Copyright and Digital Music Collections in South Africa

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A dissertation submitted in partial fulfilment of the requirements for the degree of Master of Information Studies (MIS), School of Sociology and Social Studies, University of KwaZulu-Natal, Pietermaritzburg.

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DEDICATION

To my cherished late parents, John and Joyce Whittle-Bennetts, who always lovingly encouraged and supported me with my studies. Your bright torch still lights my way.

To my two late siblings, Heather and John (Jackie) Whittle-Bennetts, two of my greatest teachers.

And

To my two beloved children, Margaret-Anne and James Samuel Polak, for all their love and understanding.

ABSTRACT

The crux of the research problem for this study pertains to the fact that, as the world moves towards a digital age, it is imperative that we gain insight into the current copyright laws which govern the transferring of music from the old analogue form to the new digital formats.

In terms of the research problem, this study explores the South African Copyright Act No. 98 of 1978 as it pertains to the transferring of sound recordings from analogue to digital format. The study also examined digital copyright laws for sound recordings in the United States, the United Kingdom and Australia as well as major copyright conventions and treaties as these international copyright laws impact on the South African situation, especially in terms of reciprocity. Furthermore, the study addressed the issue of balancing the rights between copyright holders and the public good in the preservation and dissemination of knowledge in the digital age.

The study employed methodological triangulation which included a literature search, a questionnaire and informal interviews. The population constituted 16 music librarians and two legal librarians who were surveyed. Quantitative and qualitative techniques were employed. Considering the size of the population (18) the results of a self-administered questionnaire were analysed using a calculator. Data collected for the informal interviews was analysed qualitatively.

The study revealed that music librarians in South Africa are not well-versed in South African copyright law, especially as it applies to sound recordings. Guidelines, based on the South African Copyright Act No. 98 of 1978, and specifically for South African music librarians, have been formulated concerning both print and the actual sound recordings. It is important for the music librarian to take note that the composition of songs in a sound recording has an individual copyright that is separate from the copyright of the sound recording. Further copyrights can also exist in, for example, the sleeve of an album. It is anticipated that the guidelines will give clarity to music librarians on South African digital copyright legislation with regard to sound recordings.

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"What sculpture is to a block of marble, education is to the soul." Joseph Addison

(1672-1719)

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LIST OF ACRONYMS AND ABBREVIATIONS

ARSC	Association for Recorded Sound Collections
CD	Compact Disc
CDPA	Copyright Designs and Patents Act
CD Rom	Compact Disc Read-Only Memory
DALRO	Dramatic Artistic and Literary Rights Organization
DISA	Digital Innovation South Africa
DMCA	Digital Millennium Copyright Act
DTI	Department of Trade and Industry

DVD	Digital Versatile (formerly Video) Disc
EEA	European Economic Area
E-Information	Electronic Information
EU	European Union
HYMAP	Hidden Years Music Archives Project
IT	Information Technology
ICT	Information and Communication Technology
ILAM	International Library of African Music
LIC	Library and Information Centre
OSP	Online Service Provider
PMB	Pietermaritzburg
SA	South Africa
SAMAP	South African Music Archives Project
SAMRO	South African Music Rights Organization
TRIPS	Trade Relations Aspects of Intellectual Property Rights
UK	United Kingdom
UKZN	University of KwaZulu-Natal
UN	United Nations
US	United States (of America)
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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CHAPTER 1

INTRODUCTION TO THE STUDY

Introduction

With the advent of modern technology, copyright (which was originally paper-based) has become an important and complex issue. This issue is made especially difficult by the continual migration of technology from one format to another as technology rapidly advances, rendering older machines and software obsolete. This results in the continual need to keep updated with new technology and in the digital age new copyright issues have emerged.

This Chapter deals with the background to the study, statement of the problem, aim, the rationale and limitation of the study and discusses the conceptual framework employed by the study. Key research questions and definitions of important terms relevant to the study are also noted.

1.1 Background to the study

The Hidden Years Music Archive Project (HYMAP), which has recently been renamed the South African Music Archive Project (SAMAP), was established with the aim of creating an online resource on indigenous South African music and associated cultural heritage.

Northwestern University Library (2009) describes "hidden collections" as collections which "include library materials in any format (print, microform, video etc.) that cannot be found in the online catalog or may be found there only under a collective title, without online records for the individual pieces within the set." In other words, OCLC (2009) states that they are "those special

collections and archives that are undescribed or underdescribed, and therefore undiscoverable." Hidden collections (including music collections) pose a problem in both libraries and archives since the materials have usually not been entered into an online catalogue. They are usually unprocessed primary sources and represent a large store of unused material. Because these "hidden" resources are usually unprocessed it puts them at "greater risk for loss or theft. If stolen, the lack of documentation would make them difficult to recover. [Moreover], these inaccessible collections hinder research [as they are inaccessible to scholars]" Yakel (2005).

South African musicians and their music were often banned or suppressed during the apartheid years and much has been forgotten or remains difficult to access. According to Dr Dale Peters (2005) (Digital Imaging Africa Project (DISA) project manager) the independent music archives currently lack the infrastructure to preserve these historical collections and an immediate concern is the deterioration of analogue tapes, records and other obsolete media on which much of this material is stored. There is therefore an urgent need to catalogue, digitize and restore this music, especially as a resource for future use.

An increasing concern is that the new techniques for recording sound and visual images have proliferated at such a rapid rate that access and copyright have become critical issues which need to be addressed and clarified before the old analogue records can be converted into the new digital format.

These abovementioned legal issues need to be clarified in view of the fact that the new era of digitization and the minefield of copyright issues involved have "sent shockwaves through the legal community" and this has resulted in copyright owners bringing law suits where unauthorized use is made of their work (*The ABC of copyright* 1981:11). Furthermore, "opportunities are now presented for piracy on a large scale." As far back as the 1980s, new forms of legislative protection were needed and copyright laws were being revised to meet the challenge of the new technologies (*The ABC of copyright* 1981).

Copyright law thus plays an important role in the complex world of modern communication and technological advance. "Copyright law provides protection to authors and other creators of

works of intellectual creativity. Copyright laws are designed at the same time to encourage the creation and dissemination to the public of original works" (*The ABC of copyright* 1981:11-12). As it was in the 1980s, new technological developments continue to put pressure on the law, necessitating change by "forcing copyright to adapt or expand to accommodate new creations" (*The ABC of copyright* 1981:12).

Thus, one can argue that problems of more than two decades ago still persist as the search for new norms rages. This is evident in the fact that piracy is still rife and digital copyright laws remain contentious issues which require clarification and continual amending. For example, "the South African Copyright Act No. 98 of 1978 has been amended from time to time since 1978, but Section 13 Regulations which include provisions for libraries and education, have not been amended to date. The Act and its regulations are outdated and they do not address the digital environment" (Internet Business Law Services 2008). Copyright laws also need to be balanced between protecting the rights of authors and at the same time make provision for the dissemination of knowledge for the public good.

Davidson (2000:598), while exploring the United States experience, makes the point that "most music librarians have a working knowledge of the United States copyright law with respect to situations that arise in the library, especially with respect to the use of musical works captured on paper, recordings and film." She stresses, however, that there are few music librarians who "have had to tangle with the legal issues of licensing electronic reference sources and storing digitally formatted sound to computer workstations" (Davidson 2000:598). She adds that there are even fewer music librarians who know whether they are Online Service Providers (OSPs), and if they are, what rights and responsibilities are imposed on them.

1.2 The research problem

Besek (2003:6-7) succinctly points out that "as libraries move into the digital age, they increasingly face copyright and other intellectual property questions. Creating digital surrogates and using digital technologies to make copyrighted works available to the public raise many issues." Besek (2003) adds that the collection and long-term preservation of

digital content pose challenges to the intellectual property regime within which libraries and archives are accustomed to working.

The problem is that copyright issues are complex and sometimes controversial (see the local example of "The Lion King" below). To further complicate matters, digital technology is rapidly changing and in constant need of updating. Thus, the emergence of electronic information creation, storage and dissemination in recent decades has presented unprecedented challenges for intellectual property, and, as Hannabuss (1998:190) reminds us, "the law keeps changing and we must keep up with it."

The study investigates the copyright laws in other countries and assesses what lessons can be learnt which are applicable to the South African situation. Internationally, the current "freewheeling" nature of the Internet and the new digital audio formats, which can easily be copied, have led to an epidemic of copyright infringements (Fries and Fries 2000:41). This development leaves the information worker in a quandary in that libraries play a very important role in the world of scholarship and intellectual heritage as they represent a 'public good' (Urs 2004:201). However, in the digital millennium these conflicting interests between protecting intellectual heritage by means of copyright and access to a public good via a library service or the Internet need to be balanced.

Flint (1979:107) mentions that the application of copyright to the music industry at first appears confusing and complicated because there are separate copyrights, on the one hand in the musical compositions and, on the other hand, in the records, radio programmes and the films in which they are used. This complexity is not always understood, even by those working in the industry. The problem centres on the fact that copyright laws for old sound recordings are arguably fairly explicit and straightforward, which Dommering in Hugenholtz (1996:4-5) alludes to; the confusion surrounding copyright laws arises in the digital environment. See, for example, the "Lion King" below.

The crux of the research problem for this study pertains to the fact that as the world moves towards a digitized age, it is imperative that we gain insight into the current copyright laws which govern the transferring of music from the old analogue form to the new digital formats

and from current digital formats to newer digital formats. It is important to investigate the level of interpretation of copyright laws which information workers understand and put into practice in South Africa.

The researcher acknowledges the fact that the background discussion and literature review relates mainly to copyright issues outside South Africa. There is prolific literature available on copyright and digital material internationally, but little on the South African context. One of the key questions (see below) for this study is to unpack the copyright laws applicable to South Africa which have a bearing on copyright and digital music collections in South Africa.

It is thus against the background of what the South African copyright laws for digital music stipulate and what is actually being understood and practiced by the information workers that this study sought to investigate.

1.3 Aim of the study

The purpose of this study was to undertake a survey of the sixteen South African music libraries/archives which have been identified and ascertain whether copyright issues are fully understood and adhered to by the transferring of music from analogue to digital format. Two law libraries were also included to enrich the study. It was anticipated that this study would provide clarity and clear guidelines pertaining to digital copyright regulations with regard to sound recordings and assess how this impacts on the information worker who is the interface between the collection and the user.

This study aimed to assist the South African Music Archive Project by researching and reviewing relevant literature on copyright laws with regard to the digitization of music. The research focused on an investigation into sixteen music collections (as well as two law libraries) in South Africa which the researcher identified.

To achieve this aim, the study attempted to answer the following questions:

1.4 The key questions asked:

- Which copyright laws in South Africa have a bearing on the topic and what are the implications of these laws?

- What is the situation regarding digital music copyright laws for sound recordings in other countries and what lessons can be learnt which are applicable to the South African situation?

- What problems do South African information workers/ librarians encounter with regard to digital copyright laws?

- Are digital copyright laws clearly interpreted and put into practice when the material is copied from analogue to digital format?

1.5 Rationale of the study

The study on copyright and digital music collections is important because, as Besek (2003:6-7) says, "an appropriate balance between copyright owners and users is a topic of ongoing debate in legal and policy circles." To illustrate this ongoing debate on the legal problems associated with copyright and rights issues, attention can be drawn to the well-known local legal battle which has been fought for over fifty years concerning the "Lion King" whereby Solomon Linda, the original creator of the song (known as "The Lion Sleeps Tonight") used in the movie "The Lion King", had been illegally deprived of his rights. Linda died in poverty in 1962 whereas the song has grossed over $10 million for the recording company. Dr Owen Dean, an expert on the Imperial Copyright Act of 1911, had established that copyright in "The Lion Sleeps Tonight" should have reverted back to the Linda family at the end of 1987 as "the Imperial Copyright Act states that 25 years after the creator's death, the copyright in a piece of work reverts back to their family, thus severing the rights of any person who was assigned the copyright in the meantime" (Fejes [n.d.]).

The above example highlights the controversy, complexity and legal implications surrounding music copyright issues.

The study reveals the current actual understanding and contemporary practice of digital copyright issues among information workers and presents its findings on current copyright laws applicable to digital recordings in South Africa, especially with reference to long term access and archival purposes.

The desired outcome of this study was to obtain a better understanding of what librarians understood by digitization with the purpose of providing recommendations and guidelines concerning South African digital copyright laws which are applicable to the transferring of music from analogue tapes and records to digital formats. It is anticipated that the study will enrich the SAMAP knowledge base by contributing to and fostering the preservation of, and long term access to, recorded digital music held in the South African libraries/archives.

1.6 Definition of the important terms relevant to this study

The following dictionaries and their definitions have been identified as giving clear and concise meaning to the understanding of the important terms relevant to this study. The *Oxford advanced learner's dictionary of current English* succinctly describes how the concepts of "archive" and "remaster" are understood as part of daily use. The *Law dictionary* defines the term "copyright" within the legal sphere. The *Dictionary of computing* aptly describes the computing terms "digitise", "bits" and "bytes". *What Is.com: the leading IT encyclopaedia* and the *BigBaer Music Industry* are reputable online catalogues which offer concise information technology and glossary of music industry terms respectively. Technical definitions of specific copyright terminology are discussed in Chapters two and three.

Archive

The *Encyclopaedia of library and information science* (1968:515) defines archive as "the records of any institution, public or private, preserved because of their value."

The *Oxford advanced learner's dictionary of current English* (2000:53) describes 'archive' as:
Noun: a collection of historical documents or records of a government, a family, a place or an organisation; the place where these records are stored.
Verb: to put or store a document or other material in an archive; to move information that is often not needed to a tape or disc to store it (computing).

Copyright

The *Law dictionary* (2003:111) defines copyright as "the protection of the works of artists and authors giving them the exclusive right to publish their works or determine who may so publish."

Analogue

The *Internet advisory board* [n.d.] states that "analog is everything before digital. Vinyl records, tape cassettes [and] the telephone; these all use analog signals to convey information. The radio frequency is an example of an analog signal."

("Analogue" is spelt as "analog" when quoting directly from American sources).

Bits and Bytes

The *Usborne computer dictionary* (1999:20) describes "bits" as: "Each 0 or 1 is called a bit (short for binary digit). Bits usually travel around the computer in groups of eight, called bytes."

Derivative work

The *BigBaer music industry glossary* (2003) defines derivative works as "new work based on or derived from one or more pre-existing works."

Digitise

The *IBM dictionary of computing* (1994:198-199) describes digitize as:

- To express or represent in a digital form data that are not discrete data; for example, to obtain a digital representation of the magnitude of a physical quantity from an analog representation of that magnitude
- To convert an analog signal into digital format. An analog signal during conversion must be sampled at discrete points and quantized to discrete numbers.

The *IBM dictionary of computing* (1994:24) describes analogue-to-digital conversion as:

"The conversion of an analog signal into a digital bit stream, including the steps of sampling, quantizing and encoding."

Musical work

The *BigBaer music industry glossary* (2003) defines musical work as "a melody and any accompanying lyrics; more commonly referred to as a musical composition or a song."

Phono record

The *BigBaer music industry glossary* (2003) defines phono record as "any material object onto which sounds, other than those on a soundtrack of an audio-visual work, can be recorded including an audiocassette, a CD, or a vinyl disc."

Remaster

The *Oxford advanced learner's dictionary of current English* (2000:1076) defines 'remaster' as: "to make a new master copy of a recording in order to improve the sound quality."

Ripping

"Ripping, more formally known as digital extraction, is the process of copying audio or video content from a compact disc, DVD or streaming media onto a computer hard drive. A ripper program has an encoder to compress the source media and reduce the size of the file it stores on the hard disk. It may also have a converter program to allow the user to change the media's file format. The process of re-copying the converted files to a recordable CD or DVD is called burning" (What Is.com.:2008).

Sound recording

The *BigBaer music industry glossary* (2003) defines sound recording as "the recorded performance of a song onto a phono record."

In this study the terms '**information worker**' and '**music librarian**' are used interchangeably. 'Information worker' is a general term used these days for 'librarian' but when referring to the survey, music and law librarians constitute the population and the term music/law librarian is deemed by the researcher to be the more appropriate term.

1.7 Conceptual framework

The study concerns copyright issues, which are legal in nature and are governed by copyright laws. In order to answer the key question relating to the digital music copyright laws in South Africa it is necessary to draw on the South African Copyright Act 98 of 1978 as a legal framework.

The key question regarding copyright laws in other countries and the lessons that can be learnt which are applicable to the South African situation necessitate reference to other relevant international acts and treaties, such as the Berne Convention, the Digital Millennium Copyright Act and the World Intellectual Property Organization (WIPO) as frameworks which can offer guidance towards best international and South African copyright practice. Copyright laws

presently tend to protect private authors rather than the public interest (users) which in turn restricts libraries in their role of disseminating knowledge.

The Berne Convention is an international agreement made in 1886 which offers copyright protection for literary and artistic works. The treaty standardizes basic copyright protection among over 100 signatory countries. A member country affords the same treatment to an author from another country as it does to authors in its own country. South Africa became a signatory to the Berne Convention in 1928.

The World Intellectual Property Organization (WIPO) was established in 1967 and is based in Geneva, Switzerland. It is a body which is responsible for the promotion and protection of intellectual property throughout the world. WIPO is one of the nineteen specialized agencies of the United Nations (U.N.) and it administers many international treaties dealing with intellectual property.

The Digital Millennium Copyright Act "primarily implements treaties of the World Intellectual Property Organization (WIPO). Enacted in 1996, it criminalizes the circumvention of anti-piracy features of software and calls for payments of fees to record companies for webcasts of music." (*Law dictionary* 2003:146)

The South African Copyright Act No. 98 of 1978 governs copyright law in South Africa. The Act has been updated several times to comply with the minimum standards of the Trade Relations Aspects of Intellectual Property Rights (TRIPS) agreement. The TRIPS agreement "sets out how participating nations will protect intellectual property rights: for copyright they should comply with some provisions of the Berne Convention; developed countries were given until 1 January 1996 to bring their legislation into conformity with TRIPS. Developing countries were given until 2000, and the least developed countries an additional six years." (*Dictionary of law* 2002:509)

Thus to provide a broader conceptual framework, the study investigates the problem within a framework interlinking (i) the concept of copyright and why and how it emerged (see Chapter 2,

Section A) and (ii) selected principles underpinning copyright, including the conflicting issues emerging from the major global media paradigm shift from the print/analogue format to the digital format (see Chapter 2, Section A).

The study thus discusses the origins and current interpretation of digital music copyright issues within a legal framework, taking the stance that copyright currently protects private rather than public interest which tends to restrict libraries in their role of disseminating knowledge.

1.8 Delimitation of the study

This study confines itself to the copyright laws applicable to the digitization of old analogue sound recordings into the new digital formats for library and archival purposes. The survey conducted was limited to a selection of South African music libraries and two law libraries and focuses on the perspectives of sixteen music and two law librarians (see 5.5 for reason for selection).

1.9 Structure of the study

This first Chapter outlines the research problem, aim, research questions and the rationale of the study and offers definitions of the important terms relevant to the study. Chapters 2, 3 and 4 consist of a review of the literature which is pertinent to this study.

Chapter 2 (Section A) describes copyright principles, acts, statutes and conventions and definitions relating to sound recording concepts. Chapter 2 (Section B) concentrates on libraries, the balance between the private and public good and fair use. Chapter 3 deals with the key question concerning the copyright laws in South Africa which have a bearing on the topic and the implications of these laws. Chapter 4 discusses the second key question of the study, namely the situation regarding digital music copyright laws for sound recordings in other countries which can have an impact on the South African situation. The countries which are discussed are Australia, the United Kingdom and the United States of America. The reasons for choosing these countries is discussed in the introduction to Chapter 4.

In Chapter 5 the research methods used for the study are discussed. Chapter 6 presents the results of the survey. In Chapter 7 the results are discussed. The final Chapter, Chapter 8, highlights the conclusions of the study and puts forward recommendations based on the findings. Guidelines for copyright in analogue and digital music pertaining to sound recordings (which includes both the composition of the songs, that is, print copyright laws, and the actual sound recording since copyright applies to both individually) are also provided. Appendices follow the list of works cited.

The literature pertaining to libraries and archive copyright laws for sound recordings in the United Kingdom, Australia and especially the United States is vast, whereas little has been written regarding the South African situation. However, the international copyright laws have a bearing on the South African situation, especially in terms of international treaties and conventions. It is in this context that the literature review has been divided into three Chapters as per the key questions asked.

1.10 Summary

This preliminary Chapter has endeavoured to give some background to the study, articulate the research problem, aim, research questions and rationale for the study, as well as the delimitations. The Chapter has also provided definitions of terms used which are applicable to the study. The study has employed a conceptual framework which draws on legal acts, statutes and conventions since copyright issues are legal in nature.

1.11 Note

- Use has been made of some long verbatim quotes in this study which incorporate legal terminology for the purpose of ensuring clarity of meaning
- In order not to increase the content of the study some of the important relevant documents have been incorporated as appendices
- The researcher has at times used bold print to emphasize relevant points and concepts.

CHAPTER 2

LITERATURE REVIEW: COPYRIGHT AND SOUND RECORDINGS

Introduction

Chapter 2 (Section A) introduces various issues and concerns relating to digital copyright laws, including globalization and the new era of electronic information, as well as principles and copyright acts, conventions and statutes relating to sound recordings. Chapter 2 (Section B) discusses 'Libraries and users' rights: addressing the balance between copyright holders and the public good in the preservation and dissemination of knowledge in the digital age. The section also discusses some of the problems identified in the literature concerning copyright in the digital age. Current digital projects are listed and the issue of 'fair use' is discussed.

The investigation of digital copyright issues, especially as they relate to sound recordings, involved the scrutinizing of existing literature in the form of books, journal articles, dissertations and Copyright Acts. Limited literature was identified relating to copyright in sound recordings and digital music collections in South Africa. The vast majority of literature on copyright and sound recordings, especially that which concerns libraries and the 'public good', relates to the American situation.

Section A

2.1 A brief introduction to copyright and digital concerns

The concept of copyright has emerged as a means to protect the rights of authors, composers, artists and other creators in their works. Seadle (2008:498) correctly observes that modern "copyright infringement is a problem closely tied to technology" and "since much of the

copyright law was written with pre-digital technology in mind, artifacts of these assumptions continue in the law despite attempts to modernize it."

History has shown that "copyright law was originally drafted in a world where intellectual property was always embodied in a physical form (book or journal). In the digital age it has moved from a physical object held by a LIC [Library and Information Centre] to e-information that is accessed remotely" (Coyle 1995 in Rao 2003:271). Due to this electronic shift, sound archives need to collaborate on and design repositories that can provide educational and research access to students, teachers and scholars. There should therefore be liaison between the music industries and the digital repositories concerning copyright and fair use access to older sound recordings and revenue.

Dommering (in Hugenholtz 1996:4-5) refers to copyright as being 'wasted away through an electronic sieve' because of the new chemical and electromagnetic reproduction techniques and states that "the electronic highway should be governed by information law." He adds that in order to alleviate confusion between the many nationalities, the electronic highway ("a grand and extremely complicated construction") should be international with an integral approach to the multimedia network in order to address the problems of copyright, privacy and freedom of expression.

A local source, Loock and Grobler (2006) refer to these copyright problems which have been created by the electronic shift as "dilemmas of intellectual property rights in ... cyberspace" and suggest that the South African Copyright Act (S.A. Act 98 of 1978) does provide some guidance on the way forward concerning the problem of digital copyright. For example, they state that Section 12 of the Act "gives general exceptions in the case of using copyrighted information for purposes of research and private study ... these exceptions are categorized as the 'fair use' exceptions". However, Van der Merwe (2000:42 in Grobler 2006) adds that

> The problem [with digital technology] is that information, or intellectual property, is rapidly changing from an 'analogue' to a 'digital' format, whereby … music… may be reduced to binary digits, which represent a series of 'on' and 'off' switches comprehensible to a computer only.

In view of this new analogue to digital format, Loock and Grobler (2006:174) further state that the new digital technology "makes nonsense of the categories of copyright referred to in the [South African Copyright] Act, since in the digital form the different works may be interpreted with each other to form a so-called multi-media product, which combines text, pictures, sound and video. This [change has] resulted in the term 'copyright' fast losing its meaning" since creators of knowledge "are exposed to the possibility of rapid digital multiplication" which are often "indistinguishable from the original." It is therefore essential that new ways of managing intellectual property are adopted so as to adapt "scholarly communities to the new technology." (Loock and Grobler 2006:174).

Another concern in the digital age relates to the preservation of national cultural resources. Regarding copyright laws in other countries, Seadle (2001:194) reminds us that "there are times when the US copyright laws seem to stem from a culture that puts little value on providing public access to its own past." Dietz (2000) in Moss (2005:107) poses the pertinent question: "What's at stake if we don't collect, archive, and somehow save these cultural memories?" to which he answers that "the downside is a huge lacuna in our cultural memory, if we don't try to save some kind of representation of this tremendously fertile and important moment." These observations have direct relevance to the importance of preserving our unique music heritage and enabling their further use.

In order to address these copyright digital concerns, the study draws on the legal framework for copyright protection and on legal issues linked to the impending copyright crisis which surrounds us globally in order to ascertain the copyright laws in other countries and how they impact on the South African situation. As Oddie (1999:239) points out: "The global generation and the use of digital information over online networks has massive implications for copyright management, a situation for which few countries are well prepared."

Later in this literature review, the researcher further elaborates on the above digital copyright concerns, as well as copyright principles, as follows:

2.1.1 Knowledge is of value only if it is disseminated

As Urs (2004:201) states, “in the world of scholarship and intellectual heritage, libraries play a very important role: libraries are the voices for the ‘public good’ ”. Urs (2004:201) goes on to say that “balancing conflicting private and public interests [in the digital millennium] is neither easy nor unequivocal. This issue is further accentuated in the world of academic research, where the private and public concepts are very nebulous.” The question also arises as to whether scholarly works should be separated from entertainment works. Urs (2004:201) continues by saying that “the challenges of intellectual property issues stem from their very nature – their value increases with use, and the value of intellectual property lies in public use.” In other words, copyright legislation currently protects private interests rather than the public good. This bias tends to minimize access for the public good.

2.1.2 The rights and exceptions of copyright which need to be balanced in the new copyright age

The rights and exceptions which need to be balanced include: the rights of reproduction, modification, distribution, public performance and display. However, copyright is not absolute. The limiting principles and exceptions to these rights in the digital age include archiving, copying and fair use (Urs 2004:204).

2.1.3 Infringement of copyright and the right of integrity

Hannabuss (1998:187) uses the phrase “principles in an unprincipled world” to discuss the dilemma as to what does or does not constitute infringements of copyright. Infringements of copyright can occur when the work is copied; when copies of the work are issued to the public; when the work is performed, shown or played in public; when the work is broadcast and when an adaptation is made of the work. Concerning the right of integrity, Besek (2003) states that “Congress [US] has the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and their

discoveries." Most countries have passed bills that protect the intellectual property of individuals and corporate bodies.

2.1.4 Interpretation of legal and professional guidelines pertaining to copyright law

The problem with the law is that its restrictions are not always visible and accessible. Permitted acts are mentioned in the law and guidelines and advice concerning copyright issues is provided by professional associations. However, as Hannabuss (1998) states "innocent abuses can occur," but most abuses are self-interest or ignorance, and "ignorance is no defence under the law." For example, how can a librarian really know what the user intends to do with copyright material? What constitutes 'reasonable portions' for copying and so on are often a matter of judgement and are discussed throughout the study under discussions on the complex topic of 'fair use'.

