africa otherwise than for private or domestic use articles, which the person knows to be infringing copies of the work; and
- distributing for purposes of trade or for any other purpose to such an extent that the owner of the copyright is prejudicially affected, articles which is known to be infringing copies of the work.

The following fines and periods of imprisonment are prescribed for these criminal offences:

- in the case of a first conviction, a fine not exceeding R5 000 or imprisonment for a period not exceeding three years or both such fine and imprisonment, for each article to which the offence relates;
- in any other case, a fine not exceeding R10 000 or imprisonment for a period not exceeding five years or both such fine and imprisonment, for each article to which the offence relates.

To prevent the importation of pirated works, contact the national customs authorities. Many countries have put in place border enforcement measures, which allow copyright owners and licensees to request the detention of suspected pirated and counterfeit goods.

In South Africa, copyright owners can under the Counterfeit Goods Act apply to the

Commissioner for Customs and Excise to seize and detain goods that are alleged to be counterfeit. When such an application has been granted, all stipulated goods that are counterfeit or suspected on reasonable grounds to be counterfeit may be seized and detained by the customs authorities upon entering the Republic.

**What are your options for settling copyright infringement without going to a court?**

In many instances, an effective way of dealing with infringement is through arbitration or mediation. Arbitration generally has the advantage of being a less formal, shorter and cheaper procedure than court proceedings, and an arbitral award is more easily enforceable internationally. An advantage of both arbitration and mediation is that the parties retain control of the dispute resolution process. As such, it can help to preserve good business relations with another enterprise with which your company may like to continue to collaborate or enter into a new licensing or cross-licensing arrangement in the future. It is generally good practice to include mediation and/or arbitration clauses in licensing agreements. For more information, see the website of the WIPO Arbitration and Mediation Center.

## 9. Annexures

### Annexure 1

#### Useful Internet Links

World Intellectual Property Organisation: [www.wipo.int](http://www.wipo.int)

WIPO section on small and medium-sized enterprises: [www.wipo.int/sme/en/](http://www.wipo.int/sme/en/)

WIPO website on copyright and related rights: [www.wipo.int/copyright/en/index.html](http://www.wipo.int/copyright/en/index.html)

WIPO website on enforcement: [www.wipo.int/enforcement/en/index.html](http://www.wipo.int/enforcement/en/index.html)

WIPO electronic bookshop: [www.wipo.int/ebookshop](http://www.wipo.int/ebookshop). Helpful books to buy include *Guide on the Licensing of Copyright and Related Rights*, publication no. 897; and *Collective Management of Copyright and Related Rights*, publication no. 855

WIPO electronic publications: [www.wipo.int/publications](http://www.wipo.int/publications). Helpful publications include *Understanding Copyright and Related Rights*, publication no. 909; *From Artist to Audience: How Creators and Consumers Benefit from Copyright and Related Rights and the System of Collective Management of Copyright*, publication no. 922; and *Collective Management in Reprography*, publication no.924

Directory of National Copyright Administrations: [www.wipo.int/directory/en/urls.jsp](http://www.wipo.int/directory/en/urls.jsp)

#### International non-governmental organisations

International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM; acronym derived from the original French name): [www.biem.org](http://www.biem.org)

Business Software Alliance (BSA): [www.bsa.org](http://www.bsa.org)

International Confederation of Societies of Authors and Composers (CISAC; acronym from French name): [www.cisac.org](http://www.cisac.org)

International Federation of Film Producers Associations (FIAPF; acronym from French name): [www.fiapf.org](http://www.fiapf.org)

International Federation of Reproduction Rights Organisations (IFRRO): [www.ifrro.org](http://www.ifrro.org)

International Federation of the Phonographic Industry (IFPI): [www.ifpi.org](http://www.ifpi.org)

Independent Music Companies Association (IMPALA): [www.impalosite.org](http://www.impalosite.org)

International Publishers Association (IPA): [www.ipa-ue.org](http://www.ipa-ue.org)

Software and Information Industry Association (SIIA): [www.siiia.net](http://www.siiia.net)