There are also various new issues relating to copyright such as 'creative commons' and 'copyleft' which tend to contrast to copyright law as copyrights usually remove public freedoms to intellectual knowledge whereas copyleft and creative commons want to preserve them. These new issues will be elaborated on under 'Information commons' (2.3.2).

The literature indicates that the latest developments in copyright tend to be related to technological change. There is a perception of 'free for all' and copyright laws are often unclear, but, as Hannabuss (1998) states: "copyright still exists [in the digital age] and, as some have found to their cost, people are as legally accountable for what they say and do in the electronic domain as in the hard-copy domain." He adds that "information workers seem to have to balance increasing pressures to obey and impose the law on the one hand, with a post-modern customer ethic [how the customer interprets the law] on the other."

2.1.5 Other major copyright principles

How long does copyright last, what formalities are required to obtain copyright and how does one determine who owns copyright? Laws relating to this question have changed considerably

over the centuries and are contentious issues, especially relating to digital music in the present electronic age.

2.2 Copyright laws and digital sound recordings

"The technology is changing so rapidly that frequent updates to the law will probably become the norm" (Samuels 2000:54). With new digital technology, artistic images [which includes sound] are reduced to a series of 0s and 1s. Once digitized, the image [and/or sounds] can be carried on a digital transmission system, easily stored, copied and manipulated" (Oddie 1999:239).

Relating to this rapid change in technology, Fries and Fries (2000:41) warn that "copyright laws uphold certain rights for purchasers of published works but invoke limitations on the use and reproduction of those works." That means that it is legal to make recordings of CDs which we have purchased for personal noncommercial use, such as in our car, or download an MP3 file and copy it, as long as we do not give away or resell any copies of that file. They continue that "copyright protection is automatic when an original work (such as a song) is fixed in a tangible medium (i.e. vinyl record, tape, CD etc.) of expression. No registration is required but one must register before one can file a copyright infringement suit." In the US the term of a copyright does vary and is dependent on the date which the work was created, who created it and when it was first distributed commercially. "For works created after 1 January 1978, the term is the life of the author plus 50 years. The term for works made for hire is 75 years from the date the work was first published (distributed commercially) or 100 years from the date of creation, whichever expires first" (Fries and Fries 2000:42).

Furthermore, Fries and Fries (2000) inform us of several common copyright myths in the United States (US). One common myth is that works "need to have a copyright notice to be protected. For works created on or after 1 March 1989, the copyright notice is optional" (Fries and Fries 2000:42). Another common myth is that one is allowed to distribute copyrighted material without permission provided that one does not charge for it. Whether one charges for it or not, if one distributes unauthorized copies, it is still copyright infringement. Some people believe that it is permissible to use copyrighted material without permission if their use would help to promote

the work, however permission is still required. “The legality of ripping depends on the interpretation of several laws [such as] the Audio Home Recording Act [which] protects consumers who use digital or analogue audio recording devices to make copies of prerecorded music, as long as the copies are for noncommercial use. But, because computers are not considered recording devices, as defined by the Audio Home Recording Act, one is not protected by this law when he rips his CDs” (Fries and Fries 2000:44).

To conclude, we must take note that Masango (2005:127) reminds us that “prior to the emergence of digital information, copyright law governed the reproduction or copying of printed information” [and] “Notwithstanding format, digital information is still protected by copyright” (Masango 2007:52). It needs to be remembered that “people are as legally accountable for what they say and do in the electronic domain as in the conventional hard-copy domain” (Hannabuss 1998:187).

However, with the advent of the modern digital age with its fast developing technologies (as already mentioned) much confusion has been created over copyrights and many questions have been raised. Digital technology, for example, " introduces a new level of controversy into copyright policy [and] some copyrighted works are more difficult to protect than others in the digital era.” “Music, for example, may be played or sung by anyone after it has been published, [but] if it is performed for profit, the performers must pay a fee, called a royalty, to the copyright owner” Wikipedia (2008). In order to find a way through the confusion, it is expedient for the purposes of this study to now very briefly trace the recent history of copyright and some of the important numerous new laws and international conventions which govern it and the copyright status of some countries today. The world has changed into what is commonly termed a “global village” and this has had repercussions on copyright laws and digitization.

2.3 Recent history: globalization and the creation of electronic information

Globalization is not a new concept as it had its origins during the late 19th century. The term usually refers to the removal and/or reduction of barriers between national borders and the concept usually refers to the economic interconnectedness or integration of national economies into one large international economy, for instance concerning trade, foreign investment and

migration. However, globalization also includes the spread of technology. Globalization has had a major impact on copyright issues, especially as concerns the new era of electronic information and digital technology.

Globally, nobody is exempt from copyright laws. "Many people either do not think about copyright laws or they make assumptions, such as these laws apply only to business use of copyrighted material, or they target only bootleggers and blatant pirates. Copyright laws apply to everyone and they not only protect the rights of artists and creators of intellectual property, they also protect consumers and manufacturers" (Fries and Fries 2000:42).

2.3.1 The new era of electronic information

Wienand (1998) in Rao (2003:268) defines e-information:

> E-information is information that has been converted into electronic form for the purposes of being carried or transmitted on digital media. It can be stored, manipulated, displayed on computer and transmitted over the Internet. It also includes information that is always intended to function electronically, such as computer software (source and object code). Copyright has a role in three areas of e-information: computer software, databases (collections of information held on computer, often put together using specialized computer programs) and communication of e-information.

The very nature of electronic information can lead to confusion and dispute regarding copyright issues.

Rao (2003:266) reminds us that "there is no real difference between copyright and electronic copyright (or e-copyright)." Rao (2003:266) explains that the distinction is evident in the manner in which the material has to be decoded or read by the user and that works that are published in electronic format (CDs, online databases, floppy discs etc) are protected as their printed equivalents. Rao (2003:206) further states that "the users of printed information have allowances for copying and distribution under special fair dealing arrangements [but] no such privileges exist for electronic information or e-information [and continues that] E-copyright first came into the public consciousness with the rise and fall of Napster, a peer-to-peer file-sharing service that enabled consumers to legally distribute digital music files. E-copyright refers to the right to copy music, movies, text including Web content, etc. ... if one does not hold the copyright to

something, copying it, posting it on a Web site, making it available for download or including it in an e-mail or bulletin board, results in breaking the law" (Rao 2003:266).

2.3.2 Information commons

Various new (and often controversial) copyright issues have emerged in the electronic digital realm which encourage copyright freedoms such as fair use, public domain, creative commons, founders' copyright, copyleft, open source, communal ownership and pure commons. However, the practice of fair use and the public domain are "commons-type" practices which have been in use for some time, in fact before the commons movement began (Braman 2006).

Braman (2006) explains that there is an increasing interest in an 'information commons' which is "in response to the aggressive assertion of intellectual property rights in the digital environment." She adds that "there is a new movement to reverse the trend" and these new approaches which are aimed at reversing the trend of copyright are "collectively referred to as the 'information commons'". What is interesting is that Braman (2006) explains that there exists a movement which is rather radical and extreme in that it believes that all information should be totally and freely available in an 'information commons'. She adds that "at the other extreme, some nonprofit organizations have developed techniques that make it easier for individuals to use existing copyright law to shape licenses to copyrighted materials in ways they prefer in order to maximize public access" (Braman 2006). Thus one extreme is conventional copyright, the other extreme is public domain (that is no copyright). Copyleft is a good example of "in between", as is creative commons.

The following is an outline from Braman (2006) which describes legal approaches to an information commons:

- **Fair use**: The use of copyrighted material without permission or licence, if the criteria of serving the public good and not damaging the market are met [fair use is mentioned frequently throughout this study as it is applicable to libraries].
- **Public domain**: Material is in the public domain when it has never been copyrighted, the copyright has expired, the material is voluntarily contributed to the public domain, or the government has produced the information [public domain is referred to frequently throughout this study].

- **Creative commons**: The nonprofit organization Creative Commons offers a licence that does two things: publicizes the availability of copyrighted works for use by members of the public, and makes it easy for content producers to specify the conditions under which such use can take place; areas in which conditions can be specified include attribution, commercial use, and modification of the work.
- **Founders' copyright**: Creative commons will purchase copyrights for $1.00 and release the material to the public domain after fourteen years (unless the author prefers an extension of another fourteen years from the original 1790 copyright term), [this refers to the US situation] thus making it easier for copyright holders to control their work for only a limited period before releasing it to the public
- **Copyleft**: A licence used to voluntarily release software to the public with the requirement that any reuse or redistribution of the information similarly be distributed freely to the public; also known as a General Public License (GPL) [the reader is referred to the Linux Information Project 2006 which offers details of the GPL licence]
- **Open source**: An open source software licence makes it possible for anyone to modify and reuse source code, but requires the commitment that works produced on the basis of such code also be freely available to others [copyleft and open source can be said to be similar concepts but not always identical].
- **Communal ownership**: The principle that intellectual property rights may be communally or collectively held, currently operationalized via contract law but under discussion for inclusion in intellectual property rights law
- **Pure commons**: The position that all information should always be freely available for anyone for any purpose.

Today there are many widely differing attitudes to intellectual property. Clausen (2004:418) makes the point that some people consider the protection of intellectual property as representing a form of 'social contract'. Clausen states that "if an author makes his books available through public libraries, society protects his rights in return and – hopefully – gives him reasonable compensation. The contrary view is that any law protecting the free utilization of intellectual property is wrong and undesirable."

An example of a movement towards 'information commons' is found in the need for inexpensive outlets to information by the undeveloped countries who are suffering from the digital divide between wealthy and poorer nations. Clausen (2004:418) brings to our attention the important fact that third world countries, in particular, argue that high prices [for resources] from industrialized countries tend to make these resources inaccessible to the underdeveloped countries and they also argue that, despite these varying attitudes, there is a growing movement towards 'information commons'.

The position of developing countries and their need for the relaxation of copyright laws is exemplified in the following relevant and thought-provoking quote by the spiritual teacher Krishnamurti (Krishnamurti:1967:60-1 in Ploman and Hamilton 1980:61):

> Whilst the author has certainly a right to benefit by his intellectual creations, it is quite another thing to claim that he should have the exclusive right to control the use of his creations without considering the rights of users. It should not be forgotten that, however gifted an author may be, he stands on the shoulders of those who have gone before him and he, in his turn, has an obligation to posterity. An author can claim no more than the right to receive equitable remuneration. To endeavour to constitute intellectual creations into a monopoly for exploitation would be unbecoming. The more civilized a nation, the less ought to be its desire to exploit another nation not so fortunately placed.

The concepts of fair use, public domain and creative commons are of significance to this study and are expanded on under 'public domain' in 2.5.5 and 'duration' in 2.5.4 below and in Chapter 2 Section B. In view of the growing movements which advocate change to digital copyright laws, especially in the developing nations, the researcher deemed it necessary to create an awareness of possible future trends in copyright laws. There is, however, a movement to extend copyright laws which has created much opposition, especially with regard to the preservation of sound recordings, and this is discussed below in Section B.

2.4 The development of statutes and acts

The scholars of ancient Greece and the Roman Empire were probably the first people to be concerned about being recognized as authors of their works, although they did not have any economic rights (The UK intellectual property office for creativity and innovation 2008). It was not until the printing press, invented by Johannes Gutenberg in 1440, and the subsequent higher rate of public literacy and mass production of books that an early form of copyright protection developed. Since these early days, many statutes and acts have been passed in various countries to protect copyright, ranging from the Statute of Anne in 1710 in the UK until the recent American acts such as the Digital Millennium Copyright Act (DMCA) of 1998. Because of length constraints it is not possible to go into detail concerning these numerous acts, but the major international acts which impact on copyright are outlined as follows:

2.4.1 The Berne Convention 1886

This important convention was designed for the protection of literary and artistic works (about 140 countries are signatories) and it "assists the nationals of its member states with international protection for such works as novels, poems and plays, *songs and musicals,* paintings, sculpture and architectural works" (WIPO 1979 in Rao 2003). "The convention is administered by the World Intellectual Property Organization (WIPO)" (UK Copyright Service:2007).

The convention provides for "**minimum** standards of copyright protection... The works, whether published or not, of authors from the signatory countries are protected during the author's lifetime and for 50 years thereafter. This protection also applies to those works of authors from non-signatory countries that were first published in one of the signatory countries" (Clausen 2004:418). What is significant is that "while specific details of copyright law vary from nation to nation, the Berne convention provides a common framework with regard to intellectual property rights between nations" (Release the music:[n.d.]).

This convention (which has been revised five times) thus "provided the basis for mutual recognition of copyright between sovereign nations and protected the development of international norms in copyright protection" (Rao 2003:265) (see Appendix B). In 1988 the United States of America (USA) became a Berne signatory. Prior to this, the US was bound by the Universal Copyright Convention which it signed in 1955 (Clausen 2004).

As far as South Africa is concerned, DALRO (2008) explains that

> South Africa, as a signatory to the Berne Convention, is bound to frame its national copyright legislation within certain parameters and to abide by the provisions of Article 9(1) according to which authors have the exclusive right to authorise reproduction of their works in any manner or form [see Appendix B].
>
> However, recognising the need for special provisions to take account of educational needs, Article 9(2) of the Berne Convention allows member states to permit the reproduction of copyright-protected works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the author. Thus, while copyright law reserves to the copyright owner the exclusive right to undertake certain acts in regard to that work, it recognises that some uses of copyright-protected works do lie outside the owner's control, and it consequently provides for exceptions to

the exclusive right. While many users regard these exceptions as their rights, they are technically exemptions from liability or, in other words, defences to what would otherwise be infringing acts.

What is noteworthy is that, as mentioned, South Africa became a signatory to the Berne Convention in 1928, but, McConnachie (2008:34) points out that an "issue which affects both local and foreign copyright owners is that South Africa has not updated the Berne Convention list of signatory countries since 1996" which is in contravention of the Berne Convention which "stipulates that member countries are afforded reciprocal rights, which means that when a new country signs the convention it should be protected by South African Copyright Law." McConnachie adds that in 2007 43 new countries had not been protected.

2.4.2 The Universal Copyright Convention 1952 (UCC) (revised 1971)

This convention was created in Geneva as an alternative to the Berne Convention because some of the countries did not agree with some of the terms of the Berne Convention, notably the United States, which required several changes to its laws before it could sign up to the Berne Convention in 1989. The US "now only requires registration for work first published in the U.S. by U.S. citizens" (UK Copyright Service: 2007). The UK Copyright Service (2007) also states that "the UCC ensured that international protection was available to authors even in countries that would not become parties to the Berne Convention" [and] that "the Berne Convention also became signatories of the UCC to ensure that the work of citizens in Berne Convention countries would be protected in non-Berne convention countries." Ploman and Hamilton (1980:57-59) explain that by the 1940s it was possible to divide countries into three categories according to the position which they had adopted for the regulation of their international relations in the copyright field:

- Countries that were parties to the Berne Convention
- Countries that were parties to one or several of the inter-American copyright conventions
- Countries that had not adhered to any international copyright protection system.

According to Ploman and Hamilton (1980:57) Unesco convened an international conference in 1952 to "seek a workable unity in copyright law." This law was "not intended to supplant existing agreements, it had to find a basis for conciliation between countries with widely different cultural, legal and administrative traditions." Furthermore, "it also intended to establish

stable treaty relationships between the countries of the Berne Union and those of the American continent and provide a system acceptable to the countries which had not yet acceded to any international copyright convention."

Ploman and Hamilton (1980:57-59) say that the main principle of the UCC was national treatment. In other words, foreign authors had to be treated like national authors and foreign works like national works. Unlike the Berne Convention the UCC made no provision for reciprocity so it was based on national treatment. The minimum protection offered by the UCC was 25 years, in contrast to the Berne Convention of 50 years. The convention was seen as being against the interests of developing nations and was revised several times in this connection, including the Paris revision of 1971 whereby "one of the central goals of the revision conferences had been achieved: the establishment of an international mechanism for permitting the developing countries a greater degree of access to protected works while respecting the rights of authors" (Ploman and Hamilton 1980:63).

The UCC is, however, of limited importance today since most countries are now members of the Berne Convention (UK Copyright Service 2007).

2.4.3 The Rome Convention 1961

This convention "for the Protection of Performers, *Producers of Phonograms* and Broadcasting Organisations has 69 member states" (WIPO 1961 in Rao 2003:267). Ploman and Hamilton (1980:69-70) state that," the Rome Convention, like the major conventions, establishes national treatment as the basic principle of protection. There is, however, a strong element of reciprocity with regard to certain forms of remuneration." Furthermore, "the unauthorized commercial reproduction of phonograms [that is] mainly gramophone records and sound cassettes, is prohibited. [This issue of piracy was also addressed at the Geneva Phonogram Convention of 1971 as discussed later]. The playing of a phonogram either in a broadcast or by any other performance requires the payment of 'equitable remuneration'... the Convention establishes a minimum term of twenty years for the protection of intellectual property rights in performances, phonograms and broadcasts. Like the copyright conventions, it also permits contracting states to legislate for or regulate exceptions to Convention protection as regards the private use of works,

the use of excerpts in reporting current events, 'ephemeral' fixations by broadcasting organizations for their own broadcasts and [significantly for libraries] use exclusively for teaching and scientific research."

The term 'phonogram' was defined in the Rome and Phonograms conventions as "any exclusively aural fixation of sounds of a performance or of other sounds" (Sterling 1992:50).

2.4.4 International Copyright Information Centre (ICIC) 1970

The **Unesco** General Conference of 1970 approved the establishment of the ICIC. The main functions included: to collect copyright information on books that can be made available to developing countries on terms as favourable to them as possible; to arrange for the transfer of rights to developing countries and to help in the development of simple model contracts for translation, reprint and other rights required by developing countries (Ploman and Hamilton 1980:65).

However, it is unfortunately doubtful as to whether the ICIC is still in effect as the researcher has been unable to find an update on this Copyright Information Centre.

2.4.5 The Geneva Phonogram Convention 1971

Ploman and Hamilton (1980:77) explain that in order to avoid problems which had arisen in the Rome Convention, "the goal of the Geneva Conference was to establish an international instrument which should be as simple as possible and open to all states, so as to receive quickly a wide acceptance." This convention "for *the Protection of Producers of Phonograms* against *Unauthorized Duplication of their Phonograms* has 68 member states (WIPO 1971 in Rao 2003:267). Although the Rome Convention addressed the problem of protection against piracy, the convention had limited acceptance. Modern piracy is mainly technological in nature and illicit duplication of records and sound tapes without the consent of the original producer had become a problem with the advent of the sound cassette. Among other provisions, the convention defined 'duplicate' of a phonogram as 'an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that program'. The term 'substantial' posed a problem and it was left to domestic legislation or

courts to determine when a substantial taking constitutes an infringing duplication. The question of what is to be understood by 'distribution to the public' of pirated copies also had to be addressed. Minimum standards were provided for in this regard and the question was left to the adhering states to legislate (Ploman and Hamilton 1980:77). It is thus the Rome and Geneva Conventions which are responsible for regulating sound recordings and South Africa is not a signatory to these conventions.

2.4.6 The South African Copyright Act of 1978

This Act governs South African copyright issues and is discussed below under 'South African copyright'.

2.4.7 The General Agreement on Tariffs and Trade/World Trade Organisation (WTO) 1995 (TRIPS)

In this agreement, "copyright for works from eligible countries was restored [and] Database Protection Legislation was introduced to protect databases for fifteen years from unauthorized extractions of more than a substantial part of the database contents" (Little 2002 in Rao 2003:265).

This agreement "applies to 135 WTO members and came into effect in 1995 for developed countries. Intellectual property obligations came into effect for developing countries on 1 January 2000 [to be applied] from 1 January 2005 for least developed countries. The TRIPS agreement requires all members to comply with the substantive provisions of the Berne Convention. It mirrors the Rome Convention protections *against unauthorized copying of sound recordings* and provides a specific right to authorize or prohibit commercial rental of these works. It also provides a detailed set of requirements relating to the enforcement of rights" (World Trade Organisation 1994 in Rao 2003:267).

2.4.8 The World Intellectual Property Organization (WIPO) 1996

WIPO succeeded BIRPI (the French acronym for the International Bureaux for the Protection of Intellectual Property of 1893) in 1974 with the objectives "to promote the protection of intellectual property throughout the world and to ensure administrative co-operation and co-ordination among the intellectual property unions" (Ploman and Hamilton 1980:85-86).

"The World Intellectual Property Organisation (WIPO), a specialized agency of the United Nations, is responsible for administering 23 international treaties that cover various aspects of intellectual property protection. Currently there are 179 WIPO member states (Ladas and Parry 1995 in Rao 2003:267).

"WIPO negotiates treaties that help make copyright laws more consistent between nations [and] make it possible to fight piracy worldwide, regardless of the location of the copyright holder or the infringer" (Fries and Fries 2000:57). During a Diplomatic Conference convened in December 1996 in Geneva, Switzerland, delegates from 160 countries considered two treaties on international intellectual property law. The delegates at the conference adopted new versions of the proposed treaties resulting in a new approach to copyright issues. The conference adopted a statement ensuring the two treaties would "permit application of fair use in the digital environment." It is important to libraries that the treaty emphasized "**the need to maintain a balance between the rights of authors and the larger public interest**, particularly education, research and access to education" (ARL 2007).

2.4.8.1 WIPO's three treaties:

1. **The copyright treaty** which "complements the Berne Convention [and] covers computer programs in any modes or forms of expression that are protected as literary works. The most important article concerns the rights of communication to the public. This covers the online digital delivery of works and functions as a basic rule for digital department stores, digital bookstores, digital record and video shops ... contracting parties or member countries of the Treaty can fulfil the requirements by granting authors a right of communication, transmission or distribution by transmission" (WIPO:1996a in Rao 2003:267).

2. **The Performers and Producers of Phonograms Treaty** "was intended to cover all relevant aspects of protection of performers and producers of phonograms. The definitions have been modernized to keep pace with technology. The definition of broadcasting now explicitly covers transmission by satellite and encrypted signals. The performers and the makers of phonograms have been granted the right of reproduction, both direct and indirect in any manner or form and an exclusive right to make their phonogram-based performances publicly available via interactive on-demand delivery methods" (WIPO 1996b in Rao 2003:268)
3. **The Database Treaty** "is a new instrument for *sui generis* protection of databases" (WIPO 1997 in Rao 2003:268).

2.4.9 The Sonny Bono Copyright Term Extension Act of 1998 (US)

The purpose of this act was to extend the duration of copyright protection. "In general, for individual works, the copyright term is the life of the creator plus seventy years [previously fifty], and for works of corporate authorship and works first published before January 1978, the term is ninety-five years" (McDonald 2005:11).

2.4.10 Digital Millennium Copyright Act (DMCA) of 1998 (US)

President Clinton signed The DMCA into law on the 28th October 1998. The law's five titles implemented the WIPO Internet Treaties (including the **WIPO Copyright and Performances and Phonograms Treaties Implementation Act)**; established safe harbours for online service providers; permitted temporary copies of programs during computer maintenance; made miscellaneous amendments to the Copyright Act, including amendments which facilitated Internet broadcasting; and created *sui generis* protection for boat hull designs. "The most well-known portions of the DMCA are its 'anticircumvention prohibitions' and it places strict limits on circumventory copyright protection measures such as encryption on DVD's" (Allen 2006). Allen (2006) points out that there has been a great deal of opposition to this act [and] opponents argue that it violates their right to fair use, since it inhibits using excerpts or screenshots from films.

2.5 General copyright principles relating to sound recordings in the digital age

The focus of this study is the copyright laws involved in the transference of old analogue records into digital format, especially as it impacts on the music librarian.

Fisher (2000) states that "almost all of the music that is distributed today is in digital, rather than analog form." He continues to state that "sound recordings is the field most heavily affected by new technologies". Compact discs (CDs) were developed and refined between 1965 and 1985 and Long Playing (L.P.) vinyl albums were replaced in the late 1980s and early 1990s. Today musical files are compressed using MP3 format which occupies about $1/12^{th}$ of the disc space occupied by uncompressed files.

The British Library (2007) states that there are two main reasons for digitizing analogue sound formats:

- Ensuring long-term preservation of content held on unstable or obsolescent media
- Providing ease of access.

In the following section issues relating specifically to sound recordings, such as definitions, when copyright is applicable and what copyrights exist in a sound recording, copyright owners, copyright duration, public domain, rights of copyright owners and the balance between copyright holders and users, the concept of rights, orphan works, public domain, sampling and fair dealing will be discussed.

2.5.1 Definition of sound recordings

Various definitions of sound recordings have been put forward. The University of Melbourne (2006) states:

> Sound recordings refer to recorded music or songs but can also be recorded speech or other sounds. Sound recordings are usually contained in the following formats: vinyl records, compact discs, mp3, audiotapes and cassettes, reel to reel tapes, cartridges and other fixed or recorded sound ...Written music, e.g. scores and lyrics, has its own category with its own requirements and limitations.

To add clarity to the above definition, McRobert (2001) states: " 'sound recording' is defined in section 10 of the [Australian] Act as the 'aggregate of sounds embodied in a record'. 'Record' is in turn defined as any 'disc, tape, paper or other device in which sounds are embodied'. These definitions are sufficiently broad to cover digitally recorded music, including music files stored on personal computers."

The UK Intellectual Property Office (2006) addresses copyright aspects generally and states that

> Copyright does not protect ideas for a work. However, when an idea is fixed, for example in writing, copyright **automatically** protects it. This means that you do not have to apply for copyright. Copyright applies to any medium. This means that you must not reproduce copyright protected work in another medium without permission. This includes, for example, publishing photographs on the Internet and making a sound recording of a book. [As stressed previously] a copyright protected work can have more than one copyright, or another intellectual property right, connected to it. For example, an album of music can have separate copyrights for individual songs, sound recordings [etc].

2.5.2 Copyrights in a sound recording

It is crucial to note, and is stressed repeatedly throughout this study, that several copyrights can exist in a sound recording.

UK Music (2008) explains that copyright can exist in:

- The **music** ('musical works')
- The **lyrics** of the song ('literary works')
- The **sound recording** itself. [However] only the initial (prototype) recording will be protected by copyright.
- There might be additional copyright protection accompanying a CD for example:
  - if the CD cover has a photo or design on it that might be protected by copyright as an artistic work, and
  - any written commentary about the music or song might be protected by copyright as a literary work, and
  - there might even be copyright in the way in which the printed words of the commentary are arranged (i.e. in the 'typographical arrangement').

2.5.3 Copyright owners

The owners of copyright are: (UK Music 2008)

- **Composition**: In general, the author is the first owner of the copyright (unless the work is created in the course of employment, in which case the employer generally owns the copyright)
- **Sound recordings**: Generally, the producer, the person who has made the arrangements for the recording to be made or the person who paid for the recording to be made is considered the owner of the recording.

"As soon as you create an **original** musical work i.e. it is not copied from someone else's work, and it is **recorded** in some form, written, audio or visual, you automatically own the copyright in that work" (UK Music 2008).

2.5.4 Duration

In order to limit copyright holders' terms, sound recordings have fixed durations, which vary according to the different countries and national laws and thereafter fall into the public domain. The **duration** of copyright if you are the author of a **literary, dramatic, musical or artistic work**, generally lasts for the whole of your lifetime plus 70 years afterwards. The UK Intellectual Property Office (2006) states that this period of copyright is applicable to the United Kingdom (UK), Europe and the USA. In South Africa the duration is 50 years.

In South Africa, if you are the author of a **sound recording or a performer**, copyright lasts for 50 years from the end of the year in which the recording was released or the performance made.

Copyright duration has become a contentious issue, as was discussed under 2.3.2. There is lobbying both to extend and to reduce copyright duration which will be discussed in connection with sound recordings and preservation in Chapter 2, Section B and in Chapter 4.

2.5.5 The public domain as it relates to copyright and sound recordings

After copyright expires, the work will be in the public domain and is then no longer bound by copyright.

UK Music (2008) describes the public domain as:

> [comprising] the body of knowledge and innovation (especially creative works such as writing, art, music, and inventions) which a work will become part of when its copyright protection has expired. Copyright establishes a healthy balance between the interests of the creator and the public domain establishing an incentive for creativity and innovation whilst at the same time respecting the interests of the general public.

"Public domain" is an important component of the information commons as discussed under 2.3.2. It is also relevant to sound recordings and is discussed under Chapter 2, Section B. Also see Appendix A for sound recordings and the public domain in the US. Reference to duration and the problematic issues surrounding it are referred to throughout this study.

2.5.6 The rights of copyright owners

UK Music further explains that copyright owners are granted a number of **rights** (which they can also authorise others to carry out on their behalf), including:

- The right to copy the work (*reproduction* right)
- The right to issue copies of the work to the public (*distribution* right)
- The right to rent or lend the work to the public (*rental* or *lending* right)
- The right to perform, show or play the work in public, (*public performance* right)
- To communicate the work to the public (e.g. by traditional broadcast or by making it available on the internet)
- The right to make an adaptation of the work, or do any of the above acts in relation to an adaptation, **only** applies to literary, dramatic, or musical works (*adaptation* right)

2.5.6.1. Rights relating to sound recordings

The Australian Copyright Council (2006) defines the following rights:

- **Mechanical right** refers to the right to record a song onto record, cassette or compact disc (CD)
- **Synchronisation right** refers to the right to use music on a soundtrack of a film or video
- **Performing rights** refers to the rights to perform in public and to otherwise communicate the work to the public

2.5.7 Orphan works in sound recordings

These are works which remain under copyright but for which the copyright owners cannot be found, making permission to make use of the work unobtainable.

2.5.8 Sampling

Sampling is a term referring to the use of portions of someone else's recording which are incorporated into a new composition. The use of sampling is widespread in the music industry today.

UK Music (2008) addresses the following issues regarding **private copies** and sampling:

2.5.8.1 The use of samples of other people's music

If you sample someone's song/tune without permission, you infringe copyright in the song itself (usually owned by the songwriter or the publishing company) and in the sound recording (usually owned by the record company).

2.5.9 Copies for private use

Under UK law any act of copying that takes place without the authorisation of the copyright holder is illegal (the UK is one of the few countries in the European Union without an exception for private copying or a "blank tape" levy system). But whilst in theory all unauthorized acts of private copying in the UK could be pursued as infringements of copyright, in reality it is highly impractical to do so.

2.5.9.1 The main categories of private copying (UK Music 2008)

- Copying from a *physical* format such as a CD or DVD to another physical format or device, such as an MP3 player or hard drive
- Copying from an *online* format, such as an online music services, onto a physical format or device

- Copying from *broadcast transmissions*. This is currently permitted under UK copyright as a "time-shifting" exception e.g. it is permissible to record a programme to watch at a later date. However, this doesn't create a 'right to copy'. For example, subscription systems and on-demand TV [television] cannot be copied using this provision.

  The music industry is concerned that the volume of sales of blank media has increased to an enormous level and that new technology is also enabling the unlimited reproduction of perfect clones from one original product. Without any mechanism for compensation, composers and publishers are losing out.

  As a rule, you should always obtain permission from the copyright owner(s). Authorisation to use the sample will often be given by way of licence. The fee for the licence will vary depending on how much of the original sample is used, the music intended to be sampled (it will be more expensive to use part of a famous song than an unknown drum beat) and the intended use of the sample in the new composition (it will be more expensive to build the whole new composition around the sample than to use it incidentally in the new composition).

McGraw (1988) states that there are many complexities concerning sampling and that "it is necessary to strike a balance between the right of the artist to control his work and the unencumbering of creative opportunities made possible through new technology." McGraw (1988) cites the interesting example of Frank Zappa who, in order to prevent illicit sampling made his album 'Jazz from hell' the first album that actually claims copyright protection against unauthorized sampling. He designed a notice which reads:

> 1986 Pumpko Industries Ltd. All rights reserved. Unauthorized reproductions/sampling is a violation of applicable laws and subject to criminal prosecution. Manufactured and distributed by Capitol Records, Inc., a subsidiary of Capitol Industries-EMI, Inc. Printed in U.S.A.

Zappa believes that if one is going to do sampling then it is only right to give some consideration to the people who have gone to the trouble and time to put "specialized sound on records, and not to be a bandit and steal those things from somebody else." One can empathize with the artists in their cause to protect their work.

2.5.10 Balance between copyright holders and users

Another important element to consider with music copyrights is that of balance between copyright owners and users. Although works are automatically protected by copyright one must

not lose track of the fact that copyright law should also "aim to **balance** the interests of those who invest their time and effort in creating work with those of the people who want to use and enjoy that work" UK Music (2008). In other words, copyright holders should not hold copyrights indefinitely as this hinders the public good. Rao (2003:264) (in concurrence with Masango's writings as mentioned below) states that "many concepts associated with existing rights are not easily transferable from paper-based formats to the digital world." There are a few exemptions for exclusive rights of a copyright owner which include fair use, first sale doctrine [as in the U.S.] and library use which will be addressed in Chapter 2 section B and under the US in Chapter 3.

2.5.11 Copyright in remastered sound recordings

Kent [2008] has a very informative paragraph on copyright in remastered sound recordings. He mentions that today there is much interest in restoring and remastering old material which is now in the public domain. Modern techniques in audio restoration equipment and software are so advanced and sophisticated that they can work "near miracles in removing the result of wear and tear and bring new life to the original recordings of the 78rpm era." The question at stake is whether or not "a new copyright can arise in a restored or remastered version of a sound recording which is in the public domain" (Kent 2008).

Kent [2008] answers this concern (from a British perspective based on the Copyright Designs and Patents Act (CDPA)) and warns us as follows:

> Since the **CDPA** clearly states that no copyright can subsist in a sound recording which *"is (or to the extent that it is) a copy taken from a previous sound recording"*, copyright can subsist only in the **original master** and not in any copy (such as an individual pressing) or re-recording ("dubbing") made directly or indirectly from that master. For this reason many legal commentators are of the opinion that no new copyright can arise in any re-recording of a public domain work. This may well be the case if the re-recording is merely a slavish transfer. But what if time and skill is expended, utilising the facilities of modern computer technology? Could the results justify a new copyright claim in respect of the restored material? It is debatable as to whether merely removing "clicks and crackle" from an old record would qualify, as these artifacts are not usually part of the original recording but are most likely the result of manufacturing defects and/or subsequent wear and tear. It *is* possible, however, that the creative use of equalisation or special effects (such as reverberation or pseudo-stereo) in the audio chain, or even the making of an analogue to digital transfer, might well be sufficient to establish a new

copyright in such a version. Currently there is evidence that some commercial re-issues of restored public domain sound recordings are being openly pirated, perhaps on the assumption that no copyright can exist in these copies. The validity of such an assumption has yet to be tested in the courts.

2.5.12 From analogue to digital

According to Samuels (2000:45) until the 1970s sound recordings were stored only in analogue form. This author describes the way the music was 'stored' on records as "a wavy groove etched onto the disc; and on audiotape as a continuous magnetic signal that corresponded to the analog vibrations" (Samuels 2000:45). Samuels (2000:45) continues by stating that as technology advanced the sound recording engineers "tweaked the technology to produce ever higher fidelity stereo and long-playing records, magnetic tape recordings and movie soundtracks. But the basic concept of storing an analog vibration, or an electronic or optical signal capable of reproducing an analog vibration, remained relatively unchanged in the century since Edison invented the phonograph." Samuels (2000:45-46) reminds us that it was during the 1970s that engineers "perfected the technology that allowed sound to be 'sampled' electronically, and converted into a series of numbers that could be stored and reproduced by computers. The first compact disc (CD) was introduced in 1979, and within a decade the vinyl record had become practically obsolete." He also states that the development of digitized sound had both positive and negative effects on the industry. On the positive side CDs had improved durability, versatility and sound quality but on the negative side, copyright issues developed, especially where one could rent CDs at rental stores which had a disastrous effect on the sale of CDs (Samuels 2000:46-48).

In conclusion, Chapter 2, Section A above gives an introductory overview of copyright laws and digital concerns in the electronic age, recent history such as the concept of 'globalization' as well as statutes and acts which impact on copyright laws. General copyright principles which relate to sound recordings formed an important component of the section.

Section B

The discussion now focuses primarily on library copyright issues and users' rights. Section B deals with how the copyright in sound recordings impacts on the information workers and addresses the complex issue of the balance between the copyright holders and the public good.

2.6 Libraries and users' rights: addressing the balance between copyright holders and the public good in the preservation and dissemination of knowledge in the digital age

Libraries and users' rights is an important element in this study for the following reasons:

- It is extremely important to find a balance between providing information to the public and yet at the same time protecting the rights of authors
- It is important for librarians and archivists to have fair use exemption so as to enable public access to a country's cultural heritage and preservation of material
- Copyright exemptions for libraries (fair use) are crucial for educational purposes
- The tension between society's requirements and the rights of creators needs to be resolved.

It should be noted that the bulk of the literature concerning libraries and users' rights relates to the American situation.

Traditionally libraries have always played an important role in the dissemination of knowledge for the public good. This section discusses the contentious issue which exists between the needs of copyright holders and those of society and the fact that a balance needs to be created between the two.

2.6.1 Introduction to libraries and copyright issues in the digital age

"As libraries move into the digital age, they increasingly face copyright and other intellectual property questions. Creating digital surrogates and using digital technologies to make copyrighted works available to the public raise many issues." "Copyright issues are complex and can be controversial. It is a challenge to find an appropriate **balance** between, on the one hand,

serving the public interest in developing the Internet as a tool for providing information and, on the other, protecting authors' emerging digital markets" (Peters in Besek 2003:6).

Michael Seadle, the editor of Library Hi Tech and the Digital Services and copyright librarian at Michigan State University, has written extensively on libraries and digital copyright matters. Seadle (2001:194) is concerned that "certainly there are times when the U.S. copyright law seems to stem from a culture that puts little value on providing public access to its own past. This leaves librarians and archivists scrambling to search for loopholes and exemptions that let them make the country's cultural heritage available to a wider audience beyond the walls of their institutions" (see Appendix E(i) which outlines the highly complex US sound recording Act).

Seadle (2001:198) states with consternation concerning the US recording laws:

> The fact is that many of the politicians who have written the copyright laws come from a culture which (quite reasonably) puts a premium on protecting the economic interests of those who create intellectual property. They have focused generally on commercial works, and problems relating to piracy. That was the case with the 1971 Sound Recording Act**.** Its basic intention was to create order within a federal system that balanced protection with time limits, exemptions for libraries, and a well-established concept of fair use. They succeeded with post-15 February 1972 material, but have left an uncomfortable legacy for those libraries and archives interested in providing Internet access to earlier sound recordings for legitimate educational and scholarly needs.

The National Humanities Alliance (1997) stipulates the following fair use rights which are in the interest of the public good: (see also 2.8.2 below regarding libraries and fair use):

> Existing copyright law recognizes the **tension between the needs of society and the rights of creators** by permitting a defense against charges of infringement for certain uses of copyrighted works as specified in sections 107-110 of the U.S. Copyright Act of 1976. Among these uses are: the fair use of copyrighted works for teaching, scholarship, or research, among other activities; the reproduction of copyrighted works by libraries and archives under certain conditions for specific purposes; and the performance or display of a work by instructors or pupils in the course of face-to-face instruction. Equivalent qualification of owners' rights should be extended into the digital environment with appropriate safeguards against abuse. These principles should be independent of particular technologies.

From the above quotes one can deduce that there remains a grey area which can result in confusion between owner's rights and the public good in the digital environment. The US law appears to lack clarity in this matter.

2.6.2 The importance of the preservation of sound recordings

The preservation of sound recordings is vital for any culture in order to preserve their cultural heritage as a "voice" and means to understanding their past history.

The Association for Recorded Sound Collections (ARSC) (2005) pertinently states the following concerning the importance of the preservation of historical sound recordings:

> Sound recordings are a vital part of America's, and the world's, cultural heritage. Since the first examples were created more than one hundred years ago they have served as a reflection of cultural and social history, captured and preserved in a uniquely compelling manner. History speaks to us, in its own voice, through sound recordings.

A crucial function of archives is to preserve and record a nation's history and to provide public access to the records. After all, an archive is useless if it is not used.

Besek (2003:7) elaborates that "the purpose of an archive (to ensure the preservation or to provide an easy and convenient means of access), its subject matter and the manner in which it will acquire copies, as well as who will have access to the archive, from where, and under what conditions, are all factors critical to determining the copyright implications for works to be included in it."

The Board of Directors Resolutions, from the Association for recorded sound collections (ARSC 2005) voiced their concerns regarding the relaxing of copyright laws for the preservation of historical sound recordings. In Britain, for example, contrary to relaxing copyright laws, there is lobbying to extend the copyright term (see 4.2.7). The reader is referred to Appendix C(i) for the Board of Director's concerns regarding the relaxing of copyright laws for sound recordings in the US.

The Society of American Archivists is the 'authoritative voice' in the US on issues that affect the identification, preservation, and the use of historical records. The Society of American Archivists (SAA) 1997 stresses the general **importance of archival preservation** and the necessity for the

law to make provision for copyright exemptions so as to enable access and use of educational resources:

> ...for centuries archives and archivists have aimed to help preserve for posterity a country's cultural heritage. New technology and the Internet assist in reaching the public with archival information. It is therefore essential that exemptions are permitted under copyright law to support educational use of material. The National Humanities Alliance (1997) crafted some valuable principles "with the overriding conviction that it is in the interest of evolving US information society that the legal environment foster rather than disrupt the **balance between intellectual property owners and the public good that is embodied in current law**." [This ideal could be applied to the South African situation, and indeed, to any national preservation institution.]
> …Archivists are more than just custodians of knowledge. The decisions archivists make about what evidence is saved, what is discarded, and what is converted to a different form shape the nature of our society's memory. But the nature of the historical record is not shaped only by the actions of archivists; it is also shaped by the public's ability to access the documentary heritage. Archival records to which access is limited because of unwieldy administrative or legal impediments are of little help when seeking to understand our culture.
> In addition, documents found in archives are often of uncertain authorship, date, and provenance. It is frankly impossible to determine who owns the intellectual property in most of the billions of documents found in archives. Guidelines or legislation that demand that permission be secured in advance before such documents are made available in digital form would starve our documentary heritage of the everyday voices of the average citizen.

The above perspective of the SAA is to ensure that exemptions do exist under copyright law in order to encourage and enable the educational use of resources and to ensure that a balance is maintained between the copyright owners and the public. The SAA believes that a "robust public domain for intellectual properties" should be maintained as a "necessary condition for maintaining our intellectual cultural heritage." This "robust public domain" constitutes copyright exemptions and fair use and is discussed later in this Chapter.

2.6.3 Creating a balance between the private and public good in the dissemination of knowledge

It is important that copyright law as it applies to digital works maintains a balance between the rights of the creators and copyright owners and the public use. Furthermore, this legal balance should be embodied in statutes. However, at the same time, it is important to protect privacy rights in our modern age where records can so easily be copied and transmitted electronically. However, it is equally important to archivists and librarians that copyright terms do expire on determined dates so that stories and documents can be freely revealed to the public. It is also essential that copyright law "promotes the maintenance of a robust public domain for intellectual properties as a necessary condition for maintaining ... intellectual and cultural heritage" (National Humanities Alliance 1997).

The reader is referred to Appendix C(ii) for an extract from the National Humanities Alliance principles (1997) and the response by the Society of American archivists to these principles which are most pertinent concerning the maintaining of a balance between the interests of copyright owners and the public good.

Besek (2003:7) explores the copyright issues which are relevant in the creation of a non-profit digital archive and is concerned that "the collection and long-term preservation of digital content pose challenges to the intellectual property regime within which libraries and archives are accustomed to working" and she addresses the challenges of "how to achieve an appropriate **balance between copyright owners and users** [which] is a topic of ongoing debate in legal and policy circles".

Urs (2004:203) focuses extensively on the crucial issue of this balance and libraries and explains that "a **sense of balance** is implicit in the provisions of copyright. One of the critical principles of copyright policies is to help equalise, leverage, and balance rights. Apart from fair use and doctrine of first sale, another underlying element of copyright has been the limited time factor, thus ensuring that eventually all works become 'public domain'" (Urs 2004:203).

Furthermore, in terms of the reconsideration of the question of **balance** in the digital age, Urs (2004:201) addresses the issue as follows:

> The **balance of rights and exceptions** that has been maintained for 300 years needs to be reconsidered for scholarly communications, such as theses and dissertations, as well as for articles in electronic journals [as] this type of information is fact-based, often resulting from public funds and is part of the intellectual heritage of academic institutions. As libraries move from the physical medium to the digital, library staff are increasingly confronted with the challenges of addressing copyright and other intellectual property rights (IPR) issues related to digital information. Copyright issues are being questioned in the digital world because "balancing conflicting 'private' and 'public' interests is neither easy nor unequivocal. In the world of academic research, private and public concepts are very nebulous. Right ownership issues are contentious. In the world of scholarship and intellectual heritage, libraries play a very important role, **libraries are the voices for the 'public good.'** But in the digital millennium, how do we balance often conflicting interests? How are libraries and library services affected? "**The challenges of intellectual property issues stem from their very nature – their value increases with use and the value of intellectual property lies in public use.** Market forces that operate in this domain are not purely economic**. Knowledge is not of much value if it is not disseminated.**

The right of integrity was introduced in 2.1.3 as a copyright principle. Besek (2003 in Urs 2004) highlights the fact that the right of integrity is another dimension of the copyright and mentions that the spirit which lies behind the concept of copyright is enshrined and exemplified in the United States Constitution, which provides that Congress has the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and their discoveries" (Besek 2003 in Urs 2004).

It needs to be noted that provisions of copyright do have an impact on the ability of libraries to fulfil their role in the scholarly communication process and the preservation of public domain material. Urs (2004:204) explains that there are essentially three players in this process:

1. the creators, who have legal rights;
2. the publishers, who have legal rights due to transfer; and
3. the users (individuals and institutions such as libraries and academe), who have legal rights through exceptions and limits.

Authors produce creative and intellectual works while the publishers create a market and distribute and sell the works ... often libraries are the only agencies that preserve public domain

materials [for example, old out of print works]. Libraries are the facilitators that enable users to exercise their rights to access copyrighted as well as public domain works" (Urs 2004:204).

An organization which also addressed the issue of balance is Unesco. At the intergovernmental copyright committee 13th session it addressed the issue of balance as follows:
"Reaffirming and promoting a fair balance between the interests of right-holders and the interests of the public in the digital environment
In the light of the ever more evolving digital environment and the challenges it poses to copyright, UNESCO undertook in 2002, a study on the exceptions and limitations to copyright protection, particularly in the field of scientific research, education and culture, and the striking of a fair balance between the general interest tasks of the transmission of knowledge and protecting the legitimate rights of authors and other rights holders" (Unesco 2005).

The World Intellectual Property Organization concerns itself with international trade and not education or libraries but the two agreements reached in December 1996 (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) say in their preambles that they desire to "develop and maintain the protection of the rights [of authors, of literary and artistic works, performers and producers of phonograms] to develop and maintain the protection of their rights in a manner as effective and uniform as possible." Both similarly recognize "the need to maintain a **balance** between the rights [of these authors, performers and producers] and the larger public interest, particularly educational, research and access to information. That said, neither treaty posits any limitations to the protected rights in the public interest, but only if these provisions "do not conflict" and if provisions are legislated by signatory countries they must not prejudice the legitimate interests of the creators of works" (Davidson 2000).

Creative Commons [n.d.], which was elaborated on in 2.3.2, states that it "does not reject copyright - in fact it relies on copyright legislation to carve out exceptions for private and public use. Rather, Creative Commons is attempting to re-establish **the balance between the rights of copyright holders and the public's rights to information and knowledge in the belief that shared knowledge will drive innovation and commonalities among the world's people."**

Creative Commons thus advocates and promotes the availability of copyrighted works for public use.

2.6.4 Problems associated with copyright and the dissemination of knowledge in the digital age

There are numerous problems which are associated with copyright between creators and users in the digital age. For problems expressly relating to the South African situation, see 3.4. Concerns which have been expressed in the literature relating to copyright in the digital age include the threat to cultural ecology and a 'folk heritage crisis' which has the potential to put the national heritage of recorded sound of many countries at risk. Legislative reform is also necessary regarding orphan works, that is (as mentioned under 2.5.7) works that are still under copyright but the owners cannot be traced. This is problematic as it renders permission to make use of the work unobtainable.

Again, it is important to bear in mind, as mentioned under 2.5.2 and is emphasized throughout this study, that copyright works can have more than one copyright.

Besek (2003:8) reminds us that "a copyright provides not just a single right, but a bundle of rights that can be exploited or licensed separately or together...The law distinguishes between ownership of a copy of a work (even the original copy, if there is one) and ownership of the copyright rights. Libraries and archives commonly receive donations of manuscripts or letters which all can contain copyrights."

Urs (2004:204) poses the question as to "what is different in the digital age?" and elaborates as follows:

> Copyright laws are an instrument of balancing the interests of creators and the societal obligations to facilitate the free flow of information. Advances in technology ... have demanded a review and reworking of the copyright laws. For 300 years fairly discernible boundaries between the players/creators and end users/consumers in the scholarly communication process were drawn, and apparently conflicting interests could be fairly gracefully accommodated. But the digitally networked world has threatened this cultural ecology and has dramatically shifted the balance with the ability to download materials, to make any number of perfect copies and distribute these with virtually no extra cost or effort. Creators feel threatened and have become

> paranoid in view of the threat to their market potential, and so technology is being used to enable copyright holders to exercise enormous restrictions and controls over use. Safeguarding the private and public interests has been reduced to a win or lose situation. The Digital Millennium Copyright Act (DMCA) of 1998 in the US is one such example (see www.copyright.gov/legislation/dmca.pdf) which has endangered the legitimate "fair use" of creative works. Retaining the balance between public and private concerns is the key to addressing the challenge of achieving an equilibrium of intellectual property rights. **The library community has often been the champion of the cause of "public good",** and has traditionally been the agency that has offered opportunities for the public to benefit from copyrighted and public domain materials. Therefore it is natural that the library and information professions are concerned that this balance is maintained in the digital environment. Libraries act in the vanguard of maintaining the cultural ecosystem.

In addition to the importance of maintaining the balance between copyright creators and users in the digital age there is the necessity to preserve our cultural heritage (as mentioned under 2.6.2) and to prevent old media such as analogue records from obsolescence.

With regard to **Orphan works,** which was briefly described under 2.5.7, Sohn (2007) states that reform is necessary in the US as many orphan copyright works are literally wasted because of fear of copyright infringements and the potential penalties incurred. This is a problematic situation which can be related to our South African situation where much of our cultural heritage in the form of sound recordings is currently in the process of being located and copyright holders sought.

Sohn (2007) highlights the problematic situation regarding the possible loss of valuable orphan works due to the fact that copyright owners often cannot be located:

> The by-product of the elimination of formalities like registration is that everytime something is fixed in a tangible medium, it automatically receives copyright protection. The lack of registration requirements makes it difficult, in many instances, for an artist or educator who wants to license a work to find the copyright holder. When a potential user cannot find a copyright holder after a good faith effort, we consider the work to be an "orphan" work. Because copyright infringement is a strict liability violation and damages can be as high as $150,000 per infringement, no one would dare take a chance on using an orphan work and risking the owner showing up and running to court. The result? Hundreds of thousands of works are languishing in the dustbin of copyright, unable to be used by anybody. In 2005 the Copyright Office proposed that anyone who does a reasonable search for the owner of a copyright but nonetheless find them should only be liable for "reasonable compensation." should the owner resurface – objections were raised from photographers, book illustrators and others.

Seadle (2001:7) in his article on the *Folk Heritage crisis conference* refers to the fact that **U.S. copyright law can be seen as a barrier rather than creating a balance between copyright holders and users.** He states that the conference pursued three themes: access, preservation and intellectual property. One hundred participants attended the conference and consisted of folklorists, librarians, archivists, technologists and lawyers. These participants regarded the US copyright law as "a barrier which neither upheld the rights of people of non-European origin, nor facilitated the free movement of information."

Furthermore, "a sense of urgency pervaded the conference. Paper records have a relatively long lifespan, even when printed on acidic media but **analog** sound and video recordings, even on quality media, begin deteriorating immediately. Some recordings from the 1970s suffer from the "sticky shed" syndrome and might at best survive one more use, after a restorative baking. Other physical artifacts are also vulnerable, not necessarily because of deterioration, but because many libraries and archives have inadequate provision for storing and describing non-text objects" (Seadle 2001:7). In addition to this, Seadle (2001:7) states a huge concern that, even worse than the aging of recordings, "many folk collections remain in private hands or unofficial collections. The death or retirement of a single person might send hundreds of unique items into the trash." Seadle (2001:9) continues that, regarding copyrights, ownership does matter:

> One participant argued for changing US copyright law to limit ownership rights and increase access. One participant argued that "bits want to be free" [meaning] that digital objects should be shared regardless of the law... Most people in the room saw US copyright law as a barrier which neither upheld the rights of people of non-European origin, nor facilitated the free movement of information that is key to the intellectual and educational enterprises. Yet they recognized that they had to deal with it...No one knew how much unique oral material sits in private collections in attics and basements. [Furthermore] there was much agreement at the conference on the importance of digital preservation.

The above quotes leave one with an uneasy feeling concerning the urgency and importance of preserving the world's sound recording collections before it is too late. The analogue recordings are deteriorating at a rapid pace. The task of retrieving collections from private owners is also a matter of concern. Archives need to make sure that the public is aware of their existence in order to retrieve and preserve invaluable collections. Copyright and fair use remains a thorny issue.

In order to highlight the urgency of the problem of preserving our sound recordings, the following extracts are from McDonald (2005:10-11) who states, with consternation, that "without some sort of flexible copyright clearance model, our national heritage of recorded sound and access to it is at risk":

> The recording industry does not inventory the historical output of the past 30 years recordings and the remastering of older materials. The industry looks to national sound archives to preserve our musical legacy into perpetuity. However, the music industry has stymied the legitimate efforts of recorded sound archives to provide digital preservation of and access to their vast collections of 'oldies' (recordings from 1890 to the 1950's). According to current US copyright law, the preponderance of musical recordings (post 1890's) in archive collections remains under copyright protection. Indeed music copyright is often governed more by state laws than federal. Archives can let users listen to, and in some cases borrow, these recordings, and under certain conditions, archives can provide fair use 'copies' on an item-by item basis for teaching, research and preservation. But they are prohibited by the terms of the copyright law from creating substantial digital repositories of commercially recorded sound. To date, the music industry has baulked at this suggestion. However, advances in digital technology and the advent of robust networks and digital repositories in particular indicate there are no technological barriers between the possibility of greater access and the current situation of copyright lock-down lies in the chasm of rights clearance.

Furthermore, McDonald (2005:10) states that "sound archives must begin a new dialogue with the recording industry in order to find creative, even visionary ways to move ahead to mutual benefit [and] this dialogue must acknowledge a complex legal tangle while simultaneously framing a mechanism to protect potential revenues for the industry". The sound archives and the music industry both share the same interest to promote the progress of these arts in order to make the "rich heritage of American recorded sound" as widely available as possible. He continues that "**the development of a digital sound repository is all about access. Unfortunately the educational/scholarly world's desire for, and right to, fair use access to older sound recordings**, **if extended to a significant digital repository freely available to constituents [would clash with the interests of the recording industry which is revenue, especially due to illegal file-sharing]** ... The Library of Congress's National Recording Preservation Board (NRPB) was mandated to come up with a national sound-recording preservation plan so as to bridge the divide between the preservationists and the industry" (McDonald 2005:11).