## Annexure II

### National copyright administration websites

Algeria	<a href="mailto:www.onda@wissal.dz">www.onda@wissal.dz</a>
Andorra	<a href="http://www.omp.ad">www.omp.ad</a>
Argentina	<a href="http://www2.jus.gov.ar/minjus/ssjyal/autor">www2.jus.gov.ar/minjus/ssjyal/autor</a>
Australia	<a href="http://www.ag.gov.au">www.ag.gov.au</a>
Barbados	<a href="http://www.caipo.gov.bb">www.caipo.gov.bb</a>
Belarus	<a href="mailto:vkudashov@belpatent.gin.by">vkudashov@belpatent.gin.by</a> <a href="mailto:ncip@belpatent.gin.by">ncip@belpatent.gin.by</a>
Belize	<a href="http://www.belipo/bz">www.belipo/bz</a>
Bosnia and Herzegovina	<a href="http://www.bih.nat.ba/zsmp">www.bih.nat.ba/zsmp</a>
Brazil	<a href="http://www.minc.gov.br">www.minc.gov.br</a>
Canada	<a href="http://cipo.gc.ca">cipo.gc.ca</a>
China (Hong Kong-SAR)	<a href="http://www.info.gov.hk/ipd">www.info.gov.hk/ipd</a>
Colombia	<a href="http://www.derautor.gov.co">www.derautor.gov.co</a>
Croatia	<a href="http://www.dziv.hr">www.dziv.hr</a>
Czech Republic	<a href="http://www.mkcr.cz">www.mkcr.cz</a>
Denmark	<a href="http://www.kum.dk">www.kum.dk</a>
El Salvador	<a href="http://www.cnr.gob.sv">www.cnr.gob.sv</a>
Finland	<a href="http://www.minedu.fi">www.minedu.fi</a>
Georgia	<a href="http://www.global-erty.net/saqpatenti">www.global-erty.net/saqpatenti</a>
Germany	<a href="http://www.bmj.bund.de">www.bmj.bund.de</a>
Hungary	<a href="http://www.hpo.hu">www.hpo.hu</a>
Iceland	<a href="http://www.ministryofeducation.is">www.ministryofeducation.is</a>
India	<a href="http://copyright.gov.in">copyright.gov.in</a>
Indonesia	<a href="http://www.dgip.go.id">www.dgip.go.id</a>
Ireland	<a href="http://www.entemp.ie">www.entemp.ie</a>
Kyrgyzstan	<a href="http://www.kyrgyzpatent.kg">www.kyrgyzpatent.kg</a>



Latvia	<a href="http://www.km.gov.lv">www.km.gov.lv</a>
Lebanon	<a href="http://www.economy.gov.lb">www.economy.gov.lb</a>
Lithuania	<a href="http://www.muza.lt">www.muza.lt</a>
Luxembourg	<a href="http://www.etat.lu/EC">www.etat.lu/EC</a>
Malaysia	<a href="http://mipc.gov.my">mipc.gov.my</a>
Mexico	<a href="http://www.sep.gob.mx/wb2/sep/sep_459_indautor">www.sep.gob.mx/wb2/sep/sep_459_indautor</a>
Monaco	<a href="http://www.european-patent-office.org/patlib/country/monaco/">www.european-patent-office.org/patlib/country/monaco/</a>
Mongolia	<a href="http://www.ipom.mn">www.ipom.mn</a>
New Zealand	<a href="http://www.med.govt.nz">www.med.govt.nz</a>
Niger	<a href="http://www.bnda.ne.wipo.net">www.bnda.ne.wipo.net</a>
Norway	<a href="http://www.dep.no/kd/">www.dep.no/kd/</a>
Peru	<a href="http://www.indecopi.gob.pe">www.indecopi.gob.pe</a>
Philippines	<a href="http://ipophil.gov.ph">ipophil.gov.ph</a>
Republic of Korea	<a href="http://www.mct.go.kr/english">www.mct.go.kr/english</a>
Russian Federation	<a href="http://www.rupto.ru">www.rupto.ru</a>
Singapore	<a href="http://www.gov.sg/minlaw/ipos">www.gov.sg/minlaw/ipos</a>
Slovakia	<a href="http://www.culture.gov.sk">www.culture.gov.sk</a>
Slovenia	<a href="http://www.sipo.mzt.si/">www.sipo.mzt.si/</a>
Spain	<a href="http://www.mcu.es/Propiedad_Intelectual/indice.htm">www.mcu.es/Propiedad_Intelectual/indice.htm</a>
Switzerland	<a href="http://www.ige.ch">www.ige.ch</a>
Thailand	<a href="http://www.ipthailand.org">www.ipthailand.org</a>
Turkey	<a href="http://www.kultur.gov.tr">www.kultur.gov.tr</a>
Ukraine	<a href="http://www.sdip.gov.ua">www.sdip.gov.ua</a>
United Kingdom	<a href="http://www.patent.gov.uk">www.patent.gov.uk</a>
United States of America	<a href="http://www.loc.gov/copyright">www.loc.gov/copyright</a>

**Note:** For up-to-date information visit [www.wipo.int/directory](http://www.wipo.int/directory)

## **Annexure III**

Summary of the main international treaties dealing with copyright and related rights:

### **The Berne Convention for the Protection of Literary and Artistic Works (1886)**

The Berne Convention is the main international copyright treaty and establishes the rule of “national treatment”, meaning that in every country foreign authors enjoy the same right as national authors. The convention currently has 166 members. A list of contracting parties and the full text of the convention are available at [www.wipo.int/treaties/en/ip/berne/index.html](http://www.wipo.int/treaties/en/ip/berne/index.html).