McDonald's concern regarding copyright laws which favour the music industry as opposed to archival access and the preservation of national sound recordings is an urgent problem of ongoing debate.

In a speech concerning *Digital copyright sanity* delivered by Gigi B. Sohn (Sohn 2007) she addresses the challenge of balancing creator's and users' rights in the age of digital technologies and highspeed broadband networks. Regarding music Sohn states that alternatives do exist to the current copyright "regime" such as the Creative Commons (see 2.3.2) which allows a copyright holder to license their works under terms more favourable than the traditional 'all rights reserved' standard. She mentions that music, which is already subject to a variety of government mandated license schemes, is another story entirely. She states that "the business of licensing music is completely Byzantine, in large part because of the existence of numerous publishers from whom the rights to the musical composition must be obtained. A potential licensor must also get permission from an artist or record company for the right to a sound recording, but that is usually easier. Congress has made a failed attempt to simplify the clearing of the composition right – it should try again."

Sohn (2007) is concerned that firstly, copyright protection has become longer and easier to get i.e. automatic once fixed. Secondly, the subject matter of copyright has greatly expanded (including analogue and digital sound recordings); thirdly, secondary copyright liability has expanded and damages have increased; fourthly, 'paracopyright' laws like the anticircumvention provisions of the Digital Millennium Copyright Act have limited access to and use of digital content by preventing the breaking of digital locks regardless of the reason for doing so.

Furthermore, Sohn is concerned that the law as it currently stands has allowed Hollywood, the music industry and large book publishers to have even greater control over their content, and so the public's ability to access that content has shrunk. "Like any monopoly, the copyright industries have set licensing fees so high as to prevent all but the wealthiest companies from reusing those works" (Sohn 2007).

Creative Commons would certainly oppose this control by the music industry which hinders public access. It remains to be seen how the law will evolve in this aspect, especially concerning the growing interest in an information commons which advocates public access to resources.

2.7 Current digital music projects

Seadle's and McDonald's writings (as mentioned above) remind us of the crisis that our cultural heritages will face if old analogue recordings are allowed to deteriorate and/or become obsolete. Fortunately there are various digital projects taking place worldwide to address this issue.
A study which resembles that of the South African Music Archives Project (SAMAP) whereby "an immediate concern is the deterioration of analogue tapes, records and other obsolete media on which much of [our] indigenous South African music and associated cultural heritage is stored" (Peters 2005) is being undertaken by Syracuse University. The Belfer Audio Archive and Laboratory seeks to provide a set of guidelines to chart a course in the preservation of, and access to, the recorded music held by these archives so that the archives can build a digital repository that would provide educational and research access to students, teachers and scholars. The music industry could also collaborate in the design and maintenance of the same repository, therefore both the digital repository and the music industry will benefit financially. By being able to digitize their music holdings freely, without fear of copyright infringement, sound archives would be able to do what they do best i.e. preserve the content of their holdings following established digital standards." "**As old playback technologies become increasingly inoperable, as analogue recordings wear out, we stand to lose an entire modern art form if some sort of agreement is not reached in the near future"** (McDonald 2005:11).
It is pleasing to note that there are various other studies taking place relating to digital music libraries, and the following projects were identified:

- The digital music project at Winona State University Library (WSUL) (2001) which began as a "project to enhance access for students and faculty to the music CDs held at the library [that is] the steps in cataloguing and processing the CDs". The article discusses two models, namely the e-reserve system set up by the University of Wisconsin-Madison, University of Illinois and by St Cloud State University and the

second model for digital music access is the VARIATIONS project created by Indiana University at the William and Gayle Cook Music Library. In the ereserve system "access to the music is available only to authenticated students in individual classes who lose this privilege once the class is over. The advantage is that the students can access the music both on and off campus because access to the music is password-protected." "In the second model, distribution of the streamed sound is limited to the music library, part of the main library, and one classroom. The recordings in the music library's collection can be found by searching the online catalogue. WSUL looked at the protection available for the copyrighted material on the servers and discussed the limitations."

- The Maine Music Box Pilot Project to create a digital music library is a project whereby "the partners are exploring the feasibility and obstacles of combining collections, digital library infrastructure and technical and pedagogical expertise from different institutions to implement a digital music library and integrate it into Maine's classrooms" (Lutz 2004).

- National Gallery of the Spoken Word (NGSW) (Michigan State University 1999) and HistoricalVoices.org is an ongoing five year research project spearheaded by the National Science Foundation. NGSW is creating an online fully-searchable digital library of spoken word collections spanning the 20th century at HistoricalVoices.org. NGSW provides storage for these digital holdings and public exhibit "space" for the most evocative collections. NGSW states that "from Thomas Edison's first cylinder recordings and the voices of Babe Ruth and Florence Nightingale to Studs Terkel's timeless interviews and the oral arguments of the US Supreme Court, the collections of the NGSW digital library cover a variety of interests and topics."

(Library and Archives, Canada 2006) states that the Virtual Gramophone: Canadian Historical Sound Recordings is

> a growing multimedia website devoted to the early days of Canadian recorded sound. With a database of images and digital audio recordings, as well as biographies of musicians and histories of music and recorded sound in Canada, the Virtual Gramophone provides researchers and enthusiasts with a comprehensive look at the 78-rpm era in Canada. The database at the heart of this website, when completed, will contain information on and

images of 78-rpm and cylinder recordings released in Canada, as well as foreign recordings featuring Canadian artists or Canadian compositions. The database will also contain details on the 78s and cylinders in the Recorded Sound Collection of Library and Archives Canada. Biographies of prominent Canadian performers, short histories of Canadian record companies, background information on music styles and the recording technology of the time, and digital audio reproductions of selected 78s will also be included.

- OYEZ (this project provides access to more than 2000 hours of Supreme Court audio, including audio in the court recorded since 1995) (OYEZ [n.d.])
- Naropa University Audio Archive Project (Naropa University 2000)
- WNYC, Preservation and Archive Unit (WNYC 2000)
- The Axe-Houghton Multimedia Archive at Poets House (Poet's House [n.d.]
- Recorded Sound Reference Centre (Motion Picture, Broadcasting and Recorded Sound Division, Library of Congress) (Library of Congress 2009)
- Variations 2: The Indiana University digital music library (Indiana University 2008)
- MSU Vincent Voice Library (Michigan State University 2005)
- The Centre for the Study of Democratic Institutions Audio Archive (University of California 2008)
- Cylinder Preservation and Digitization Project (University of California [n.d.]
- UNESCO's Audiovisual Archives page gives current news on audiovisual projects around the world (UNESCO 1995-2009)
- University of Venda: The indigenous music and oral history project (University of Venda 2006-2008)

There are various related professional music associations such as:

- Association for Recorded Sound Collections (ARSC 2005)
- International Association of Sound and Audiovisual Archives (IASA [n.d.])
- Music Library Association (MLA 2005)
- International Association of Music libraries, Archives and Documentation Centres (IAML [n.d.])
- International Council on Archives (2008)
- Society of American Archivists (1997)
- Audio Engineering Society ([n.d.])

- Southeast Asia-Pacific Audiovisual Archive Association (SEAPAVAA 2008).

2.8 Exceptions to copyright with respect to libraries (US)

One can deduce from the study so far that the call to relax copyright laws (as mentioned above under 2.3.2) and the contentious issues surrounding the balance between copyright holders and the public good, as well as the fact that the US copyright law is viewed as a barrier rather than as creating a balance between copyright holders and the public good, is a complex and thorny subject. However, the US constitution does make provision for exemptions to copyright, known as 'fair use' as mentioned below.

2.8.1 Section 108: special privileges for libraries and archives (US)

Section 108 of the US constitution outlines the 'Limitations on exclusive rights: reproduction by libraries and archives.'
As relates to US special privileges for libraries and archives, Bielefield and Cheeseman (1997:109) describe the importance of these privileges:

> Part of the copyright law, Section 108, extends special privileges to qualifying libraries and archives. These privileges are of the utmost importance to librarians and libraries, enabling them to better serve their patrons, including researchers, teachers, professors, and students. Entitled "Limitations on Exclusive Rights: Reproduction by Libraries and Archives," Section 108 allows libraries and archives that meet certain criteria to make and/or distribute copies of printed materials. Not only does this section make it possible for libraries to copy whole works for certain reasons, but it also allows copying for interlibrary loan to fill patron requests. And, of course, it is important to remember that Section 108 privileges coexist with the Section 107 fair use doctrine. One right does not preclude or cancel the other.

Bieleford and Cheeseman (1997:161-163) state that a order warning of copyright notice needs to be displayed in a library or archive and is to be included on printed forms supplied by certain libraries and archives and used by their patrons for ordering copies of **phonorecords** (see Appendix D). This warning of copyright notice is also applicable in South Africa and will be discussed in Chapter 3 and the guidelines in Chapter 8. A sample copy of copyright notice for our South African libraries is also attached under Appendix D.

Urs (2004:203) makes the important point that copyrights are never absolute and there are some "limiting principles and exceptions to the rights which are relevant for librarians in the digital age" such as:

1. *Archiving and copying*. Libraries and archives are permitted to make up to three copies of unpublished copyrighted works for the purposes of preservation, security or for deposit for research use in another library or archive. Libraries can also make up to three copies of a published work to replace a work in their collection if it is damaged, deteriorated or lost, or the format of which has become obsolete.
2. *Fair use*. What constitutes "fair use" is debatable. However there are certain factors that govern fair use:

    - Purpose and character of use, i.e. is it for commercial use or for non-profit educational purposes?
    - Nature of the copyrighted work. The fair use principle is generally more lenient for fact-based works than it is for "fanciful" works, and also is broader for published works than it is for unpublished works
    - Amount or proportion of the whole that is to be copied
    - Effect that the use has on market potential or the value of the copyrighted work.

First sale doctrine. The matter of disposition of a particular copy of a copyright is limited by the first sale doctrine, according to which the owner of that particular copy of the work may sell or transfer that copy. Libraries' lending and marketing of used books are governed by the first sale doctrine.

The first sale doctrine is discussed under 4.3.2.3.

Urs (2004:203) continues by stating that

> issues and concerns are complicated by the difficulty of defining what constitutes a 'copy' in the digital age. The first copy may be the only copy for which the copyright receives an economic return. There are understandable concerns of users, including those of libraries, regarding loss of their rights as provided for in the above 'exceptions'.

Bielefield and Cheeseman (1997:106-107) cite three reasons why educators and librarians in all types of libraries might wish to duplicate some types of sound recordings and issue a stern warning under the second point:

1. Copying can be done quickly, easily and cost effectively
2. Some of the old formats in which sound recordings are found are fairly fragile [e.g. old analog records] and audio cassettes. "It may seem sensible to save the original and make

copies for users. However, *'don't do it'* warns Bieleford and Cheeseman. "There are no fair use guidelines that have been agreed to specifically for sound recordings. Under fair use, it is possible to copy a portion of recording, but if one applies the same rules to audio cassettes and other sound recordings as apply under the law to books and periodicals, it can be readily seen that copying the whole book is more likely than not to be an infringement."

3. To switch [the sound recording] from one medium to another. For example, if a library has some phonorecords in excellent condition in its collection, the more use they get, the greater the chance is that the quality will diminish. Wouldn't it be better to tape –record that phonorecord and let the tape be used instead? *No. It would not!* The change to another medium is an adaptation – one of copyright holder's basic rights-and is an infringement.

Most importantly, Bieleford and Cheeseman (1997:107) advise that "the safe course of action is to buy the number of sound recordings that are needed .... or to obtain permission to use the material."

For further information on the US Act section **17 U.S.C. §108: Reproduction by libraries and archives** the reader is referred to Appendix E(i).

Kenneth Crews (2001) directs the Copyright Management Centre at Indiana University. He wrote a paper which examines in detail the interpretation and application of Section 108 of the US Copyright Act and reveals that the US library exceptions are most complex and are filled with conditions and limitations which can result in much frustration for librarians. Crews (2001) cites many interesting common situations and offers a systematic approach to Section 108 of the US Copyright Act. As the situations are most complex and relate to the US situation the researcher has included the account as an appendix. Appendix E(ii) outlines Crews' account of common library situations and highlights the complexity of the situation regarding libraries and the copying of phonorecords in the US.

2.8.2 Fair use/dealing

Fair use concerning copyright forms an important component of this study in the sense that it is applicable to libraries and archives. The term usually refers to the idea that a reasonable portion of copyright material should be allowed to be reproduced in a way that it does not infringe on the copyright of that material. In other words, the material can legally be reproduced without the permission of the copyright owner, especially for educational purposes and for 'the public good'.

'Fair use' is the term which is used in the US and 'fair dealing' is commonly used in commonwealth countries. However, the term 'fair dealing' is often used interchangeably with 'fair use' in the literature.

Wikipedia (2009) explains that there is a distinction between the terms of 'fair use' and 'fair dealing' in the US and the commonwealth countries.

> Fair dealing is a doctrine of limitations and exceptions to copyright which is found in many of the common law jurisdictions of the Commonwealth of Nations. Fair dealing is an enumerated set of possible defenses against an action for infringement of an exclusive right of copyright. Unlike the related United States doctrine of fair use, fair dealing cannot apply to any act which does not fall within one of these categories. In practice, common law courts might rule that actions with a commercial character, which might be naïvely assumed to fall into one of these categories, were in fact infringements of copyright as fair dealing is not as flexible a concept as the American concept of fair use.

DALRO (2008) also addresses the issue of the difference between 'fair use' and 'fair dealing' and states that in the US fair use is by law determined qualitatively as well as quantitatively. Section 107 of the US Copyright Act states that it depends on four factors:

- the purpose and character of the use
- the nature of the copyrighted work
- the amount and substantiality of the portion used in relation to the whole
- the effect of the use on the potential market for the work.

Charles Masango, a South African writer from the Department of Research and Innovation at the University of Cape Town, writes extensively on the subject of fair use and states that" in print media, notwithstanding the protection that the copyright act gives to owners of copyrighted

works, the fair dealing exemption allows individuals to copy printed works, which have not gone into the public domain without being charged with copyright infringement. There is however no general consensus on the quantity of copies that will qualify for fair dealing" (Masango 2005:129).

It is the lack of "general consensus on the quantity of copies" that qualify for fair dealing that is problematic for librarians and will be discussed in Chapter 3 (3.3.2). The concept of fair use has become especially problematic in the digital realm. Masango (2005:132) explains why this is so:

> The fair dealing exemption seems unsuitable in the digital realm because when the exemption was being designed it warranted that both the reproduced and original text from where the reproduction was done had to be in a physical format. This was germane as there were no possibilities for the early technologies of reproduction to reproduce or copy texts that were not in hard copies. This is, however, contrary in the digital environment as digital works can be converted into hard copy text and vice versa.
>
> The incorporation of the same fair dealing exemption that exists in the print environment to the digital environment seems incongruous, as the fair dealing exemption that is applied in the print environment has no clear definition.

The reader is also referred to Appendix E(ii) for Crews' account regarding fair use in the US.

2.9 Concluding comments on copyright holders versus the 'public good'

Concerning the US situation regarding fair use Davidson (2000) states that after various conferences e.g. Conference of Fair Use (CONFU) 1994-1997 there is a conscious attempt to seek consensus regarding what constitutes fair use among educators, librarians and commercial interests. "Whereas the educators and librarians cling to the notion that the principles of fair use should remain the same in the digital environment, the commercial interests focused on the fact that digital is different...the strengths of the commercial interests will unquestionably continue and wax more enthusiastic and powerful as more and more of our culture and its sources of information are digitally packaged and licensed rather than sold. In general, commercial publishers take a dim view of the fair-use argument, seeing it as a dodge from fair reimbursement."

Regarding copyright enforcement Seadle (2008) states that "the future of copyright enforcement will likely continue to be a function of technology [and] the technology race between infringers and rights holders will continue to evolve" (Seadle 2008).

Besek (2003:23) stresses that more studies are needed since "many of the uncertainties come from applying laws to technologies and methods of distribution they were not designed to address [and] such studies could however narrow the issues and suggest constructive ways to achieve the goal of creating and operating an archive to ensure long-term preservation of works in digital form for the benefit of society."

Thus one can concur with the writers above (Davidson, Seadle and Besek) that the issue of balance between copyright owners and users remains a topic for ongoing debate and will continue to develop. Good advice from Davidson (2000) is that "the task of music librarians is to keep informed about current legislation and to lend their voices to concerted action as appropriate." Urs (2004:207) concludes that "perhaps the time is ripe for separating the copyright issues for scholarly works from 'entertainment' works [because] the paradigms that govern, or should govern, scholarly works are moral aspects rather than economic aspects ... the fundamental distinction of academic research is that it is 'fact-based', publicly supported, and is part of the intellectual heritage and should tilt the balance in favour of '**public good**' concerns rather than private interests, and thus be freed from the copyright quagmire."

Preservationists and archivists concerned with sound recordings (see Appendix C(i)) tend to favour the balance being tilted in favour of the 'public good' although, as Davidson (2000) reminds us above, this perspective does not always go down well with the creators of works and those with commercial interests such as the recording companies.

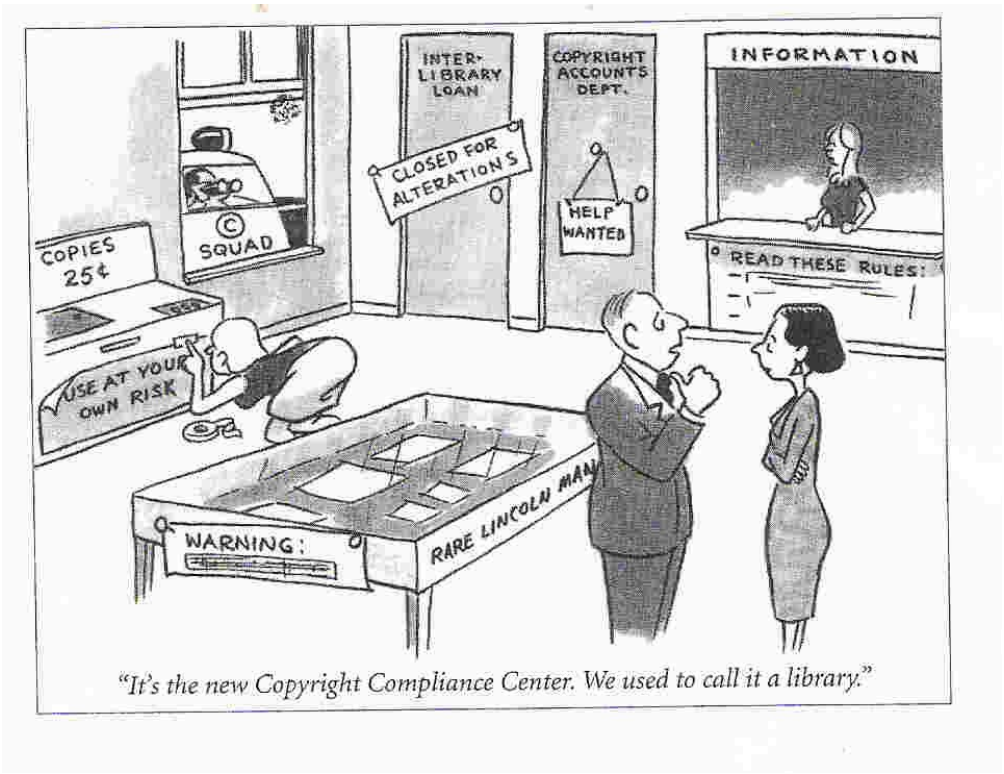
Amidst all the changes in technology and the emergence of a new digital world one ponders the future of the role of the traditional librarian. Akeroyd (2001) in Barton (2006) predicts that academic librarians of the future will "comprise a mixture of professionals with changing boundaries and alliances. A leaner, meaner workforce which is well paid and occupying the high ground of knowledge transfer, leaving the mundane and routine jobs to contractors." To add to

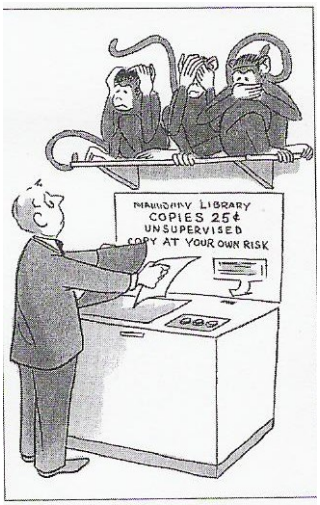
this statement Barton (2006) concludes that "if digital librarians can be boundary riders on the storm, they can achieve this high ground, remaining relevant, indeed essential, to the changing world around them.

2.10. Summary

Section A of this Chapter discussed the issue of sound recordings and the various principles, treaties, organizations and conventions which have an impact on copyright and sound recordings. The Chapter also offered the reader definitions to understand the various technical terms associated with sound recordings.

Section B discussed the complex issue of libraries and users' rights and the balance between the copyright users and the 'public good' in the preservation and dissemination of knowledge and sound recordings in the digital age. Although libraries and users' rights formed a major component of the section, the importance of preservation was brought to the fore and current digital projects were listed. Numerous problems associated with copyright in the digital age were highlighted, such as the threat to cultural ecology, the risk of old recordings becoming obsolete which poses a risk to national heritages, as well as the complexities of fair use.





Cartoons by Bion Smalley.

(Cartoons: Samuels 2000:23)

CHAPTER 3

SOUTH AFRICAN COPYRIGHT LAW (SA)

Introduction

The Copyright Act No 98 of 1978, as amended, governs copyright in South Africa. In response to the key question regarding the copyright laws in South Africa, this Chapter outlines South African copyright law principles and gives definitions of the important terms as they relate to South African copyright law and sound recordings. Challenges regarding copyright and digital laws, fair use and specific provisions for libraries and proposed copyright law amendments are discussed.

3.1 A brief history of South African copyright law

Dean (1987-2006:1-2A – 1-3) states that although Roman Dutch law as applied in South Africa during the 19th century knew a form of common law copyright, our common law had not since 1917 granted any protection in the nature of copyright.

The Act of 1978 has been amended several times. Dean (1987:1-4) states that "the law of copyright currently protects the following classes or broad categories of works: literary, musical and artistic works, sound recordings, cinematograph films, broadcasts (television and sound), program-carrying signals, published editions and computer programs." Dean continues by saying that "no formalities are prescribed for the acquisition of copyright in these works and, provided the works meet certain conditions, copyright exists automatically."

Similar to other developing countries, South Africa acquired its intellectual property (IP) system from its colonial power (Creative Commons [n.d.]). South Africa, as a self-governing

'dominion' within the British Empire, became a signatory to the Berne Convention in 1928 (as discussed under 2.4.1). The Berne Convention is the oldest and the most important multilateral copyright treaty and it is this treaty which introduced the principle of 'national treatment' to international property law, and stipulated that "a member state must afford protection to other member states in the same manner as it provides protection to its own works." (Creative Commons n.d.)

However, some member states were not giving effect to their obligations under the Berne Convention and so the World Intellectual Property Association (WIPO) lay the foundation for the development of a new agreement entitled the 'Trade Related Aspects of Intellectual Property Rights' (TRIPS) agreement, which came into effect in 1995. "The TRIPS agreement stipulated minimum standards for countries to comply with in order to protect and enforce copyright in their countries" (Creative Commons [n.d.]).

Creative Commons [n.d.] reminds us that

> the South African Copyright Act of 1978 governs copyright law in the country and has been updated on numerous occasions to comply with the minimum standards of the TRIPS agreement. South Africa participated in TRIPS as a developed country and has therefore not been able to take advantage of the mechanisms that allow developing countries to come into compliance with TRIPS at a later stage.

3.2 General introduction to South African copyright principles

Jill Addleson, (2005) the curator of collections, Durban Art Gallery, gave an informative talk on copyright. Although Addleson talks from an art and museum perspective, her speech is also relevant to archives and sound recordings. She states that

> there is nothing daunting about the definitions of copyright; what is daunting, however, is that to infringe copyright law is to court legal disaster. Only the copyright owner may reproduce the work. Anyone who publishes intellectual works without permission has infringed copyright.

In South Africa an artist holds copyright on his or her work during his/her lifetime and for a further 50 years. "On an artist's death, copyright is inherited by his immediate family, or by someone the artist has assigned, or by his or her estate. Copyright is held by those persons for 50 years after the artist's death. Thereafter the work falls into the public domain and anyone wishing to publish an artist's work(s) may do so freely, without fear of infringement of copyright laws" (Addleson 2005). Addleson (2005) reminds us that it is "customary and courteous, however, when a work is out of the copyright period and it is owned by a museum [or archive] for publishers to write to that particular museum [or institution] requesting permission to publish the work in a forthcoming publication [and] when the publication is printed, the work reproduced in it is acknowledged as being owned by that particular museum."

The *Artistic and Literary Rights Organization* (DALRO) is an organization in South Africa, which, on behalf of South African artists, musicians, writers, performers etc., "watches over issues of copyright in all the arts." Addleson (2005) recommends that, if any museum work [including archives] needs guidance on copyright, he or she contact Dr Gerhard Robinson, the Director of DALRO at: gerard.robinson@ dalro.co.za. DALRO is affiliated to its Swedish counterpart, an organization called BUS.

Copyright fees are not set and are negotiable (an agreement between, for example, the museum/archive institution and the particular artists or their families). Addleson (2005) is unaware of any museum institution in South Africa which makes provision for copyright payment to artists in its operating budget. "This means that funding to pay copyright to artists or their families currently has to be raised through sponsorship." Addleson (2005) believes that this should change "as our museums start to recognize that artists should receive copyright payment for their work, in the same way that musicians have been receiving copyright payment for their recordings for many years," but fees should be 'realistic' so as not to "price themselves out of the copyright market to their own detriment ... the agreement drawn up between the two parties [for example] museum and artist, must be in writing and it must be signed by both these parties and witnessed by two people for each party" but the agreement does not necessarily have to be drawn up by a lawyer. "Paying copyright promotes the growth of a climate of respect for intellectual property, which is central to our national heritage" (Addleson 2005).

The Open Review is a site which invites people to participate in discussions which focus on how the Act serves as access to knowledge for South Africans and advocates change if necessary. It must be noted that it is possible to change copyright if it is deemed necessary (see 3.6). One is also reminded of the pertinent advice of Davidson (2000) (2.9) who stated that librarians need to keep themselves informed concerning current legislation and voice their opinions where appropriate.

The Open Review of the South African Copyright Act 1978 [n.d.] states that "copyright in a *sound recording* vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic [in the copyright holder]:

(a) making, directly or indirectly, a record embodying the sound recording;
(b) letting, or offering or exposing for hire by way of trade, directly or indirectly, a reproduction of the sound recording;
(c) broadcasting the sound recording;
(d) 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;
(e) communicating the sound recording to the public

In terms of the South African Copyright Act, the following facts concerning copyright in South Africa are provided by Smit and van Wyk Attorneys (2007) and are quoted verbatim for legal clarity.

3.2.1 Difference between copyright and other intellectual property

"Copyright in South Africa, like in most other countries, differs from other forms of intellectual property in that it is not a right that needs to be registered (except in the USA). Unlike patents, trademarks or registered designs, copyright vests in the author of a work once the work is created in a material form."

3.2.2 What is eligible for copyright protection?

"In terms of the South African Copyright Act, literary works (such as words of songs), musical works and sound recordings are eligible for copyright."

3.2.3 The author of copyright in terms of the South African Copyright Act

The authorship of copyrighted works is frequently disputed. The South African Copyright Act provides very clear guidelines as to who shall be considered authors of any particular types of copyrighted works. The following is a summary of these guidelines:

- Literary, musical or artistic works - the person who first makes or creates the work
- Photographs - the person responsible for the composition of the photograph
- Sound recordings - the person who made arrangements for the making of the recording
- Films - the person who made arrangements for the making of the film
- Broadcasts - the first broadcaster
- Published editions - the publisher of the edition
- Programme-carrying signals - the first person emitting the signal to a satellite
- Computer programs - the person who exercised control over the making of the program.

3.2.4 Exceptions to authorship of copyrighted works in terms of the South African Copyright Act

The author is usually regarded as the first owner of the work. However, there are exceptions to this which include:

- Literary or artistic works made by an author when employed by a newspaper, magazine or the like. In this case, authorship vests in the publisher. However, authorship vests in the author for the unused sections
- If someone commissions and pays for the making of a film or sound recording
- If the work was created in the course of an author's employment, the authorship vests in the employer.

3.2.5 Duration of copyright in terms of the South African Copyright Act

This depends on the type of work that has been created. Generally, the term of copyright is 50 years, subject to the following:

- **Literary, musical or artistic works** - copyright exists for the life of the author plus fifty years following death, calculated from the end of the year the author died in or 50 years from the date of first publication, performance in public, offering for sale of records thereof or the broadcasting thereof , whichever is earlier
- Films and photographs - fifty years from the end of the year in which the work is made publicly available, or the end of the year in which the work is first published, whichever is longer, or fifty years from the end of the year in which the work is made
- **Sound recordings** - fifty years from the end of the year in which the recording is first published [or made available to the public]
- Broadcasts - fifty years from the end of the year in which the broadcast first takes place
- Programme-carrying signals - fifty years from the end of the year in which the signals are emitted to a satellite
- Published editions - fifty years from the end of the year in which the edition is published.

It needs to be noted that the duration of copyright for literary, dramatic, musical or artistic works in South Africa differs from the UK, Europe, the US, and Australia in that in those countries copyright lasts for the authors' lifetime plus 70 years. In South Africa (like Canada) the duration lasts for the lifetime of the author and 50 years thereafter as discussed under 2.5.4. Sound recordings in the US and Australia (4.1.2) last for 70 years from the end of the year the recording was first published. In South Africa and the UK it remains 50 years. As was discussed under 'Information Commons' 2.3.2 this remains a controversial topic and there is at present lobbying on both sides, some lobbyists wishing to extend the copyright duration and others wanting to curtail the duration.

Dean (1987-2006:1-31) expands on copyright in South Africa as follows:

Literary, musical and artistic works

Besides works of this type made under the direction or control of the State or of a prescribed international organization, in the case of literary, musical and artistic works (except photographs), the copyright endures for a period of 50 years after the death of the author. If, however, before the death of the author none of the following acts have been done in respect of a work of this nature or an adaptation thereof, namely:

(i) The publication thereof

(ii) The performance thereof in public

(iii) The offer for sale to the public of records thereof

(iv) The broadcasting thereof

The term copyright continues to subsist for a period of 50 years from the end of the year in which the first of any of these acts is done. If none of these acts is ever done in relation to a work of this nature, the duration of the copyright is perpetual.

3.2.6 Transfer of copyright

Dean (1987-2006:1-31) states that "much like other property, copyright can be transferred by assignment, testamentary disposition or by operation of law. Copyright can also be licensed to a licensee for royalties. It is important to note that an assignment and an exclusive license (which precludes anyone else, including the author from using the creation) must be in writing and signed by the assignor to be valid. A non-exclusive license may be written or oral, or inferred from the conduct of the parties."

3.2.7 Musical works and sound recordings in South Africa as defined by the South African Copyright Act

It is interesting to note that Dean (1987-2006:1-8A – 1-8B) states that "prior to 1992 there was no definition of a musical work in the Act or any of its predecessors and the term therefore must of necessity have been given its ordinary meaning with the important qualifications that the music must have been reduced to writing or musical notations, or otherwise must have been preserved in a material form e.g. on a record or a tape. In 1992 the following definition of 'musical work' was inserted in the act."

Dean (1987-2006:1-9) defines 'musical work' "as a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music."
Dean (1987:1-10A) mentions that the [1978] Act "defines a sound recording as any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with a cinematograph film." Dean continues that

"the Act defines 'record' to mean *any disc, tape, perforated roll of other device in or on which sounds, or data or signals representing sounds, are embodied or represented so as to be capable of being automatically reproduced or performed therefrom*."

Dean (1987-2006:1-10A) emphasizes that "the work which we are here dealing with is the actual record or tape, not, for instance, the musical work which is embodied in the record. **The musical work as such is a separate work and is an independent subject of copyright**. So, too, the record is an independent work and an independent subject of copyright, although it may embody another copyrighted work."

Dean (1987-2006:1-15) states that "...there are no formalities as such prescribed for the coming into being of copyright [and], unlike other forms of intellectual property law, the Copyright Act does not make provision for any form of registration or the taking of any formal step in order to obtain copyright in a work." However, Dean (1987-2006:1-15) does mention that " there are two general requirements in respect of a work for the subsistence of copyright in it, namely (a) originality and (b) existence in material form".

3.2.8 Originality

Dean (1987-2006:1-15) notes that "it is a requirement for the subsistence of copyright in a work that the work be original" and exist in a material form.

Furthermore, "it is a maxim in copyright law that there is no copyright in ideas. It is the material form of expression of the idea which is the subject of copyright."
"The Act defines 'writing' to mean *any form of notation, whether by hand or by printing, typewriting or any similar process.* For copyright purposes, a work does not come into existence until it is reduced to a material form. So, as in a novel or a lecture for instance, a musical work does not come into being while it only exists in the composer's mind even though he might give a rendition of it on a musical instrument, it will only come into being when it is reduced to some material form such as a written notation."

3.2.9 Qualified person

There are two relevant concepts: these are the notions of a 'qualified person' and 'publication'. "A 'qualified person' in terms of the Act is an individual who is a citizen of, or is domiciled or resident in, South Africa or a country to which the operation of the Act has been extended by proclamation, and in the case of a juristic person, a body incorporated under South African law or under the law of a country to which the operation of the Act has been extended by proclamation. The operation of the Act has been extended to specific countries which are listed in a Schedule to the copyright Regulations" (Dean 1987-2006:1-15).

3.2.9.1 Publication

Dean (1987-2006:1-20) elucidates on publication as follows:

The Act states that publication of a work occurs when, with the exception of a cinematograph film and a **sound recording,** copies of the work are issued, with the consent of the copyright owner, to the public in sufficient quantities so as, having regard to the nature of the work, to satisfy the public's reasonable requirements. A cinematograph film or a **sound recording** is considered to be published when copies of the film are sold, let for hire or offered for sale or hire to the public. The Act states specifically that certain acts in relation to works do not amount to publication, namely the following:

(a) The performance of a musical or dramatic work, cinematograph film or **sound recording**
(b) The public delivery of a literary work
(c) The transmission of a work in a diffusion service
(d) The broadcasting of a work
(e) The exhibition of a work of art; and
(f) The construction of a work of architecture.

3.2.10 Restrictive acts in respect of literary or musical works

An important aspect of this study relates to the restrictions in reproducing copyrighted works in respect of musical compositions and lyrics since copyright is held both in recordings and musical compositions.

Dean (1987-2006:1-33/4) lists the restricted acts in respect of these types of works:

(a) Reproducing the work in any manner of form
(b) Publishing the work if it was hitherto unpublished
(c) Performing the work in public
(d) Broadcasting the work
(e) Causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster
(f) Making an adaptation of the work
(g) Doing in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraph (a) to (e) inclusive.

3.2.11 Sound recordings (Dean 1987-2006:1-34/35)

The following are restricted acts in respect of sound recordings which is a crucial element of this study:

(a) Making, directly or indirectly, a record embodying the sound recording
(b) Letting or offering or exposing for hire by way of trade, directly or indirectly, a reproduction of the sound recording
(c) Broadcasting the subject matter embodied in the sound recording by means of the use of the sound recording
(d) Causing the subject matter of the sound recording to be transmitted in a diffusion service, unless the service transmits a lawful broadcast, including the sound recording, and is operated by the original broadcaster
(e) Communicating the subject matter embodied in the sound recording to the public

In terms of this study, points (a) and (b) above are most relevant to libraries.

3.2.12 Infringement of copyright (Dean 1987-2006:1-37)

"There are two forms of civil law copyright infringement, namely so-called direct (or primary) infringement and indirect (or secondary) infringement. In certain instances infringement of copyright constitutes a criminal offence."

3.2.12.1 Elements of primary infringement

Dean (1987-2006:1-37/8) states that "a direct or primary infringement of the copyright in a work takes place when a person, without the authority of the copyright owner, does, or causes someone else to do any of the acts which are in respect of that work designated as restricted acts and therefore are within the monopoly of the copyright owner. This amounts to the unauthorized copying of the work and/or commercial exploitation of it. Copyright is not only infringed by misusing or misappropriating the whole of the work but also by misusing or misappropriating a substantial part of the work. This concept 'substantial' in respect of a part of a work relates primarily to quality, not quantity…" Furthermore, "the degree of similarity between a copyrighted work and an alleged infringing copy must also be assessed against the background of what it is about the copyrighted work which is original. The court must determine wherein lies the originality of the copyrighted work and then view the alleged infringing copy from this perspective" (Dean 1987-2006:1-37/8).

General consensus on the quantity of copies that will qualify for fair dealing as well as what constitutes 'reasonable portions' when copying is a problematic issue and will be discussed more fully under 3.2.12.3 and 3.3.2 (Section 12 (1) of the South African Copyright Act of 1978).

3.2.12.2 Elements of secondary infringement

Dean (1987-2006:1-44) mentions that there are two forms of secondary infringement as follows: "Indirect infringement takes place when certain acts are done without the authority of the copyright owner in connection with direct infringements of copyright. There are basically two forms of indirect infringement of copyright, namely unauthorized dealing with infringing copies of a work and permitting an infringing public performance of a work to take place."
An example of an unauthorized dealing with infringing copies of a work is "when an infringing copy is an article which is an unauthorized reproduction or adaption of a work in which copyright subsists where the making of that copy infringes the copyright in question."
An example of permitting public performance is infringement committed by "permitting a place of public entertainment to be used for the public performance of a protected literary musical

work in circumstances where such public performance is itself an infringement with the knowledge that such public performance is an infringement" (Dean 1987-2006:1-46).

3.2.12.3 When is copyright not infringed?

Musiker (1989) explains that the "Copyright Act, and reproduction regulations published in Government Gazette 6252 of 22 December 1978, make provision for exceptions when acts which would otherwise infringe copyright, are permitted. It must be remembered, however, that a reproduction of less than a substantial part of a work is in the first instance not an infringement. [However], 'substantial' in this context is both a qualitative measure and a quantitative measure." For example, a single line of a song, or even the first four notes as mentioned in Chapter 4, might be judged to be substantial. Musiker (1989) adds that

> Section (12)1 of the Copyright Act provides ... that it is not an infringement of copyright if a literary work is used solely, and then only to the extent reasonably necessary for the purposes of research or private study by, or the personal and private use of, the person using the work. The term 'use' here does not include the making of copies of the whole or substantial part of a work unless such copies are authorized by the reproduction regulations.
>
> Even if a reproduction is authorized by the reproduction regulations, it may not conflict with a normal exploitation of the work, and must not be reasonably prejudicial to the legitimate interests of the copyright owner. The reproduction regulations in general allow a person to make not more than one copy of a reasonable portion of a work having regard to the totality and meaning of the work. The whole work may not be copied, unless the regulations expressly allow it. Copies made of the same material, except if for teaching purposes, must be in the course of isolated and unrelated reproduction of distribution on separate occasions.

The guidelines in Chapter 8 expand on the issue of what does and does not constitute copyright infringement with reference to musical and sound recordings as applicable to the library situation.

3.2.13 **Reproduction** (Dean 1987:1-39)

The term 'reproduction' which features prominently in the restricted acts in respect of the various categories of works, is defined in the Act as follows:
'reproduction' in relation to –

(a) A literary or musical work or a broadcast, includes a reproduction in the form of a record or a cinematograph film
(b) An artistic work, includes a version produced by converting the work into a three-dimensional form or, if it is in three dimensions, by converting it into a two-dimensional form
(c) Any work, includes a reproduction made from a reproduction of that work

and references to "reproduce" and "reproducing" shall be construed accordingly.

Following on from the above, Dean (1987:1-39) states that

> 'Reproduction' as a restricted act, can take place in any manner or form. Reproduction therefore can also take place in a non-material form [i.e. **digital]**. This is in contrast to the position under the Copyright Act, 1965, where reproduction was limited to being in a material form. In the Pastel Software case (Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd) electronic reproduction of an ephemeral nature was recognized. This is in keeping with the wide ranging ambit of reproduction under the 1978 Act. The 1978 Act in any event gives a wide meaning to the concept of 'material form' and in S2(2) reference is made to a work being *written down, recorded, represented , in digital data or signals or otherwise reduced to material form.*

Dean (1987:1-40) elucidates

> The wide meaning given to "reproduction" is of considerable significance in the electronic age and in e-commerce. Examples of what would constitute reproduction, whether in a material form or otherwise, for purposes of the Act include loading software and data into a computer; operating a computer program, (this entails a reproduction of the program being made internally in the computer); downloading material from the Internet; displaying material on a computer screen, including material sourced from the Internet; and incorporating material in a website.
>
> Electronic communications and the Internet bring about new situations with which copyright law must deal. It is necessary to adapt or extend classical copyright concepts so as to cater for these new situations which have arisen in the electronic age.

For further discussion on The Electronic Communications and Transactions Act 25 of 2002 ('ECTA') see 3.5 below.

3.2.14 Mechanical rights in musical works (Dean 1987-2006:1-55)

The right to reproduce a musical in or on a record is commonly known as the "mechanical right". It is important to note that "the copyright in a musical work is not infringed by making a sound recording or a copy of the work, or of an adaptation thereof, if copies of the work or of a similar adaptation were previously made in or imported into South Africa for the purposes of retail sale by or with the licence of the copyright owner and certain requirements set out in S14 of the Act are met."

3.2.15 Background or incidental material

It is possible for recordings to have background music and it is noteworthy that "the copyright in an artistic work is not infringed by its inclusion in a cinematograph film or in a television broadcast or transmission in a diffusion service if such inclusion is merely by way of background or incidental to the principal matters represented in the film, broadcast or transmission" (Dean 1987-2006:1-55).

The above section gives an overview of the general copyright principles as they apply to the South African situation in terms of the South African Copyright Act of 1978 (see Appendix G).

3.3 Specific provisions for libraries in South Africa

There are specific provisions for libraries in South Africa regarding both print (the composition and lyrics of a song) and the actual sound recordings. These provisions are contained in Section 12 (1) of the South African Copyright Act of 1978.

We are aware that sound recordings have two copyrights, one in the words and music and the other in the actual sound recording. However, the librarian needs to be aware that there is often a third copyright in a sound recording and that is the copyright in the artwork on the sleeve of the cover of a recording.

For a detailed explanation of specific provisions for South African libraries regarding copyright and sound recordings (for both the composition and the actual recording) the reader is referred to the guidelines in Chapter 8.

3.3.1 Fair use/dealing

The following description of fair use (from Lohman 2000 in Loock and Grobler (2006:175)) is quoted for its apt description of the necessity of fair use:

> Given the broad scope of the [South African] Copyright Act, copyright would intrude into everyday life in innumerable ways, were it not for the fair use doctrine. Fair use serves a crucial role in limiting the reach of what would otherwise be an intolerably expansive grant of rights to copyright owners. The fair use doctrine operates as a 'safety valve' to mediate the tension between copyrights and the free flow of information when utilizing ICTs (information communication technology) for educational and even public purposes.

The Berne Convention (as mentioned in 2.4.1. above) was designed for the protection of literary and artistic works. Thus "in accordance with Article 9 of the Berne Convention, the South African Copyright Act, sets out general exceptions from the protection of literary works. Section 12(1)(a) states that fair dealing with a copyright-protected literary work is permissible for the purpose of research or private study or for the personal or private use of the person using the work" (DALRO:2008).

However, the problem lies in the fact that "the Act does not provide a precise definition" (DALRO: 2008) and Masango (2005:132) concurs with this statement by saying that "the copyright acts of most nations do not define the fair dealing exemption. Section 12 (1) of the South African Copyright Act 98 of 1998 for example, does not offer a definition of fair dealing (Copeling 1978:41 in Masango 2005).

Furthermore, and importantly, Masango (2005:129) states that

> The South African Copyright Act 98 of 1978 section 12(1) says that there shall be no infringement of copyright by any fair dealing with a *literary or musical work.* Section 13 furthermore stipulates that in addition to the fair dealing allowances under section 12, "reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interest of the author (Copeling 1978:48). Notwithstanding that these sections allow copying of copyrighted works, the South African Copyright Act does not state what should be considered as a reasonable portion of copied works nor does it state how frequently copying of a document is permitted under fair dealing exemption. With this lacuna, "it is possible that a whole Chapter from a long book may be considered reasonable, while in the case of a sonnet even a few lines may be held to exceed the limits of reasonability" (DALRO [n.d.]. The consequences of the lack of clarity by the act on what a reasonable portion to be copied should be is exhibited by the South African Reprographic Rights Organization. The Dramatic, Artistic and Literary Rights Organization (DALRO) that collects copyrighted revenues for authors of copyrighted works in South Africa qualifies reasonable portion of copying under fair dealing on the basis of "totality and meaning of the work"(DALRO [n.d.] ... The fair dealing exemption frees scholars and other users from the obligation to ask permission or to pay a fee for the copy and use of copyrighted works. (Harper 2001). In situations where scholars cannot themselves copy the information, copyright acts allow libraries to copy such information to send to users...For example, Regulation 7 of the South African Copyright Act 1978 allows libraries to "reproduce an article from a periodical issue or collection, or a reasonable portion of any other work and upon request make such copy available to a person for the sole purpose of private study or the personal or private use of the person using the work.

Masango (2005:129) continues that "this affords substantial relief to many scholars especially from developing countries as they rely on copied materials for their studies due to lack of access to original works."

"Fair dealing" permits the users to copy, for their own study or research or private use, as much of the work as is necessary to meet their reasonable needs, without seeking permission from the copyright owner or paying compensation.

Concerning the debatable issue as to how much may be copied under South African law, DALRO (2008) explains:

> One cannot say how much, for what is fair in each particular case will depend on the circumstances of that case. Contrary to wide-spread belief, South African law does not specify that 5%, or 10%, or 20% - or any percentage - is "fair", and nor does it say that a single copy may be made as long as it does not constitute a "substantial amount". If you were to copy a large portion of a book or journal, and were then charged with copyright infringement, you would have to convince the court that your actions were fair, given your circumstances.

> Copyright experts agree that fair dealing is a question of fact and impression having regard to all the circumstances, and in some circumstances taking too much of a work, or even taking small amounts of a work on a regular basis, would not be fair.
>
> Fair dealing is not quantified in any law, and it cannot be, since it rests, as we have seen, on a particular set of circumstances. In some countries, voluntary guidelines have been developed. In Norway 15% of a complete work or 30 pages, whichever is the lesser, is considered fair for private use. In Britain the Publishers' Association, the Writers' Guild and the Society of Authors accept, as within the bounds of fair dealing for research or private study, one copy of a maximum of one Chapter in a book, or 5% of a complete work. The British guidelines have no legal force, but might be of persuasive value as a defence in a South African court.

Nicholson (2009) also alludes to the fact that South Africa does not have 'fair use' provisions in its copyright laws [as is the case in the US as described above under 2.8.2] and states that "**all** use of copyright material is governed by the principle of 'Fair Dealing' in Section 12(1) of the SA Copyright Act. Section 12(1) permits reproduction of a literary or musical work, without permission, for:

a. For the purposes of research or private study by, or the personal or private use of, the person using the work;
b. For the purposes of criticism or review of that work or of another work;
c. For the purpose of reporting current events –
   - in a newspaper, magazine or similar periodical; or
   - by means of broadcasting or in a cinematograph film;

Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.

Section 12(2-4) permits reproduction of copyright material, without permission, for

Judicial proceedings, or a report of judicial proceedings; Quotation; by 'way of illustration' for teaching purposes (for example in a powerpoint presentation)."

It is important to remember that this permitted reproduction also applies to artistic works, films, sound recordings, broadcasts, published editions and computer programs.

3.4 Challenges and recommendations regarding copyright and digitization in South Africa

The main functions of archives are to preserve and protect a nation's cultural heritage and to provide access to these resources. Page-Shipp (2009:53/4) states that an archive would want to digitize in order to ensure access, protection, preservation, prestige or reciprocity and to promote income generation. However, few archives in South Africa are ready for scanning. The digitization of archival collections in South Africa involves many challenges in the form of financial and human resources, skills and knowledge of copyright laws.

One of the major challenges facing South African archives is the digitization of national resources. This is a hugely expensive venture and lack of both financial and human resources have prevented many archives from embarking on digitization projects which also require a thorough knowledge of copyright laws. One of the major concerns is the potential threat of loss of irreplaceable sound recordings owing to obsolescence of technology (such as the old analogue recordings and cassettes) and decay of the actual fragile recordings. It is crucial that these recordings are preserved for posterity as part of the South African cultural heritage as many of the recordings contain the only source of oral indigenous knowledge available.

Page-Shipp (2009) in his *Audit of digitization initiatives, ongoing and planned in South Africa,* which is "the first phase of an extensive exploration of the national development needs for effective and efficient digitization and preservation of valuable heritage and research collections" in South Africa states that "the perception that there are many 'scanner-ready' collections in South Africa is misleading; many of the collections will require significant work before scanning [digitization] can commence."
However, permission for digitising is required for the scanning and there are copyright issues involved as Page-Shipp (2009:54/55) explains:

- when the holding archive owns the **copyright** for the material, or when copyright still resides with the author.
- and/or when the holding archive has the **right to restrict access** to the material

- and/or when the original owners, explicitly or implicitly, **excluded permission for publication** of the material in donating the material to the archive. (In most cases, archivists adopt a conservative approach to this aspect.)

There are also many challenges to the digitization community as identified by Page-Shipp (2009:62) which include:

- many large and small collections have yet to be catalogued and organised to render them suitable for digitisation.
- development and maintenance of knowledge and skills for digitisation; and the training and retention of skilled people
- resources: finances, technology infrastructure (software, hardware and systems) and connectivity
- identification and promotion of standards for the creation and management of the digital information resources;
- policies on intellectual property rights, ownership, access licensing and prioritisation.
- no national long-term preservation strategy is in position.

Furthermore, Page-Shipp (2009:9-15) identifies the following points regarding digitization and offers some useful recommendations:

(i) Identification of priority themes for digitization projects. The audit revealed a 'daunting' amount of material worthy of digitization. However, 'resource constraints will necessitate choices.'

(ii) A National Heritage Repository. The scale and complexity of the digitization projects varies enormously. The audit suggests a National Repository of the collections which could later be linked via the portal to all other repositories in Southern Africa which can eventually form part of a virtual online collection of heritage items. Furthermore, it is recommended that the repository be located at a "well-governed institution, with sufficient autonomy to ensure sustainability."

(iii) Training and skills development. The main obstacle to smooth and rapid development of capacity to digitize the backlog of collections and establish a sustainable system for preserving and marketing the digital collections is the lack of informed and experienced practitioners of all types...the need arises in essentially two categories: existing staff in institutions who will be running digitization projects in the short term to catch up with back-logs. They will require guidance and training that will assist them to upgrade their skills. 'Digital librarians' who can take charge of the planning and management of projects and the development of repositories. Provision should also be made for tertiary Departments of Librarianship to include the planning and management of degree courses.

(iv) Infrastructure needs. A recommendation is that almost all libraries, museums or other institutions which have heritage items should be provided with a basic digitization set-up, which does not have to be expensive.

(v) A National Portal to digital collections. This is particularly important in order to access the information. The Aluka portal is a portal which focuses on African collections. Page-Shipp states that "in the South African context a national portal would make a unique contribution and would be a 'nationally owned channel of access' to the South African material and would mitigate some of the reservations felt by librarians and curators about access to 'our' material being via foreign-based portals. The portal would provide managed access to information and support with respect to current Best Practice in digitization and preservation. It is recommended that an institution should be identified to host a National Portal and an advisory group established to direct development and that the advice of global leaders in the field should be sought."

(vi) A National Digitization and Preservation Support Centre. A support centre should be funded "so as to promote support rather than control, effective use of distributed skills and expertise and a high degree of transparency and good communication to promote progress and collaboration."

(vii) Permission to digitise: Best practice guidelines for South Africa.

Another aspect of concern is that of "looting by cultural imperialists". Africans have always been concerned that much of their indigenous knowledge is 'stolen' by imperial powers who make a profit on their specialized and unique knowledge and music, as mentioned in the case of the 'Lion King' above. Page-Shipp (2009:14-15) explains the situation and the desperate need for a National Digitization Policy:

> There is widespread nervousness over raiding of Intellectual Property, usually grossly exaggerated, especially where the real nature of copyright protection is not properly understood. 'Looting by cultural imperialists' is a much more substantial threat and widely publicised bad experiences have led to a situation where the professional consensus on this matter is one of fear. However, much if not all of the risk of such looting can be eliminated if collection custodians observe appropriate procedures in participating in digitisation partnerships, and a draft set of such procedures is presented in the report. (Section 16)
>
> Concerns over the 'management of the historical narrative' are more intractable, at least in part because they are difficult to define in manageable terms. The task of producing a 'National Digitisation Policy' has been devolved to the National Department of Arts and Culture, but there is no sign of the early emergence of a product acceptable to all the stakeholders. In the meantime, progress is likely to suffer unless a few high profile champions can be persuaded to take a lead.

Because the issue of a National Digitisation Policy is unlikely to be resolved soon Page-Shipp (2009:15) recommends that "pending the formulation of a National Policy on Digitisation, professional organisations should formulate their own best practice consensus for the guidance of members."

Page-Shipp (2009:32) states that the US-based Mellon Institute has funded many digitization projects in South Africa and a great deal of the material is published on www.aluka.org "which requires subscription access, although [importantly to African librarians] this is presently provided gratis to users in research and education institutions in Africa. Copies of all digitised material are also held in South Africa by DISA, the digitising body, and Aluka require only a non-exclusive licence to use the material on their website. This does not mitigate a widespread belief that '*Aluka have copyright to our heritage material"*' which is the main concern of many South African archives, as discussed below.

Page-Shipp (2009:32) further states that

> in principle, the arrangement suits the Mellon Institute, which includes among its objectives the provision of South African material for educational use in the USA, as well as in African countries, and also suits South African researchers because it satisfies immediate access requirements and is likely to be a more sustainable distributor – and preserver – than any alternative presently available in South Africa. South African participants were assisted with training and other advice as part of the 'capacity building' activity in DISA. To many, this would appear to be a mutually beneficial arrangement, with a healthy partnership operating between DISA and Aluka.

The following introductory paragraph relates to the contract between Digital Innovation South Africa initiative of the University of KwaZulu-Natal ("**DISA**"), and the Aluka initiative.