### **International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961)**

The Rome Convention extends protection to neighbouring rights: performing artists enjoy rights over their performances, producers of phonograms over their sound recordings, and radio and television organisations over their broadcast programmes. The convention currently has 91 members. For a list of contracting parties and full text of the convention, see [www.wipo.int/treaties/en/ip/rome/index.html](http://www.wipo.int/treaties/en/ip/rome/index.html).

### **Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms (1971)**

The Phonograms Convention provides for the obligation of each contracting state to protect a producer of a phonogram who is a national of another contracting state against the making of duplicates without his/her consent, against the importation of such duplicates, where the making or importation is for the purposes of distribution to the public, and against the distribution of such duplicates to the public. “Phonogram” means an exclusively aural fixation (that is, it does not comprise, for example, the soundtracks of films or video cassettes), whatever be its form (disc, tape or other). The convention is currently in force in 78 countries. A list of the contracting parties and full text of the convention are available at [www.wipo.int/treaties/en/ip/phonograms/index.html](http://www.wipo.int/treaties/en/ip/phonograms/index.html).

## **Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIPS) (1994)**

Aiming at harmonising international trade hand-in-hand with effective and adequate protection of IP rights, the TRIPS Agreement was drafted to ensure the provision of proper standards and principles concerning the availability, scope and use of trade-related IP rights. At the same time, the agreement provides means for the enforcement of such rights. The TRIPS Agreement is binding on all 159 members of the World Trade Organisation. The text can be read at [www.wto.org/english/docs\\_e/legal\\_e/27-trips.doc](http://www.wto.org/english/docs_e/legal_e/27-trips.doc).

## **WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) (1996)**

The WCT and WPPT were concluded in 1996 to adapt the protection of the rights of authors, performers and phonogram producers to the challenges posed by the advent of the digital world. The WCT supplements the Berne Convention for the Protection of Literary and Artistic Works, adapting its provisions to the new requirements of the information society. This means, firstly, that all regulations in the Berne Convention are applicable *mutatis mutandis* to the digital environment. It also means that all WCT contracting parties must meet the substantive provisions of the Berne Convention, irrespective of whether they are party to the convention itself. The WCT extends authors' rights in respect of their works by granting them the exclusive rights to authorise or prohibit:

- the distribution to the public of original works or copies thereof by sale or otherwise (right of distribution);
- the commercial rental of computer programs, cinematographic works (if such commercial rental has led to widespread copying of such works, materially impairing the exclusive right of reproduction) or works embodied in phonograms (right of rental); and
- communication to the public of their original works or copies thereof, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them (right of communication to the public).

The WCT entered into force on March 6 2002 and currently has 90 members (see: [www.wipo.int/treaties/en/ip/wct/index.html](http://www.wipo.int/treaties/en/ip/wct/index.html)). In contrast to the WCT, the WPPT deals with holders of related rights, its purpose being the international harmonisation of protection for performers and phonogram producers in the information society. However, it does not apply to audiovisual performances. The WPPT mainly protects the economic interests and personality rights of performers (actors, singers, musicians etc.) in respect of their performances, regardless of whether they are recorded on phonograms. It also helps persons or legal entities that take the initiative and have the responsibility for the fixation of the sounds. WPPT grants rights holders the exclusive right to authorise or prohibit:

- direct or indirect reproduction of a phonogram (right of reproduction);
- the making available to the public of the original or copies of a phonogram by sale or other transfer of ownership (right of distribution);
- the commercial rental to the public of the original or copies of a phonogram (right of rental); and
- the making available to the public, by wire or wireless means, of any performance fixed on a phonogram in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them, e.g. on-demand services (the right of making available).

With regard to live performances, i.e., those not fixed on a phonogram, the WPPT also grants performers the exclusive right to authorise:

- broadcasting to the public;
- communication to the public; and
- fixation (of sound only).

The WPPT came into force on May 20, 2002, and 91 states are currently members (see [www.wipo.int/treaties/en/ip/wppt/index.html](http://www.wipo.int/treaties/en/ip/wppt/index.html)).

### **Convention on Cybercrime (2001)**

Drafted by the Council of Europe, the convention on cybercrime sets out a common criminal policy aimed at the protection of society against cybercrime. It is the first international treaty on crimes committed via the internet and other computer

networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security. It contains a series of powers and procedures such as the search of computer networks and interception. Read the full text at [conventions.coe.int/Treaty/en/Treaties/Html/185.htm](http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm)

### **Copyright Directive (2001)**

The European Community Directive on the harmonisation of certain aspects of copyright and related rights in the information society harmonises rights in certain key areas, primarily to meet the challenge of the internet and e-commerce, and digital technology in general. It also deals with exceptions to these rights and legal protection for technological aspects of rights management systems.

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## NOTES

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