CONSENT TO ACCESS TO AND USE OF HISTORICAL MATERIALS

This consent relates to projects by the Digital Innovation South Africa initiative of the University of KwaZulu-Natal ("**DISA**"), and the Aluka initiative of Ithaka Harbors, Inc. ("**Aluka**") to digitally preserve and make available certain historical documents and other materials described in the attached cover letter (the "**Historical Materials**"). DISA and Aluka intend to create reproductions of the Historical Materials in digital or electronic form (these reproductions, whether they are reproductions of writing, photographs or audiovisual recordings, are referred to as

the "**Digital Images**") and make the Digital Images available online for scholarly, educational and other non-profit cultural purposes.

As the contract is still under discussion the researcher has been asked not to print the contract in its entirety. However, the Alan Paton Centre has objected to certain terms of the contract.
In a telephonic discussion and subsequent e-mail correspondence with Jewel Koopman (2009) from the Alan Paton and Struggle Archives, UKZN (PMB) Mrs Koopman stated that "the main problem for us [the Alan Paton Centre, UKZN] is that when DISA scans the documents, they then take ownership of copyright of the scanned images. The copyright of the original documents still belongs to the archive of origin, but the version that goes onto the Internet becomes the property of DISA/ALUKA."

The Alan Paton Centre is therefore one of the Centres in South Africa which was not in favour of the contract entered into between DISA and ALUKA. According to Jewel Koopman, this contract stipulates that when material is scanned/digitized, the original owner keeps the original 'paper' copyright but the scanned copyright is owned by Aluka. A disadvantage is that the material is no longer owned by the South African archive but rather by a foreign nation which then has the right to sell it, thus depriving the archive of the royalties. A concern is that South African national heritage is leaving the country and can be exploited financially by other countries. On the other hand, many of the archives consider this a fair deal as the material is publicized on the Internet.

Page-Shipp (2009:56) believes that it is generally widely recognized that:

1. Digitisation has definite short-term value, especially in terms of access and rescue of decaying items from oblivion
2. Preservation in the long-term is desirable for the sake of future users.

Regarding old analogue sound recordings which are becoming fragile and obsolete, the first point regarding digitization is definitely of value in terms of access and long-term preservation.

However, Page-Shipp (2009:56) reminds us that "there will be future preservation costs, including storage media migration, provision of back-up copies, augmenting and consolidating collections and weeding of low-relevance material and duplicates." Unfortunately many South African, and especially archives in other African countries, are not in a financial position to afford these future costs.

Limb (2007) focuses on current challenges regarding the direction and control of African digitisation initiatives and stresses that "digitisation refers not only to isolated pilot projects but also to an increasingly mainstreamed process of making information resources available online ...and control of the content, rate, and direction of digitisation is crucial if the process is to serve primarily African interests" (Limb:2007:18). Thus, contrary to the ALUKA initiative whereby original material is owned by a foreign nation, Limb would prefer to see Africans in control of their own digitization projects thereby retaining ownership. Unfortunately, as mentioned previously, lack of financial and human resources and an ever deepening digital divide between the wealthy and developing nations often renders digitization by African countries of their own resources nigh impossible.

Creative commons [n.d.] concurs with the above concerns, and voices similar disquieting concerns as those expressed by the Alan Paton Centre regarding foreign powers gaining a monopoly over African intellectual property and the lobbying for an extension of copyright duration:

> Many people believe that the U.S. and other IP exporting nations are leading a trend that is seeing increasing private control over information and knowledge. Although South Africa's legislation complies substantially with the minimum standards of the TRIPS agreement, there are concerns that intellectual property rights are not being effectively enforced in the country. As South Africa continues to comply with increasingly restrictive copyright controls put forward by the U.S. and other IP nations, the digital divide that keeps developing countries out of the knowledge loop steadily increases. As in most countries around the world, copyright in South Africa does not have to be registered and arises automatically when a person reduces their idea to material form. The term of copyright is still 50 years after the author's death (as opposed to the EU and the U.S.'s 70 years) but many people believe that it is only a matter of time before multinational publishing companies persuade or push governments to adopt the longer term.

A longer copyright term would certainly not be in the financial, technological or educational interests of African countries which are calling for shorter copyright terms in order to prevent foreign monopolies of intellectual property, as discussed under information commons in Chapter 2, Section A above.

Fortunately there are various conferences held internationally which address the issue of libraries in the digital age and problems associated with digitization and South African librarians need to keep abreast of the latest developments concerning digitization so to voice their concerns internationally. The University of Zadar (2009) in Croatia is holding its annual conference on libraries in the digital age from the 24 – 28 May 2010. These annual international conferences on Libraries in the Digital Age (LIDA) address issues concerning the changing and challenging environment in which libraries and information systems and services have to cope with in the digital world. "Since its inception in 2000, LIDA has emphasized the examination of contemporary problems, intriguing advances, innovative approaches and solutions. Each year a different and "hot" theme is addressed, divided in two parts; the first part covering research and development and the second part addressing advances in applications and practice" (University of Zadar 2009).

3.5 Organizations and relevant acts concerning copyright in South Africa

The following organizations and acts have a bearing on copyright:

In 1986 the **Book Trade Association of South Africa** issued a four-page guide entitled 'Copying and Copyright' to advise teachers and educationalists as to how and when copying involves an infringement of copyright. Publishing could become uneconomic if photocopying becomes rampant. The Association reminds readers that one of the primary purposes of copyright is to protect the livelihood of the authors and publishers of literary, dramatic, artistic and musical works and to encourage their dissemination (Musiker 1989).

South Africa's **Bill of Rights** grants a right of access to information (Creative Commons n.d.):

The Promotion of Access to Information Act of 2000 states that it gives effect to the constitutional right of access to any information held by the State or any other person that is required for the exercise or protection of any rights. This has profound implications for South Africa's access to the past. The South African History Archive for example, is acting on behalf of individuals to gain access to the hidden history of the apartheid years. The Act also has serious implications in the realm of freedom of expression rights and may lead to a clash with intellectual property rights legislation.

It is believed by commentators, such as Creative Commons' chairman, Larry Lessig, that IP rights law needs to distinguish between republishing someone's work on the one hand, and building upon or transforming that work on the other.

South African national heritage, now protected by the **National Heritage Resources Act of 1999** may also present a challenge to IP law when knowledge held in private control is identified as having relevance as a public good to be shared by all.

Republic of South Africa (2002) states that the **Electronic and communications transaction Act** was passed with the following object:

> To provide for the facilitation and regulation of electronic communications and transactions; to provide for the development of a national e-strategy for the Republic; to promote universal access to electronic communications and transactions and the use of electronic transactions by SMMEs; to provide for human resource development in electronic transactions; to prevent abuse of information systems; to encourage the use of e-government services; and to provide for matters connected therewith.

Southern African Music Rights Organization (SAMRO 2005)

The Southern African Music Rights Organisation (SAMRO) was established in 1961 with the objective to protect the intellectual property of composers and authors, as well as to ensure that composers' and authors' talents are adequately credited both locally and internationally for music

usage. The organisation is the primary representative of music performing rights in Southern Africa.

South African Intellectual Property Laws Amendment Act 1997

Smit and van Wyk (2005-2007) describe the South African Intellectual Property Law Act as follows:

> Intellectual Property Laws confer a number of exclusive rights upon inventors, authors and other Intellectual Property owners, and not upon the intellectual work itself. In South Africa, Intellectual Property Laws are governed by four Acts of Parliament; The Trademarks Act, the Patents Act, the Designs Act and the Copyright Act...in summary, Intellectual Property Laws confer certain rights upon the owners of that property and not on the property itself. The rights themselves are property and may be sold, licensed or disposed of in any way in which the owner of those rights wishes.

3.6 Proposed copyright amendments to the South African Intellectual Property Law Act

It is advisable for librarians to heed the advice of Davidson (2000) as mentioned above in 2.10.5) "to keep informed about current legislation."

In terms of current legislation it must be noted that the South African Intellectual Property Laws Amendment Act is currently under discussion. Although the study is primarily dealing with South African music copyright laws, the researcher takes the view that it is essential to be aware of any changes to intellectual property laws since many of South Africa's recordings concern indigenous knowledge in the form of oral stories and recorded songs.

There is currently talk that The South African Intellectual Property Laws Amendment Bill 2007 (Protection of Indigenous Knowledge) has proposed amendments to the Performers Protection 1993 and Designs Act, 1993. The then South African Minister of Trade (Mpahlwa 2008) had published a draft for the submission of public comments of which the closing date was the 15 June 2008. In an e-mail communiqué with Denise Nicholson (2009) (the copyright librarian at the University of the Witwatersrand) she stated that "The Traditional Knowledge Bill, as far as I know, is still in the draft form and has not gone further as yet. I can't get any information out of the DTI [Department of Trade and Industry] though, despite writing to them a few times. There

were a lot of objections to the Bill from all sides. The IPR [intellectual property rights] from Public Financed Research and Development Act was a separate IP act and was passed."

In a follow-up e-mail communiqué with Denise Nicholson (2009) she stated the following: "I went to a meeting with people from Wits [Witwatersrand University] and a lady from an organization has been commissioned by the Presidency to do the Impact Study on this Bill. She said that their report had to be submitted by tomorrow [25-09-2009] to the President's Office and then we just have to wait and see. Apparently the DTI are not happy about this study and have not been forthcoming in giving this organization any documents that will help them in the study. DTI wanted this Bill to go through and submitted it to Parliament in July 2009 (despite so many objections) and apparently the Presidency stepped in and insisted on the impact study before it goes further."

Further to the proposed intellectual property amendments Internet Business Law Services (2008) adds more detail:

> In 1998 the South African Department of Trade and Industry's Intellectual Property office published Draft Regulations [and] again in 2000 it published proposed amendments to the Act itself. Both sets of proposals were very restrictive to education, research and libraries. [Importantly] they also failed to address digitization or the needs of persons with sensory disabilities. As a result two copyright task teams have been mandated by the South African Vice-Chancellors Association (SAUVCA) and the Committee of Technikon Principals (CTP).These task teams successfully challenged both sets of proposals. As a result, the Department of Trade and Industry excluded the proposed amendments from the Copyright Amendment Act No. 9 of 2002. Since then there has been an impasse in the legislative process.

Thus the proposed copyright amendments are still in a draft form and the controversy surrounding it provides a rather interesting and perplexing situation which will need to be followed up as any amendments could have an impact on indigenous South African sound recordings.

As was mentioned under 3.2 it is therefore possible to lobby for constructive changes and amendments to copyright laws.
It is important to keep abreast of the latest developments. In the words of Hannabuss (1998:190) "the law is there and should be known. The law keeps changing and we must keep up with it.

3.6.1 Comment on the proposed amendments: a lesson to be learnt for the South African situation

With regard to the proposed **South African Intellectual Laws Property Act Amendment 2008** (which is currently still under discussion as mentioned above), Rimmer (2008) has written an informative article stating that lessons can be learnt from the Australian/New Zealand experience regarding the importance of protecting traditional knowledge. The following is an extract from his article:

> I note, with interest, that the policy document, The Protection of Indigenous Knowledge through the Intellectual Property System, has paid particular heed to the experience of Australasia in dealing with traditional knowledge: "Lessons can be learned from New Zealand and Australia, which are both good examples of countries whose courts use the common law to protect traditional knowledge."
>
> I would comment that the Australian experience has been a mixed one….
>
> The old Howard Conservative Government showed little interest in the protection of traditional knowledge. A Federal bill on the recognition of communal moral rights in respect of copyright works created by Indigenous communities has not been implemented….The new Rudd Labor Federal Government has yet to establish its priorities in respect of the protection of traditional knowledge. It has expressed an interest in establishing a right of resale – which would have the potential to benefit Indigenous artists and communities.
>
> Australian Aboriginal and Torres Strait Islander communities have been promoting the need for greater legislative protection of Indigenous Intellectual Property… Professor Mick Dodson of the National Centre for Indigenous Studies at the Australian National University has been instrumental in lobbying for the greater protection of traditional knowledge both in Australia and at an international level. He was influential in pushing for the protection of Indigenous intellectual property as part of the Declaration on the Rights of Indigenous Peoples 2007.
>
> In light of this experience, I would like to commend the Government of South Africa on its initiative in developing a substantive piece of legislation on the protection of traditional knowledge. It is a shame that the Australian Government has not yet shown the same sense of purpose in developing a comprehensive regime for the protection of traditional knowledge.

It is hoped that South Africa will heed this commendation and continue to protect its indigenous knowledge (which is also recorded in sound recordings in the form of oral heritage) as a vital resource for future generations.

3.7 Summary

This Chapter has outlined a brief history of South African copyright law and enumerated South African copyright laws and principles as they relate to digitization in electronic formats which includes sound recordings in South Africa. Challenges regarding copyright and digitization and proposed amendments to the South African copyright laws were highlighted and comments on the proposed amendments and lessons to be learnt were incorporated into the discussion. Concerning specific provisions for South African libraries as relates to print (the composition of songs) and the actual sound recording itself the discussion was brief as detailed guidelines for South African music librarians are to be found in Chapter 8.

CHAPTER 4

GENERAL PRINCIPLES REGARDING COPYRIGHT LAWS IN OTHER COUNTRIES

Introduction

This Chapter will discuss copyright law for sound recordings as it applies to (i) Australia; (ii) The United Kingdom (UK) and the United States of America. South Africa as an ex colony of the United Kingdom had similar copyright laws and Australia and South Africa are both in the commonwealth. The situation regarding copyright laws in Australia and the United Kingdom thus have a bearing on our South African copyright laws and can offer us insights and lessons for our own situation. Sterling (1992) deals extensively with intellectual property rights for sound recordings and offers a comprehensive account of the copyright situation in other countries should the reader wish to relate to other countries).

The situation regarding copyright laws in the United States of America is most complex. Although mention has been made of the United States situation regarding the addressing of the balance between copyright holders and the public good in libraries in Chapter two, owing to the fact that the bulk of the literature refers to the American situation, it needs to be noted that the American copyright laws regarding sound recordings have not been covered in-depth in this study. Mention, however, has been made of the many US Acts regarding digital sound recordings. Of importance is the fact that the American situation regarding 'public domain' does impact on South African sound recording copyright laws. The researcher has therefore attached appropriate appendices concerning American copyright law for sound recordings as they apply to libraries (see Appendices A, B, E(i) E(ii)) for the reader to refer to. The reader is also referred to McConnachie (2008:32-48 and 80-83) who deals extensively with the American and South African situation, including working examples of copyright infringements.

4.1 AUSTRALIA

Introduction

Copyright in Australia is governed by the Australian Copyright Act of 1968.

The Australian copyright aspects covered in this section include general copyright sound recording principles applicable to Australia such as the rights of copyright owners, duration, ownership, acknowledgements and exemptions for libraries and archives. The reason for outlining the principles pertaining to Australia, the UK and US separately is to highlight the fact that, although (as DALRO (2008) explains) each country is bound to frame its national copyright legislation within the parameters of the Berne Convention and to abide by the provisions of Article 9(1) (see Appendix B) each country is also governed (within the framework of the Berne Convention which outlines minimum protection) by their own national copyright laws. These laws, especially regarding the duration of sound recordings and reciprocal rights, impact on the South African situation concerning the remastering (digitization) of old sound recordings and the complex issue of public domain. It is thus necessary to have a knowledge of copyright laws as they pertain to each country.

4.1.1 Rights of copyright owners in Australia

Copyright owners of sound recordings have control over the rights to do the following in relation to their works:

- reproduce the work in material form;
- publish the work;
- perform or play the sound recording in public;
- communicate the work to the public;
- make an adaptation of the work;
- broadcast the work, or transmit it to subscribers;
- rebroadcasting television and sound broadcasts;
- make an adaptation, e.g. an arrangement or transcription of a musical work; and
- do any of these acts in relation to an adaptation of the work.

The Australian Copyright Council (2006) states that

Sound recordings are protected by copyright. Copyright is separate and additional to any copyrights in material on the recording. Thus in a CD there may be:

- a copyright in each musical work
- a copyright in the lyrics to each song and
- a copyright in the *sound recording* of the music and lyrics.

The Australian situation regarding separate and additional copyrights in a sound recording is not unusual and follows the pattern of South Africa, the UK and the US.

McRobert (2001) in his discussion on Australian 'subsistence of copyright in digital music' stresses this point of separate copyrights:

> Under Australian copyright law, a typical pop song would attract a separate copyright in the literary work (in the lyrics), the musical work (the musical composition) and copyright in the sound recording under the *Copyright Act 1968.* Significant revisions to Australian copyright law were introduced with the enactment of the *Copyright Amendment* (*Digital Agenda) Act* 2000 ('Digital Agenda Act'), which entered into law on 4 March 2001. The primary purpose of the Digital Agenda Act was to bring Australia's copyright legislation into conformity with its international obligations under the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty concluded in 1996.

As is the case in South Africa, the UK and the US it is important to note that "when you record a demo, you have two copyrights: one in the words and music and the other in the sound recording" (*Recording Engineer's Weekly* 2005).

Section 31(1)(a) of the Act lists the exclusive rights of copyright owners in literary and musical works as:

- To reproduce the work in a material form;
- To publish the work;
- To perform the work in public; and
- To communicate the work to the public.

The Act defines the term "communicate" as: “The Digital Agenda Act also includes for the first time a definition of "to the public", defining the term as meaning the public inside or outside Australia. Similar rights exist in relation to sound recordings by virtue of s85(1) of the Act” McRobert (2001).

4.1.2 Duration of copyright in Australia

If the sound recording was made before 1955 then copyright has expired. The sound recording is in the public domain and permission is not required to reproduce or perform the work. If the sound recording was made after 1955 but before 1 May 1969 then copyright lasts for 70 years from the end of the year the recording was made. If the sound recording was made after 1 May 1969 then copyright lasts for 70 years from the end of the year the recording was first published (University of Melbourne 2006).

The duration of copyright for a sound recording in Australia therefore differs from that of South Africa and the UK which is 50 years but is similar to that of the US which is 70 years from the end of the year in which the recording was first published.

Furthermore, the University of Melbourne (2006) makes it clear that

> the copyright in sound recordings exists independently of the copyright in any literary, dramatic, musical or artistic works recorded in them [and that] this is important when considering any copying or communicating and obtaining permissions from copyright owners. Sound recordings of early music, e.g. classical music, are not necessarily copyright free. The composition and lyrics will most likely be out of copyright, but the date the *recording* was made will determine whether or not copyright in the recording itself has expired. If copyright protection still applies, permission will be required from the recording company.

“For most material, copyright lasts for 70 years after the end of the year of the creator’s death, or 70 years from the end of the year the material was first made public” (Australian Copyright Council 2008). This would include musical compositions and lyrics for songs.

4.1.3 Ownership of the sound recording

Similarly to the South African, UK and US situations, “the first owner of copyright in a sound recording is usually the person who paid for the recording to be made. However, in some cases,

performers recorded on sound recordings own a share of the copyright in those sound recordings" (Australian Copyright Council 2006).

With regard to who owns copyright in music and lyrics in Australia, "the general rule is that the first owner of copyright in a musical work is the composer, and the first owner of copyright in the lyrics is the artist. However, there are some important exceptions [such as] if you are on the staff (as opposed to working freelance) your employer will usually own copyright in works you create as part of your employment duties" (Australian Copyright Council 2006).

However, it needs to be noted that, regarding the ownership of the sound recording, Australian copyright was altered by legislation which was introduced in 2004 (The Australian Government 2006).

The Australian Copyright Council (2006) outlines the amendments:

> The amendments made to the Copyright Act as a result of the Australia-US Free Trade agreement (AUSFTA) [2004] have changed the general rules on ownership of copyright in *sound recordings*. As a result, performers generally have some rights in *sound recordings* of their live performances. Therefore, unless there is an agreement to the contrary, the first owners of copyright in a *sound recording* of a live performance will be the performer and the person who owns the recording medium (such as the master tape). However, performers have very limited rights in relation to recordings made before 1 January 2005 and are not entitled to exercise these rights where this would interfere with the rights of those who already owned copyright in those *sound recordings.* Even for recordings made on or after 1 January 2005, performers' rights are likely to be very limited in practice as the result of provisions. Performers will not own a share in the copyright in the *sound recording* if the performance was in the course of their employment or the recording was commissioned (for example, a record company engages a production studio to produce a master recording.)

4.1.4 Acknowledgements

Similarly to other countries, it is important that the source of the material and the moral rights of the copyright owner are acknowledged and properly attributed. For sound recordings, it is recommended that the following information be included:

- the title of each work;
- the name of each composer, lyricist and arranger of the work;

- the artist/group and the record company label.

If the copyright owner is unknown, indicate 'Copyright owner unknown. All reasonable attempts made to identify. If you are the copyright owner or know who they are please advise us' (University of Melboure 2006).

4.1.5 Copyright infringements in Australia

The Australian Copyright Council (2008) states that the following constitutes copyright infringement in Australia:

- You can infringe copyright by using someone else's copyright material without their permission, unless there is a special exemption [for example for libraries] for your use
- Using a part of a work can also infringe copyright if is an important part – it needn't need be a large part Even if you change or add to what you use, you can infringe copyright if what you use an important, essential or distinctive part of the original material
- A person who infringes copyright can be sued by the copyright owner and taken to court. A court can order a range of things, including that the infringer pay compensation and pay the copyright owner's costs.

  In some cases, a person who infringes copyright can be charged by the police, and can be ordered to pay a fine or, in serious cases, jailed.

Other activities prohibited by the Copyright Act

People can also be sued, or in some cases charged by the police, for doing the following, unless a special exception applies:

- **authorising** infringement (that is, endorsing or sanctioning someone else's infringement – for example, by asking or encouraging them to infringe copyright, or by providing them with the means to infringe)
- **importing** certain types of items containing copyright material, such as feature films on DVD
- **renting out** CDs and computer programs
- **selling** infringing articles or certain unauthorised imports
- **circumventing** a mechanism that controls access to digital material, or **decoding** an encrypted broadcast
- **selling, importing** or **manufacturing** certain circumvention devices, circumvention services and decoders
- **removing** or **altering** rights management information in digital files
- **failing to attribute** (or falsely attributing) the creator of a work

- **changing** or doing something else with a work that damages the creator's reputation or is offensive to the creator
- **recording** or **filming** a live performance without the performers' consent.

Piracy

Infringement on a commercial scale – such as copying and distribution of counterfeit CDs, DVDs or software – is often referred to as "piracy". There are industry bodies that investigate reports of piracy, and assist police to prosecute infringers. [Piracy is an ongoing international problem]

It is noted that using an important part of the work constitutes infringement, even if it is not a large part. The question of what constitutes a reasonable portion is often controversial and is referred to repeatedly in this study under 'fair use'.

4.1.6 Exemptions for libraries and archives

A feature of Australian library exemptions, in comparison to South Africa, the UK and US, is that in Australia the copyright rules for libraries as relates to literary works and sound recordings is straightforward and clear-cut. The Australian Copyright Council (2008) offers clearer outlines than South Africa does with regards to fair use and the special exemptions in the Copyright Act for libraries and archives in Australia with regard to sound recordings. The following exemptions are quoted verbatim to ensure clarity of meaning:

4.1.6.1 Published material

> A library may reproduce published written, artistic and musical works in its collection for people who have requested the material for their research or study. The requests must be in writing and must be accompanied by a signed declaration that the client requires the copy for research or study, will not use it for any other purpose, and has not previously been supplied with a copy of the same material by the library. The library may supply the material by email.
>
> The library must keep written requests and declarations for four years. There are limits on what can be reproduced, depending on whether the material is in hardcopy or electronic form and whether or not it is commercially available. The library must mark copies with the date they were reproduced and the name of the library. There is no equivalent provision for audiovisual material such as CD-ROMs, DVDs and audio CDs.

[This fact does, however, underline the difficulty which libraries and archives experience in this regard]

4.1.6.2 Old unpublished material

A library may copy an unpublished written, artistic or musical work whose author has been dead for more than 50 years for a client's research or study. There are equivalent provisions for unpublished films and sound recordings made more than 50 years ago. The application of these provisions to films is complex, however.

4.1.6.3 Manuscripts and other original versions

A library may copy a manuscript or other original version – such as a painting, first copy of a film or first copy of a sound recording – to supply to a person for research on the library's premises or on the premises of another library.

4.1.6.4 Copying old unpublished material for publication

A library may copy an unpublished written, artistic or musical work whose author has been dead for more than 50 years for a person who wishes to publish it. There is an equivalent provision for unpublished films and sound recordings made more than 50 years ago. There is a procedure in the Copyright Act to enable an unpublished written, artistic or musical work to be published, but no equivalent procedure for films and sound recordings.

4.1.6.5 Copying for other libraries

A library may reproduce a published written, artistic and musical work in the library's collection for another library which has requested it for inclusion in its collection, or for another to supply to its client for research or study. The material may be supplied by email.

There are limits on what can be reproduced, depending on whether the material is in hardcopy or electronic form and whether or not it is commercially available.

There is no equivalent provision for audiovisual material such as CD-ROMs, DVDs and audio CDs.

4.1.6.6 Copying for preservation

A library may copy a manuscript or other original version – such as a painting, first copy of a film or first copy of a sound recording – for preservation.

If the library is a "key cultural institution", it can also make three preservation copies of the following:

- a manuscript;
- an original artwork, provided a photographic reproduction is not commercially available;
- a published work, provided a copy of it is not commercially available;
- a particular edition of a work, provided the authorised officer of the library or archives is satisfied that it is appropriate that a preservation copy be made of that edition;
- an original sound recording, an unpublished sound recording, an original film and an unpublished film; and
- a published sound recording or film, provided a copy of it is not commercially available.

[There is lack of clarity regarding the equivalent provision for digital audiovisual material as mentioned above]

4.1.6.7 Copying to replace lost, stolen or damaged items

A library can make a replacement copy of an item in the collection which has been lost, stolen or damaged if a replacement copy is not available for purchase.

A library is now allowed to make a replacement copy of a particular edition of a work which has been damaged, lost or stolen, even though another edition of the work is available for purchase, provided an authorised officer makes a declaration stating why a replacement copy should be made from the particular edition.

4.1.7 Fair use

Regarding legislative protection of digital information and **fair dealing** in Australia and the US, Masango (2005:131) quotes Lahore (1996):

In order to protect corporate rights holders' digital content, some nations have enacted new legislative acts. The United States has promulgated the Digital Millennium Copyright Act (DMCA) of 1998 and the Australians the Copyright Amendment (Digital Agenda) Act of 2000. Although these nations have promulgated these acts, these acts do not contain new clauses that will enable users of digital information to fairly use the information without being accused of infringement. These acts have simply adopted the contents of the print **fair dealing** exemption into the digital environment with circumvention clauses that make it a crime for any user who wants

> to copy digital information. In the United States, the Digital Millennium Copyright Act (DMCA) 1998 that was promulgated to govern digital works incorporated the fair dealing exemption in section 1201(1)(c) (The Digital Millennium Copyright Act 1998). The Australian Copyright Amendment Act (Digital Agenda) Act 2000 **expressly stipulates that the fair dealing that exists in the print environment should be applied in the digital realm.**

Furthermore, Masango (2005:133) states that "in Australia, although the Copyright Act 1968 sets out an inclusive list in section 40(2) of matters to which regard is to be had in determining fair dealing, there is insufficient guidance as to what in a specific instance will amount to fair dealing by way of reproduction. The Act does not define what an exclusive right is or what would constitute reproduction. The Act merely uses exclusive right in the sense of a right belonging to one person or entity, or class of persons or entities" (Sterling & Hart 1981 in Masango 2005).

Thus, as is the case in South Africa, the UK and the US, fair dealing in the digital environment is a complex and problematic issue. Although Australia does stipulate that the same fair dealing that exists in the print environment should be applied in the digital environment (which can be problematic as discussed above in Chapters 2 and 3), Australia lacks guidance concerning clarity on exclusive rights and reproduction.

It can be concluded that many of the Australian copyright principles which apply to sound recordings such as ownership, additional copyrights contained sound recordings, rights of copyright owners and acknowledgements are fairly straightforward and follow similar patterns to those of other countries. As mentioned above it is noteworthy that the duration of copyright for a sound recording, as well as compositions in musical works, is 70 years in Australia which differs to that of South Africa which is 50 years for both the sound recordings and musical compositions.

There are a number of guidelines available in Australia to assist the librarian concerning library exceptions to copyright in the digital age and fair dealing.

4.2 THE UNITED KINGDOM (UK)

Introduction

Copyright in the UK is governed by the Copyright Designs and Patents Act (CDPA) of 1988.

The UK copyright aspects covered in this section include similar copyright issues as mentioned under Australia which are applicable to the UK such as duration, the rights of copyright owners, copyright infringement, as well as a special emphasis on remastering of old analogue sound recordings and the public domain, including pertinent examples of possible copyright infringements.

Note: The discussion of the UK includes the European Union as the UK and the European Union Intellectual property legislation has largely been harmonized.

4.2.1 British Copyright Acts

Kent [2008] gives some background on the copyright history of the UK:

[After the Copyright Acts of 1911 and 1956, on the] 1st August 1989, new copyright legislation came into force – the Copyright Designs and Patents Act (CDPA), which supersedes the 1956 Act. The purpose of the Act (and its subsequent amendments) is to harmonise copyright law in the UK with that of her European Union (EU) partners, as well as to comply with certain international treaty obligations. Under the current legislation, the duration of the sound recording copyright term remains unchanged (50 years), but is now to endure from the end of the year in which a recording is ***made***, or if published within the original term, the end of the year in which it is ***published*** (whichever is the later). If, during the original term, the recording is not published but is nevertheless ***made available*** to the public by being played in public or communicated to the public, the term of copyright expires 50 years from the end of the calendar year in which it is first made available.

Importantly, the **CDPA** also confirms that the term of copyright in any recording made ***before*** 1st June 1957***, whether published or not***, is to endure from the end of the year in which the recording was ***made***.

The above quote offers clarity on the copyright terms for **sound recordings** in the UK.

4.2.2 Duration of copyright

Release the music ([n.d.]) (an organization which campaigns against the fact that the music industry is lobbying to change copyright in sound recordings from 50 years to 95 years or longer!) states that currently "for literary, dramatic, musical or artistic works, copyright remains in effects for 70 years from the end of the calendar year in which the last remaining author of the work dies."

"For sound recordings, the term is fifty years from the end of the calendar year in which the work was first published" (Release the music n.d.). However, according to the University of Cambridge (2005), if during that period the recording is published, copyright expires 50 years from the end of the calendar year in which it is first published. If the recording is not published but is otherwise communicated to the public, the copyright expires 50 years from the end of the copyright year in which it is first so made available.

The MCPS-PRS Alliance [n.d.] adds concerning music copyright that "if the music originates from outside the European Economic Area (EEA), the copyright lasts for as long as the music is protected by copyright in its country of origin, provided that the length of time does not exceed 70 years."

Thus, as mentioned above, the duration for sound recordings in the UK is the same as that for South Africa that is, 50 years from the end of the calendar year in which the recording was first made. However, the term in Australia and the US is 70 years and the UK is wanting to extend its term which is causing controversy in the music industry, especially as it impacts on developing countries and libraries and the 'public good' as discussed in Chapter 2.

4.2.3 When does music copyright begin?

As is the case in the previous countries mentioned, "in music, copyright begins automatically once a piece of music is created, and documented or recorded (e.g. on video, tape or CD) or simply writing down the notation of a score" (The MCPS-PRS Alliance [n.d.]).

4.2.4 Copyright in sound recordings

Similar to the South African, Australian and US situations, it is again emphasized that "sound recordings have an individual copyright that is separate from the copyright of the composition. Even if the composition is in the public domain, a specific sound recording of it may not be. Therefore, the two types of copyright that apply when talking about music are:

1. The copyright that applies to the composition, musical score and lyrics of a musical work. This is signified by the traditional 'c in a circle' symbol and remains in effect for 70 years after the death of the last remaining author
2. The copyright that applies to the sound recording itself which is signified by the 'P in a circle' symbol and remains in effect for 50 years from the death of the last remaining author or from when the work was made available to the public, by authorized release, performance, broadcast, etc." (Release the music [n.d.]).

In explaining what copyright exists in music in the United Kingdom (UK), the UK Copyright Service [n.d.] concurs that there are mainly two types of copyright to be considered in music copyright and adds the following: "The traditional 'C in a circle' copyright applies to the composition, musical score, lyrics, as well as any artwork or cover designs, as all of these are individually subject to copyright in their own rights. The second type of copyright applies to the sound recording itself, and is signified by the 'P in a circle'". Both Release the music (n.d.) and The UK Copyright Service [n.d.] give the example that if one wants to include a section of Tchaikovsky's *1812 Overture* into one's own musical composition, it would be legal for one to record their own version of the *1812 Overture* because Tchaikovsky has been dead for much longer than 70 years, and his compositions are now in the public domain. However, it would not be legal to sample somebody else's recording of the *1812 Overture* that had been released in the last 50 years. One would not be in breach of Tchaikovsky's copyright as the author of the composition but one would be in breach of the copyright of the owner of the recording one sampled. Provided one performed and recorded the work oneself, no infringement would have occurred." (It is noted that the actual copyright duration varies according to national laws).

The UK Copyright Service [n.d.] continues that in the UK

> one would be justifiably annoyed if someone else simply copied your recording and started selling it themselves [and] this is where the copyright in the sound recording comes into play. Copyright law recognizes the

problematic nature of this situation which is unique to sound recordings, and gives sound recordings distinct protection in their own right that is separate from that in the underlying work. The copyright in the sound recording will run for 50 years from the year of recording, or 50 years from date of release if released in that time.

4.2.5 Copyright in works reproduced

Kent [2008] warns that:

> Any musical or literary work ***reproduced*** in a sound recording may be subject to separate copyright protection, irrespective of the copyright status of the actual recording. The right of a composer or author to control the making of any recording of a musical or literary work is known as the ***mechanical right***, and a licence from the relevant rights owner (usually the publisher) in respect of a copyright work is mandatory before any re-issued recording is published. A royalty may be due and payable on each copy manufactured and sold. In the EU territory, the term of copyright in a musical or literary work, *whether published or not*, lasts for the lifetime of the composer/author and expires after a period of 70 years from the end of the calendar year in which the composer/author dies. The work then passes into the public domain. Even where a musical (or literary) work can be shown to be in the public domain in one country, it does not necessarily follow that it is in the public domain universally (for example, there are many well-known works in the U.S. public domain which are still protected in the UK and other countries).

We are again reminded that there exist several copyrights in a sound recording. As mentioned above details of copyright law vary from nation to nation and this has to be taken into consideration concerning public domain works, as the following UK examples highlight.

4.2.6 Sound recordings and the public domain

The following extract and examples quoted verbatim from Kent [2008] describe the public domain situation in the UK concerning sound recordings and cites useful and explicit examples pertaining to this study:

> "It is fair to say that only those sound recordings ***first published*** in the UK before 31st December 1957 can safely be considered to be in the UK public domain. That is, the recording copyright term (50 years from the end of the year of actual ***making***, or publication in the case of recordings released between 1st June and 31st December 1957) has expired, and any corresponding Performers'/Recording Rights no longer subsist. A recording made

before that date ***but not published until later*** may still be subject to these rights, despite the recording being in the public domain.

Example A: *Artist X makes a recording with Company Y in England in 1954, which is published that same year. As the recorded performance was given in the UK it qualifies for protection (regardless of the nationality of X), but since more than 50 years have now elapsed from the giving of the performance by X and the making of the recording by Y, both the performance and the recording are now in the public domain in the UK.*

Example B: *The 1954 recording by X is not published by Y until 1960. Although the recording is now in the public domain, X will have continuing rights in the performance (and Y will have Recording Rights in respect of that performance) until 31st December 2010.*

Unpublished recordings such as alternative masters, studio out-takes, or those made for private or demonstration purposes are other examples of works that might well be in the public domain, but may nonetheless be subject to Performers'/Recording Rights.

Even **foreign-source recordings** may find themselves in the public domain in the UK. For example, up until the early 1950s, a joint licensing arrangement existed between RCA Victor in the USA and His Master's Voice (HMV) in the UK, whereby many of their respective recordings were published contemporaneously on the other's label. Today many an original RCA Victor recording is in the public domain in the UK but still protected in its home country.

Some foreign sound recordings made or first published prior to 31st December 1957 but which were never released in the UK may also be in the UK public domain. Under the CDPA such recordings would have enjoyed reciprocal protection, and the duration of copyright in works afforded such protection cannot exceed the period laid down in the Act (*i.e.* 50 years in the case of sound recordings).

In July 2008, the EU Commission adopted a proposal to extend the copyright term in respect of sound recordings. It is understood that the 50 year term will be extended by 45 years, so

that recordings will then be protected for 95 years. However, the new legislation will not be retroactive and will apply only to those recordings still in copyright on the date of commencement of any national legislation. The term extension will also affect the rights of performers."

The UK Copyright Service [n.d.] reminds us of the crucially important fact that because sound recordings have separate individual copyrights they do not necessarily automatically fall into the public domain after 50 years:

Sound recordings will have an individual copyright separate to the underlying composition. If the underlying composition is in the public domain, it does not follow that a sound recording is. You cannot reproduce a more recent sound recording of a public domain work, though you may create your own sound recording from the public domain composition. A notable exception is Peter Pan. The copyright for J.M. Barrie's work Peter Pan, was due to expire in 1987 in the UK, but an amendment to the 1988 Copyright Designs and Patents Act (instigated by Lord Callaghan) was passed to allow the copyright to run indefinitely in the U.K. Any royalties are to be paid to the trustees of the Hospital for Sick Children, Great Ormond Street, London for as long as the hospital exists.

4.2.7 Lobbying to extend copyright duration in the UK

As noted above, "it is the duration of copyright on sound recordings that the music industry is lobbying to change from 50 years to 95 years (or longer), and it is this issue that is the focus of the *Release the music campaign* (Release the music [n.d.]) who strongly oppose this extension.

It is interesting to note that in contrast to the UK in the US there is lobbying to shorten the duration of copyright, especially as put forward by the preservationists (see 4.3.2.11 and Appendix Ci).

The International Herald Tribune (2007) also mentions the urge to extend the duration of copyright for U.K. sound recordings. It mentions that

> a report from a parliamentary committee stated that "British copyright laws on sound recordings must be extended beyond 50 years to prevent veteran musicians like Cliff Richard and Paul McCartney from losing royalties in later life." "The issues of copyright protection has become a hot topic in Britain as early hits from aging musicians approach the cut-off point. Under current rules, performers can earn royalties for 50 years from the end of the year when the sound recording was made. In comparison, novelists, playwrights and composers enjoy copyright protection for their life +70 years afterwards. If the rules do not change, Richard's

first hit *Move it!* from 1958 would lose protection in 2009, while early tracks from the Beatles like *Love Me Do* would also soon be out of date. The copyright protection for performers in the U.S. is 95 years from release. In Australia it is 70 years.

4.2.8 Rights of copyright owners

If you own the copyright you possess the sole authority to:

1. Copy the music
2. Issue, lend or rent copies to the public
3. Perform, show or play the music in public
4. Communicate the music to the public (i.e. broadcasting it via TV, radio, Internet etc. (The MCPS-PRS Alliance [n.d.].

4.2.9 Recording rights

It is important to note that, in the UK, in addition to the various copyrights as outlined in 4.2.4, there are also performers' rights and recording rights which are independent of the copyrights in the sound recording.

Kent [2008] states that:

> Under the CDPA anyone having an exclusive recording contract with a performer in respect of a performance is now granted **Recording Rights** to prevent anyone else, without proper consent, from making a recording of that performance or causing an illicit recording to be played in public, broadcast, distributed or sold. Qualification for Recording Rights is the same as that for Performers' Rights *(see above)*, but can also include a corporate body which is registered in, or has substantial business interests in, a qualifying country. Recording Rights in respect of a performance endure until the expiration of 50 years from the end of the year in which the performance ***takes place***, or if within that period a ***recording*** of the performance takes place, the rights continue to subsist from the end of the year in which that recording is ***released***. Performers' Rights and Recording Rights are completely independent of, and are in addition to, any copyright in the underlying sound recording.

4.2.9.1 Moral rights

According to UK Music (2008) 'moral' rights are an additional form of protection which protect the personality of the author or creator, as opposed to his economic interest right. An author or creator cannot assign or transfer his moral rights during his lifetime but an author can waive his right in a written instrument. The 3 main moral rights are:

- **The right to be identified as the owner** of the right whenever a work is published, performed or communicated to the public ('the paternity right'). The author must 'assert' this right in writing for example by including a suitable clause in each publishing contract
- **The right to object to a 'derogatory' treatment of your work** ('the integrity right'). Treatment is derogatory if it distorts or mutilates a work or is otherwise prejudicial to the honour or reputation of the author. The author is the one who generally decides whether or not the use of his work is 'derogatory'
- **The right not to have a work falsely attributed to you.** The integrity and paternity rights last as long as the copyright in the work. The right not to have a work falsely attributed to him expires 20 years after that person's death. If the author dies, the rights pass to whoever is elected in the author's will or to the person receiving the copyright.

Moral rights exist in virtually every country, but can vary in scope from one country to another (e.g. in France, moral rights last forever) as they are not harmonised at EU level (UK Music 2008).

4.2.10 Copyright infringement in the UK

UK music (2008) states that

> Infringement occurs when someone misappropriates the whole work or a substantial or significant part of it without permission of the copyright owner, even if the infringer is unaware that he is infringing copyright. There is no specific rule about this. Sometimes just using a very small part of a work (e.g. a few music notes such as the first four notes of Beethoven's Fifth Symphony) could amount to infringement if it forms the most essential part of the original work. If a few notes immediately bring to mind the original song, there will definitely be infringement of copyright if that part of the work was used without the copyright owner's permission.

Infringement will thus incur when

- the work is copied
- copies of the work are issued to the public
- the work is performed, shown or played in public
- the work is broadcast or included in a cable programme service
- an adaptation is made of the work or any of the above in relation to such an adaptation (UK Music 2008).

4.2.11 Penalties for infringement of copyright

UK Music (2008) explains that

> The copyright owner is entitled to bring civil proceedings for infringement and to seek redress in the same way as if any other property right had been infringed. For example, he may be awarded damages, or may obtain an injunction in order to stop the infringement immediately. Copyright infringement can also trigger criminal liability with a maximum penalty for an offence of ten years imprisonment.

UK law distinguishes between **primary** and **secondary** infringement of copyright: (UK Music 2008)

- To perpetrate, or authorize the perpetration of, any of the acts restricted by copyright without the copyright owner's consent constitutes ***primary infringement***.
- To encourage or assist a primary infringer (e.g. companies who deal with infringing copies, or who facilitate such copying, or facilitate public performance) amounts to ***secondary infringement***. This can be more difficult to prove since liability depends on the secondary infringer knowing or having reason to believe that the activities were wrongful.

4.2.12 Exceptions to copyright and fair use

Fair dealing for libraries does exist in the UK and it is interesting that special emphasis on the fact that a 'balance between the interests of copyright owners and the public interest' is hoped to be attained (as highlighted by the researcher), though from the quote below one can deduce that the fair dealing exemption (similar to the case in South Africa) is rather limiting. Similarly to South Africa, it is noted that the fair dealing will only apply to literary works for research and

private study (which should include musical works such as compositions of songs provided that the author is fully acknowledged) but sound recordings are totally exempt from the fair dealing exemptions, even by libraries and archives for preservation purposes.

UK Music (2008) explains:

> Exceptions to copyright do exist, specifically to establish a **balance between the interests of copyright owners and the public interest**. This means that certain acts normally restricted by copyright are allowed under specific circumstances without the consent of the copyright owner e.g. the use of a copyright protected works by **librarians** or educational establishments, for only transitory recordings by broadcasters and "time shifting" (i.e. copying broadcast transmissions to watch at a more convenient time). The **'fair dealing' exception** e.g. dealings with a work for the purposes of criticism, review and news reporting, is not infringing copyright in the work as long as the work is used in a 'fair' way and it is accompanied by sufficient acknowledgement of the author of the work. Another fair dealing exception is that recognized for research and private study**. However it is limited to literary works (therefore music and recordings are not subject to this exception)**.

For more information on this important issue Wall (1993:xxii) elucidates:

> Research or private study permissions *exclude* sound or video recordings and films. Hence there is **no fair dealing** for that purpose, nor any legal provision for library copying for research or private study because ss38 and 39 of the Act are couched in terms of copying from written or printed matter. But there is some fair dealing, for example for criticism or review... or for public administration purposes. Thus libraries could copy on behalf of an individual under fair dealing, though *not* for research or private study, but should insist on a signed statement from the requester to certify the purpose and its coverage by the Act....Home taping of borrowed recordings is however illegal and to be discouraged wherever noticed. [Regarding **rental right]** this can apply to public rental, and public loan when the lender is a public library in respect of sound recordings, films, video recordings and computer programs in electronic format. Public libraries can proceed with loan or rental if no licensing scheme is available and if rights owners waive the royalty entitlement. At present, public libraries have a free licence for sound recordings, subject to acquisition restrictions, and commercial hire of sound media is very unlikely to become licensed.... Research [concerning electronic copyright licences] is continuing in the USA and in the UK, and one suggestion from the USA was for a partnership between universities and publishers for electrocopying purposes, with automatic recording of records usage and billing. The UK has projects on electrocopying, for example CITED and STILE.

As noted above, it is always debatable as to how much 'a reasonable portion' of material is for reproducing, and this is especially so in musical works. As mentioned under 4.2.10 sound recordings are unique in that a tiny part of the work, as much as the first few notes, can amount

to copyright infringement if it is a recognizable part of an original work. Hannabuss (1998) states that no matter how "precise the guidelines are on how much to copy, ultimately it is a matter of judgement. Substantial part, for instance, under which fair dealing requires users of copyright material not to copy more than a reasonable proportion of material differs depending on the material e.g. prose, poem, introductory music phrases and so forth. For example, Billy Joel's 'Piano Man' can be recognized from the introductory phrase alone, not just the first line."

4.2.13 Music publishers

Music publishers play a vital role in ensuring that composers and songwriters are paid for the use of their music by promoting, licensing, managing and safeguarding the copyright in their work. The relationship between a music publisher and a songwriter/composer is supported by a *publishing contract* setting out the rights and obligations of each to the other. Under these contracts songwriters and composers assign the copyright in their music to the music publisher in return for a commitment to promote, exploit and protect that music. The publisher agrees to pay the songwriter/composer a percentage of any income earned from such exploitation as royalties. (UK Music 2008)

Of importance to music librarians is the fact that, as Hannabuss (1998:186) clearly states, "copies cannot be made of sound recordings, films and videos, even for preservation, although permission can be sought."

This section on the UK has emphasized the importance of understanding and having a thorough knowledge of copyright laws should an archive want to digitally remaster old sound recordings. Copyright principles, especially concerning old analogue sound recordings, such as duration, the numerous independent copyrights contained in a sound recording, and copyright infringement were highlighted. Examples cited regarding sound recordings and the public domain formed an important component of this section.

4.3 THE UNITED STATES OF AMERICA (US)

Introduction

Copyright in the US is governed by the US Copyright Act of 1976.

As noted previously, there is prolific literature on the US copyright situation which is highly complex. The purpose of this section on the US is to highlight the importance of the public domain concerning sound recordings which impacts on other countries and to outline important US Copyright Acts. General copyright principles applicable to the US such as publication, copyright infringement and duration are also discussed.

4.3.1 General discussion

"Copyright in the US is established by the US Constitution and is articulated in title 17 of the US code" (Music Library Association (MLA):2005).

Historically the US responded, like the UK, to the needs of authors and publishers by adopting statutory copyrights. The copyright situation in the US however, is more complex.

"Under the 1976 Copyright Act, which became effective 1 January 1978, a work is automatically protected by copyright when it is created. A work is created when it is "fixed" in a copy or phonorecord for the first time. Neither registration in the copyright office nor publication is required for copyright protection under the present law" (U.S. Copyright Office 2008).

Title 17 of the US code provides for copyright protection of **sound recordings**. Sound recordings are defined by the U.S. Copyright Office (2008) as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work. Common examples include recordings of music, drama, or lectures. Copyright in a sound recording protects the particular series of sounds "fixed" (embodied in a recording) against unauthorized reproduction and revision, unauthorized distribution of phonorecords containing those sounds, and certain unauthorized performances by means of a digital audio transmission" (U.S. Copyright Office 2008).

In terms of publication (Seadle 2001:195) explains that "Publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance, or display of a work does not itself constitute publication. (17 USC 101)" (Seadle 2001:195).

Copyright infringement, in common with the countries above, occurs "when a copyrighted work is reproduced, distributed, performed publically, displayed, or made into a derivative work without the permission of the copyright owner" (Copyright Office 2008).

Concerning US copyright laws, Ezine Articles (2008) states the following facts: (quoted verbatim for clarity)

- Copyright is defined as an exclusive right to publish, sell or otherwise deal with a written matter be it a book containing any kind of material. The Copyright Act of 1976 protects any writing after January 1 1978 for the lifetime of the author plus seventy years. If there are two or more authors of a work then the copyright lasts for 70 years from the death of the last remaining author. Anonymous publications however are different. They last for 95 years from the date of publication or 120 years from the date of writing whichever is shorter
- Any works that pre-existed the January 1 1978 were originally copyrighted for 28 years with a renewal of that term available. The Copyright Act extended the renewal period to 47 years making the total term as 75 years. Public law number 105-298 which was written on October 27 1998 extended the term to 67 years, for a total of 95 years
- The availability of any work in the **public domain** where it is freely accessible to the outside world cannot be copyrighted as it is accessible to anyone. Thus it is freely copyable and distributed by anyone. If a work is protected by a copyright, it is denoted with a small c in a circle or the words copyright is written below it
- The practice of requiring a notice to be published advising people of the copyright is not required by the law as amended on March 1 1989 at the Berne convention. United States along with other countries agreed to follow its guidelines. However works written prior to the date required a written notice or they were considered in the public domain. If a notice is still used after that date it is beneficial to the author as it identifies his or her name, the date of writing and publication, and helps in any judicial matters pertaining to the work
- Copyright Law protects the intellectual property of individuals or a group of individuals, from unscrupulous people who would try and benefit from the hard work and knowledge of others.

In common with Australia and the UK, literary works are protected for 70 years, whereas in South Africa it is 50 years. [However, the treatment of anonymous publications is unique in the US situation]. There is also provision for corporate authorship whereby copyright expires 95 years after the publication date (MLA:2005).

As relates to music, ideas for compositions, styles of performing and new ways to generate sounds, a composition which is in the composer's head and therefore not fixed in a tangible medium, an unrecorded content of a jazz performance, titles of compositions, songs and books are not subject to copyright protection (Music Library Association 2005).

The issues of ownership and copyright duration for sound recordings pre-1972 are problematic and not straightforward in the US and the reader is referred to Appendix A for a detailed account of the varying public domain dates for pre-1972 sound recordings by Robert Clarida (2001). Clarida (2001) states that "sound recordings first fixed before 15 February 1972 – a category that includes the collective recorded genius of the Beatles, Charlie Parker, Hank Williams and (almost) Elvis Presley – are generally not eligible for federal copyright protection but must be protected, if at all, under the disparate laws of the individual states."

Another problematic issue which has arisen is that of rights holders wanting to cling to their rights. As noted above, this is in contradiction to the Information Commons whereby there is a growing movement in favour of lowering the copyright terms.

Masango (2005:128) discusses this issue:

> [that the battle against perpetual copyright] is still being fought today as rights holders keep shifting copyright limits in order to uphold their copyright. In the United States because of Disney's copyright on Mickey Mouse, the owners were not willing to see the Mickey Mouse copyright that was to expire in 2003 enter the public domain, so they lobbied Congress extensively. In 1998, Congress passed the Copyright Term Extension Act (CTEA) extending the length of copyright to the life of the creator plus seventy rather than fifty years ... The implications are that financial corporations are constantly aware of the financial loss involved when copyrighted materials enter the public domain. They keep fighting to maintain it and are succeeding in the print environment as well as in the digital environment.

4.3.2 US Acts which apply to copyright law in the US and subsequently to digital music

Historically, various Acts have been passed: 1790 (copyright protection, which was modelled on the British Statute of Anne, was given an option to renew for a further 14 years to a maximum of 28 years); 1831 (copyright first term was extended to a maximum of 42 years) and in 1909 copyright was extended to 56 years. This was not, however, in alignment with the rest of the world whereby copyright protection had been expanded to the life of the author plus 50 years (Samuels 2000:205-207).

What follows is an overview of more recent sound recording Acts which have an impact on the digital realm. It bears reminding that because sound recordings contain separate copyrights in the musical composition, lyrics, cover design as well as the actual recording, these Acts are all applicable to copyrights in sound recordings.

Prior to the 1971 Sound Recording Act sound recordings in the US were protected either by state statute or by common law (Clarida 2001) (see Appendix A). MLA (2005) states that "there are numerous complicating factors, not the least of which is the fact that most works published prior to the 1976 copyright revision are subject to the formalities imposed by the 1909 Copyright Act."

4.3.2.1 The 1971 Sound Recording Act

"The 1971 Sound Recording Act was the first federal law that extended copyright protection to sound recordings" (Seadle 2001:195). (It must be noted that Congress did not extend statutory protection to recordings created before that date whereby various state laws applied). Seadle (2001:196) continues that "the Act did not address who actually owns the rights to sound recordings and declined to fix authorship among producers, performers and other parties to the creation of a sound recording." [The resulting ambiguity] "in ownership plagues those who try to comply with the law by seeking appropriate permission to use a work [and so] it is not unusual for rights owners themselves not to be sure what (or how many) rights they own." "The Act of 1971 (which did nothing to clarify or alter the situation for pre-1972 recordings) had been written mainly to serve as an anti-piracy measure for commercial recordings on physical media i.e. to prevent phonorecord piracy, and Congress was reluctant to upset the existing commercial balance among affected parties. "Significantly the right of public performance was not included

because it was assured that the aforementioned rights were sufficient to protect sound recordings from piracy" (Leach 2000:204 in Seadle 2001:195).

4.3.2.2 **The 1976 Copyright Act** (effective from 1978)

Authors complained throughout the 20th century that 56 years was too short. Life expectancy was lengthening and so many authors lived long enough to see their own works go into the public domain. Some writers were not 'discovered' by the public until years after they created their works and their copyrights had expired. The Berne Convention required life plus 50 years as a minimum period of protection and as America had fallen behind the rest of the world in the protection it granted its authors, this prevented the US from joining the Berne Convention.

In 1976 the U.S. finally joined the rest of the world**: the life of the author plus 50 years**, and after another 12 years the US joined the Berne Convention.

McGraw (1998) expands on the issue of **rights** under the 1976 Copyright Act: "The rights which may be claimed by the copyright owner of a sound recording are more limited in scope than those which may be claimed in connection with other types of copyrightable works. These rights under the 1976 Copyright Act are as follows:

- To reproduce the copyrighted work in copies or phonorecords (the right to duplicate the sound recording in a fixed form that directly or indirectly recaptures the actual sounds fixed in the recording)
- To prepare derivative works based on the copyrighted work (the right to create a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality)
- To distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease or lending.

The duration of the rights under copyright for sound recordings created after January 1, 1978 is the life of the author and fifty years after the author's death. If the work is made for hire (a sound recording made in the course of a producer's employment by a record company), the rights endure for seventy-five years from the date of publication or one hundred years from the date of creation, whichever is shorter."

Seadle (2001:197) identifies and highlights the following problems regarding the 1976 copyright law: (See Appendix A)

> [This Act] made major changes in the duration and regulation of copyright, especially for unpublished materials [but] the law quite explicitly did not apply to pre-1972 sound recordings. This provision appears to throw all pre-1972 sound recordings into a uniquely old-fashioned situation where no federal copyright regulation applies until all protection ceases in 2067.
>
> The Senate suggested leaving pre-1972 recordings under state or common law. The House recognized that this could lead to perpetual protection, which the constitution does not allow, and set an arbitrary date 75 years in the future (later changed to 95 years) when all protection would cease.
>
> This provision raises far more questions about pre-1972 recordings than that it solves. Chief among these are:
>
> - Which state laws apply, what are they, and how much do they really protect recordings? By now state laws have been revised many times since 1972. Some may even have been deleted on the theory that federal copyright law had taken over. Merely finding out what protections exist could become a significant research task.
> - To what extent might Federal copyright exemptions such as fair use (17 USC 107) apply? Presumably the Federal statute embodying fair use would not, but the concept of fair use existed also in pre-1978 case law.
> - To what extent, if any, does the question of publication apply? For example, is a live broadcast more an unpublished work than a sound recording? This matters because unpublished works can fall into the public domain as early as 2003, well ahead of the 2067 date in 17 USC 301.
> - How much does any of this really apply to non-commercial spoken word material that was never sold to the general public on conventional recording media? The intent of the 1971 law seems focused clearly on record sales. Would the courts really apply it, for example, to a chance recording of a speech by President Woodrow Wilson published before 1923?

Seadle (2001) concludes that one cannot assume that pre-1923 US sound recordings fall into the public domain or that recordings made by "government officials on government business had no copyright protection" (Seadle 2001:198). Seadle (2001:197) states that "as a librarian I had also applied the 17 USC 108 provision allowing certain kinds of libraries to keep and hold certain kinds of news broadcasts to pre-1972 news shows as well. That may be valid, or it may be undermined by the 17 USC 301(c)."

Seadle (2001:197) is concerned that

> The legal situation of pre-1972 recordings seems only to grow less clear the more it is examined. This is partly because no case law exists for many of the kind of unique non-commercial recordings that most interest libraries and archives. That could be good news for those who provide Web access to older materials based on a risk-assessment model, since it suggests little or no litigation. Those who wish simply to follow the law can be left having to make very conservative interpretations.

Because, as mentioned earlier, Congress did not extend statutory protection to recordings before 1972, there have been several disputes between recording companies. A well-known dispute case was Capitol Records vs Naxos of America whereby Capitol records owned the rights to several classical recordings made in the 1930's which were reformatted and remastered onto compact discs by Naxos, without permission from Capitol Records to use these old recordings. The contentious issue was whether Capitol could maintain a copyright infringement against Naxos premised on the common law of New York. For details of this interesting case concerning the copyright issues involved in the remastering of old records the reader is referred to <http://www.courts.state.ny.us/reporter/3dseries/2005/2005_02570.htm>

4.3.2.3 The First Sale of Doctrine of the 1976 US Copyright Act

This Act allows someone who purchases a recording to then sell or otherwise dispose of that recording. However, a person who sells or gives away a recording may not keep, sell or give away any copies. In other words, if only one copy of a recording was purchased, then only one person should possess it and any copies made from it (Fries and Fries 2000).

In other words, "the copyright owner effectively 'exhausts' its rights upon the 'first sale' of a particular copy of a work." Congress passed an amendment in 1984 to make an exception to the first sale of doctrine so that it would not apply to sound recordings. Record companies retained the exclusive right to rent their works and could prevent purchasers of their records from commercially renting out their sound recordings (records, tapes or CDs). This forced the closure of audio rental stores (Samuels 2000:48).

It must be noted that many websites offer free downloads of promotional music authorized by the copyright holders. But just because an artist offers free downloads of a song, it does not

necessarily mean that the music is in the public domain. Music is only in the public domain if the copyright has expired, or if the copyright holder has explicitly declared the music to be in the public domain (Fries and Fries 2000:44).

4.3.2.4 Audio Home Recording Act (digitization) 1992

With the dawning of the new digitized age picture and sound reproduction was almost perfected and the new digital era was truly born. In response to this new technological advance, copyright had to adapt and so the Audio Home Recording Act allows consumers to record music for private, non commercial use, but not for commercial gain which would require permission from the owner (Fries and Fries 2000).

Digitization

Samuels (2000:49) states that "the second major response to the digitizing of music was the **Audio Home Recording Act of 1992."** Although inexpensive and easy-to-use cassette tape recorders had been around for a long time, and although home taping was infringing copyright it was known that the sound quality was never as good as the original. However, everything changed with the introduction of the digital audio tape recorder. "What it records is not the sound wave, but a bunch of ones and zeroes, ons and offs, that can be used to digitally reproduce the original recording exactly. It perfectly captures the original recording because it records, digit for digit, the same sequence of electronic bits, into the second and third generations and forever. "The tenth copy of a copy will sound just as good as the original" (Samuels 2000:49). Record companies became extremely worried and threatened to bar the sale of the digital audio tape recorder which resulted in copyright having to adapt and so Congress introduced the 1992 Home Recording Amendment, with its many complications and technical regulations.

Fries and Fries (2000:44) state that

> the Audio Home recording Act represents a historic compromise between the consumer, electronics and recording industries. As part of this compromise, digital audio recording systems for consumers must include a device that prevents multiple-generation copies. In exchange for this protection, U.S. manufacturers and importers must pay royalties of $1 to $8 per digital recording device. Two-thirds of these royalties go to the

Sound Recording Fund, which allocates small percentages for nonfeatured artists and back-up musicians. The other third goes to the Musical Works Fund and is split 50/50 between songwriters and music publishers."

4.3.2.5 Fixation and Trafficking in Sound Recordings and Music Videos Act of 1994

In December 1994, as part of its treaty obligations under the World Trade Organization (WTO), Congress added a new section granting performers of live musical performances the exclusive rights to record their performances, or to transmit or distribute unauthorized recordings. Prior to this time, federal copyright existed only in works that were already "fixed in a tangible medium of expression (Samuels 2000:170). (The rights granted to artistic works should be the same as those granted to other works and subject matter.)

4.3.2.6 Digital Performance Rights in Sound Recording Act of 1995

This Act "provides copyright owners of sound recordings the exclusive right (with some limitations) to perform the recording publicly by means of a digital audio transmission [which is] is a departure from previous copyright laws, in which the owner of the musical work had exclusive public performance rights" (Fries and Fries 2000:57).

4.3.2.7 The No Electronic Theft Act 1997

This act was an amendment to the U.S. Copyright law (title 17 of the U.S. Code). The NET Act "redefines the term 'financial gain' to include the receipt of anything of value, including the receipt of other copyrighted works. In other words, the copyrighted songs traded during swap meets have commercial value. Students obtaining free copies of these copyrighted works are realizing a financial gain, and therefore are in violation of the NET Act." The NET Act also sets penalties for willfully infringing a copyright:

- For purposes of commercial advantage or private financial gain; or
- By reproducing or distributing, including by electronic means, during any 180-day period, one or more copies of one or more copyrighted works with a total retail value of more than $1000 (Fries and Fries 2000:49).

4.3.2.8 Digital Millennium Copyright Act of 1998

The Digital Millennium Copyright Act states that "without permission from a song's owner, it is illegal to make copyrighted music available online for unlimited distribution. This law also puts specific limitations on the length of public broadcasts, the types of song and artist announcements and the frequency and sequence of songs played" (Fries and Fries 2000:57).

4.3.2.9 Technological Protection Measures 1998

The Digital Millennium Copyright Act granted a new type of protection against the unauthorized circumvention of technological protection measures. Under that Act, owners of copyright in digital works may protect them by encoding the works to prevent unauthorized access or copying. If owners so encode their works, users are legally prohibited from circumventing such protection schemes. These measures are most complicated and have many exceptions and special limitations.

4.3.2.10 Copyright Management Information 1998

The Digital Millennium Copyright Act also added a new type of protection for copyright management information whereby owners of copyright in digital works may put their works in electronic "envelopes", or electronically embed in their works information that identifies the author and certain other copyright information relating to the work. If an owner does so, then it is now illegal for a user to knowingly alter or remove such copyright management information from copies of the works (Samuels 2000:170).

Note: The US joined the Berne Convention in 1989. "The Uruguay Round Agreements Act of 1994 restored copyright protection in the US to certain foreign works that had been protected in the source country (e.g. the former Soviet Union) but not here" (Davidson 2000).

4.3.2.11 The Sonny Bono Copyright Term Extension Act of 1998

This Act extended the copyright term to the **life of the author plus 70 years.**

Concerning **public domain** and the U.S. law, Crews (2001:3) in McConnachie (2008) mentions that "the U.S. Copyright Act of October 1976 states that [copyright] duration lasts for 70 years for works created after 1978, but works that were registered before 1978 remain under copyright protection for 95 years as a result of the Sonny Bono Copyright Term Extension Act, which was signed into law in 1998 [and] because of other amendments, this means that works published in the States in 1922 or earlier are in the public domain but that works published after that will only enter the public domain in 2019 ... The ramification for archives that are located in the United States of America is that the time frame for using their holdings to generate income is much greater than in South Africa, where all musical tracks that came into copyright through publication in 1957 fall into the public domain in 2007, 50 years having elapsed" (McConnachie 2008).

Samuels (2000:206-207) states that there are many other countries, especially in Europe, which have extended their copyright to life of the author plus 70 years. For foreign authors, "they conditioned the extension upon reciprocity" meaning that the rights of foreign authors would be protected only if the foreign authors' own countries also extended protection to life of the author plus 70. This meant that American authors could not participate in the extension of copyright in these countries. As a copyright exporting country, the U.S. would gain by the reciprocal extension of copyright term. There was considerable opposition to the term extension because the U.S. Constitution provides that Congress may grant copyright protection 'for limited times'. Even though 70 years is still a limited time (though in reality this could exceed a century) many thought that the extension violated the spirit of the 'limited times' provision and it was considered to be greed on the part of the heirs. It is interesting to note that the present-day situation in Britain is the opposite whereby copyright extensions are currently being lobbied for. (see 4.2.7). The Sonny Bono Copyright Extension Act, whereby the above 20 year extension was introduced, ultimately prevailed, but at a price for copyright holders.

Samuels (2000:207) states that "a coalition of music licensees convinced Congress to condition the term extension upon passage of the fairness in Music Licensing Act, also of 1998" with the result that "while all copyrights were extended for an additional 20 years, the value of the music copyrights was decreased by limitations imposed upon the music licensing organizations."

4.3.2.12 WIPO

U.S. laws are in compliance with the WIPO treaties, except for a provision in the Digital Millenium Copyright Act that makes it illegal to create or distribute software designed to defeat copy protection schemes. Once this provision is strengthened, U.S. laws will be in compliance with the intent of those treaties (Fries and Fries 2000:57).

The above section covered the important US acts concerning copyright in the new digital era and highlighted the fact that copyright and sound recordings in the digital era, especially regarding copyright infringements when remastering old analogue sound recordings, and public domain issues, remain controversial. The complex issue of pre-1972 sound recordings in the US was also addressed.

4.3.3 Copyright in Sound Recordings

"Generally, copyright protection in the US extends to two elements in a sound recording:

1. The contribution of the performer(s) whose performance is captured and
2. The contribution of the person or persons responsible for capturing and processing the sounds to make the final recording.

It should be noted that "a sound recording is not the same as a phonorecord. A phonorecord is the physical object in which works of authorship are embodied. Phonorecord includes cassette tapes, CDs, L.P's, vinyl discs, as well as other formats" (U.S. Copyright Office 2008). As stressed above and again below, several copyrights exist in a sound recording and this also applies to the US.

Schornstein (2006) states that "musicians who produce their own compact discs, tapes and/or vinyl albums also should obtain copyright registration in the actual sound recording i.e., the performance contained on the compact disc, tape and/or vinyl album itself, as compared to the copyright in the musical composition. These are distinct property rights which need to be protected."

McRobert (2001) highlights Section 106 of the U.S. Act which provides that owners of copyright enjoy certain exclusive rights, including the right:

- To reproduce the copyrighted work in copies or phonorecords;
- To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- In the case of literary and musical works, to perform the copyrighted work publicly;
- In the case of literary and musical works, to display the copyrighted work publicly; and
- In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

McRobert continues by saying that notably, the 1976 Act did not provide the owners of copyright in sound recordings with a public performance right. Indeed, no public performance right was introduced until the passing of the *Digital Performance Right in Sound Recordings Act* (US) in 1995. Pursuant to this Act owners of copyright in sound recordings were granted the exclusive right to authorise the digital transmission of their works."

Samuels (2000:44) concurs that the situation in the US is more complex than the UK and elucidates on the complexity of the US copyright laws for **sound recordings** by stating that, besides the rights the composers have in their music, until 1972 there were no federal rights in the sound recordings themselves, i.e. the producers and performers who made recordings had no federal rights in their records, tapes, or CDs. Copyright has now been extended to protect these sound recordings. As early as 1906 record companies had lobbied for the protection of sound recordings, but Congress did not act. However, with the rapid advance in technology this issue has been reintroduced, especially after the introduction of the tape recorder and the subsequent record and tape piracy which reached epidemic proportions in the 1960s and 1970s. Record piracy did not only hurt the record companies, "but it also hurt consumers because if other companies 'pirate' records without paying their fair share, then the original record companies have to charge more to make a profit and so everyone ends up paying higher prices for legitimate records and tapes" (Samuels 2000:45). In 1971 Congress reacted to this change in technology and passed a special amendment making sound recordings separately copyrightable under the federal statute, effective for records made after 15 February 1972 i.e. **two separate copyrights.** Samuels (2000:45) continues by stating that as a result of the amendment, most records, tapes

and CDs since 1972 involve two separate copyrights. The copyright in the music (usually identified on the album by the symbol 'c in a circle' belongs to the composer, and extends to the making, distribution or public performance of the song. The copyright in the sound recording (usually identified on the album by the symbol 'P in a circle', for phonorecord, belongs to the record company (and sometimes partly to the performers), and extends only to the making or distribution of that particular recording of the song. There is usually also a separate copyright in the cover art of the record or CD" (Samuels 2000:44).

It needs to be remembered that, according to McRobert (2001) in his discussion on Australian 'subsistence of copyright in digital music' (see 4.1.1) he states that "under Australian copyright law, a typical pop song would attract a separate copyright in the literary work" that is, in the lyrics, as well as in the musical composition, the actual sound recording and the artwork on the cover, that is a potential total of **four** copyrights.

It is of interest that Creative Commons [n.d.] notes that the United States was not always such a keen advocate for intellectual property rights enforcement as, "until fairly recently, the U.S. considered itself a developing country, ignoring the intellectual property rights of countries outside the union on the grounds that it needed to acquire knowledge and innovations from the outside world in order to catch up to technological developments in Europe. As soon as the US's exports of IP outnumbered its imports, however, the country signed onto major international agreements and has continued to push for enforcement of its IP rights in countries – including developing [countries] - around the world.

US Copyright Regulations may be accessed for further clarification of the U.S. Copyright Act of 1976 at the Cornell Copyright Information Centre (2008).

4.3.4 Doctrine of Fair Use and libraries

The US Copyright Act Section 108 contains the "limitations on exclusive rights: reproduction by the libraries and archives" and was discussed in Chapter 2, Section B: addressing the balance between creators of works and the public good (see also Crews: Appendix E(ii)).

Concerning the highly complex topic of fair use in the US, particularly as pertaining to libraries, the reader is referred to 2.10.7. Regarding the topic of fair use, Fries and Fries (2000:57) state:

> The Doctrine of Fair Use, embodied in Section 107 of the Copyright Act, allows copies to be made without permission of the copyright holder under limited circumstances. Reproduction of copies for purposes such as criticism, news reporting, teaching and research is generally not considered infringement. Factors that must be considered in determining if a situation qualifies as fair use include the nature of the copyrighted work, the purpose and character of the use, the portion used in relation to the work as a whole, and the effect of the use on the market potential of the work.

As mentioned previously under 3.3.2, Masango (2005:132-133) states that "the copyright acts of most nations do not define the fair dealing exemption":

> ... in the United Kingdom and the United States Copyright Act 1976, fair dealing... is not defined (Laddie et al. 2000:754; Nimmer 1985:368 in Masango 2005). [Similarly, in South Africa fair use and libraries is not well defined.]

"The portion used in relation to the work as a whole" has been noted as a debatable topic and the wisest action would be to consult the copyright holder of the work to be reproduced if it is at all possible.

The above general US copyright principles bear a similarity to those of South Africa, Australia and the UK, especially concerning the many copyrights held in a sound recording. However, concerning duration and the public domain in sound recordings) especially as concerns pre-1972 sound recordings) as well as fair use and library exemptions the situation is far more complex (see Appendix A for guide to public domain and US sound recordings).

4.3.5 Summary

This Chapter has discussed the copyright acts and principles as they apply to Australia, the United Kingdom and the United States of America. The copyright acts of these countries have a bearing on our South African situation, especially so far as the public domain is concerned as well as the fact that each country is a signatory to the Berne convention as discussed in Chapter 2 (see Appendix B). Each country is thus governed by national Copyright Acts. "The Berne Convention ... provides flexibility on how nation states implement details of the convention, and

in order to understand specific aspects, it should be read in conjunction with national copyright laws" UK Copyright Service). Under the terms of the Berne Convention, authors are automatically protected internationally but they are also entitled to enjoy additional rights as granted under national laws such as longer copyright duration hence the necessity to outline specific (and at times unique) detail pertaining to copyright laws in each country.

To conclude, the Music Library Association (2005) offers good advice for librarians by warning that "copyright laws are both complex and subtle, and penalties for mistakes can be severe ... it is always advisable to consult qualified legal counsel when establishing policies or otherwise taking actions which might constitute infringement."

CHAPTER 5

RESEARCH METHODOLOGY

Introduction

In this Chapter the research methods used to investigate the knowledge of music librarians concerning digital music copyright laws for sound recordings are described. The reasons for adopting triangulation are provided under 5.4 below.

5.1 Method employed

This study employed methodological triangulation using a number of methods which included the review of relevant literature, a survey of music librarians by means of self-administered questionnaires and informal telephonic interviews.[1]

5.2.1 Survey method

"A survey gathers data at a particular point in time with the intention of describing the nature of existing conditions" (Bertram 2003:13). The nature of the particular research problem of this study (i.e. an investigation into the level of understanding of digital music copyright laws by South African music librarians) advocated that the most appropriate methodological approach to obtain the required information would be to conduct a survey.

The two basic approaches of research that the study adopted are the quantitative and qualitative methodologies of enquiry. In simple terms, the quantitative method involves collecting numerical data or data which can be counted. The qualitative method involves collecting textual or verbal data (Bertram 2003:44-45). Babbie and Mouton (2001:270) state that one of the main

[1] The researcher acknowledges that it could be argued that methodological triangulation was not used given that results from the telephonic interviews were not satisfactory. However, the researcher is of the opinion that an attempt was made at triangulation and this needs to be recorded in the methodology employed.

aims of qualitative research is "in-depth (thick) descriptions and understanding of actions and events." This research hoped to capture a "sense of actions as they occur" (Babbie and Mouton 2001:272) by means of in-depth questionnaires and unstructured telephonic interviews.

5.2.2 The literature search and review

A good literature search is an extremely important component of any research.

Deakin University [n.d.] quotes Bruce (1994) who states that "a literature review of relevant literature is nearly always a standard Chapter of a thesis or dissertation". He continues that "the review forms an important Chapter in a thesis where its purpose is to provide background to and justification for the research undertaken."

Deakin University puts forward the important reasons cited by Bourner (1996) for spending time and effort on a good literature review:

- to identify gaps in the literature
- to avoid reinventing the wheel (at the very least this will save time and it can stop you from making the same mistakes as others)
- to carry on from where others have already reached (reviewing the field allows you to build on the platform of existing knowledge and ideas)
- to identify other people working in the same fields (a researcher network is a valuable resource)
- to increase your breadth of knowledge of your subject area
- to identify seminal works in your area
- to provide the intellectual context for your own work, enabling you to position your project relative to other work
- to identify opposing views
- to put your work into perspective
- to demonstrate that you can access previous work in an area
- to identify information and ideas that may be relevant to your project
- to identify methods that could be relevant to your project.

An exhaustive literature review has been appropriate for this study to establish the digital music copyright laws in South Africa and internationally so as to be able to recommend best practice.

5.3 Research instrument

The instruments that the researcher employed as methods of data collection were the self-administered questionnaire and the telephonic interviews, both of which will be discussed individually.

5.3.1 The questionnaire

In this study, a questionnaire was compiled for the initial survey. "It is absolutely vital to design the questionnaire properly to ensure that the respondents understand what you are asking them" (Bertram 2003:50). The format and content of the questionnaire employed was modelled on a previous questionnaire on copyright by the International Association of Music Libraries (IAML). Two types of questions were used, namely closed or structured questions and open or unstructured questions which rely on content analysis (see Appendix H).

5.3.1.1 The structure of the questionnaire (categories of information)

The questionnaire consisted of four sections. Category A (questions 1 to 2) covered copyright legislation and guidelines; Category B (questions 3 to 5) asked the respondents about general issues involved in copyright; Category C (questions 6 to 11) covered questions on content of copyright rules as they specifically apply to libraries; Category D asked the respondents to respond to general questions regarding digital music copyright issues and contained both closed-ended and open-ended questions.

5.3.1.2 Types of questions

"There are several kinds of question and response modes in questionnaires, including, for example: dichotomous questions; multiple choice questions; rating scales; and open-ended questions" (Cohen, Manion and Morrison 2000:248). Dichotomous questions refer to closed questions. As noted above, both closed and open-ended questions were implemented in the survey.

5.3.1.2.1 Closed questions

Closed questions have both advantages and disadvantages. Disadvantages are that "[Closed questions] do not enable respondents to add any remarks, qualifications and explanations to the categories, and there is a risk that the categories might not be exhaustive and that there might be bias in them" (Oppenheim 1992:115). Closed questions are considered by researchers to have the advantage in that they are usually considered to be quick and easy to complete.

5.3.1.2.2 Open-ended questions

The open-ended questions were designed specifically to ascertain the kind of problems which South African music librarians encounter with regard to digital copyright laws and also gave the librarians an opportunity to put forward the kind of problems which they experience in the application of the copyright laws.

"Open-ended questions allow the respondent to answer a question in whichever way he or she thinks is appropriate" (Bertram 2003:47). Cohen, Manion and Morrison (200:248) state that "the open-ended question is a very attractive device for smaller scale research or for those sections of a questionnaire that invite an honest, personal comment from the respondents … [and] it is the open-ended responses that might contain the 'gems' of information that otherwise might not have been caught in the questionnaire."
Given the nature of this study, that is to assess problems which music librarians may encounter in interpreting copyright law, open-ended questions were considered appropriate.

5.3.2 The interviews

It is important "to keep uppermost in one's mind the fact that the interview is a social, interpersonal encounter, not merely a data collection exercise" (Cohen, Manion and Morrison 2000:279). The researcher initially intended to conduct face-to-face structured purposive interviews whereby the researcher uses an interview schedule, which is a set of questions in a predetermined order. When it became apparent that the respondents had very little knowledge concerning digital music copyright laws it was decided to spare the travelling expenses and conduct informal telephonic interviews with the respondents.

Copyright issues and problems which emerged from the initial questionnaire determined which music librarians and what areas and/or problems/clarification of comments were focused on in the informal telephonic interviews. Thus it was not necessary to compile a formal schedule as each respondent discussed their particular problems/ideas. It was considered important for the researcher to include the verbal contact with the music librarians as "quotes are also a way of ensuring that the voice of the interviewee is heard, and not only the voice of the researcher" (Bertram 2003:39).

5.4 Validity and reliability

Cohen, Manion and Morrison (2007:145-6) warn that there are several areas where invalidity can lurk. Appropriate instrumentation for gathering the type of data required is therefore important. In order to test for validity and reliability, Babbie and Mouton (2001:275) state that "triangulation is generally considered to be one of the best ways to enhance validity and reliability in qualitative research. This study employed methodological triangulation using a number of methods as a means of enhancing validity and reliability. Babbie and Mouton (2001:275) quote Denzin (1989:236) who states that "triangulation, or the use of multiple methods, is a plan of action that will raise sociologists [and other social science researchers] above the personal biases that stem from single methodologies [and that] by combining methods and investigators in the same study, observers can partially overcome the deficiencies that flow from one investigator or method." In this study methodological triangulation was adopted by

collecting data from three different sources, namely the questionnaires, qualitative informal telephonic interviews and the literature. The researcher believed that methodological triangulation was appropriate to answering the key questions. The questions relating to copyright laws draw on the literature. The questions relating to the problems which music librarians encounter and their understanding and interpretation of the digital copyright laws were gleaned from the questionnaire. Furthermore, the informal telephonic interviews which followed were based on some of the issues which emerged.

Furthermore, in terms of validity, Bertram (2003:16) mentions that participants are "more likely to speak honestly" if anonymity is ensured and that their responses could not be "traced directly back to them." The researcher reassured the participants that their questionnaires and informal interviews would remain anonymous at all times unless consent was expressly obtained.

5.5 Population

The aim of the study was to investigate the level of understanding of digital music copyright laws of the music librarians in South Africa. This aim thus determined the population of the study which was to target South African music librarians.

The population of the study constituted professional librarians from eight university music libraries, one philharmonic music library and three South African Broadcasting Corporation (SABC) libraries. In addition two law libraries were included to enrich the study by contributing to the legal perspective.

The music libraries were selected on the understanding that they are the main and most important music libraries in South Africa. Two law libraries were selected by the researcher, the one being of local significance in the province of KwaZulu-Natal and the other being of national significance in South Africa.

Initially 22 questionnaires were sent to the following music and law libraries which were identified in South Africa. These libraries included: Merensky Library, University of Pretoria;

Natal Philharmonic Music Library; Cape Philharmonic Music Library; Eleanor Bonnar Music Library UKZN, Durban; International Library of African Music (ILAM), Rhodes University, Grahamstown; W.H. Bell Music Library, University of Cape Town; Stellenbosch University Music Library; University of the Free State Music Library; University of Venda (Music Project); Postma Library, North West University (ex University of Potchefstroom which included the Information Centre for South African Music (ISAM); Wartenweiler Library, University of Witwatersrand;, University of South Africa (UNISA) which included the Harold and Eda Steafel collection of music instruments; the Nelson Mandela Metropolitan University (ex Port Elizabeth University); and three SABC libraries, namely the SABC Radio Broadcast Facility Library, the SABC Record Library and the SABC Media Libraries. The two law libraries were the Natal Law Society Library and the Department of Justice library.

A total of 18 questionnaires were returned (see 5.7 below).

5.5.1 Known characteristics of the population

The employment, professional status and gender of the respondents were known to the researcher. All the respondents were qualified professional librarians of which seventeen were female and one was a male.

5.6 Pre-testing the questionnaire

To further enhance validity, the questionnaire was pre-tested before it was given to the respondents to fill in by a staff member (who is also a professional librarian) of the Information Studies Programme of the University of KwaZulu Natal as well as by a legal librarian at the Department of Justice to ensure that the questionnaire was clear, well constructed, unambiguous, easily understood and relevant. The questionnaire was then sent to academics in the Information Studies Programme and the South African Music Archive Project for final approval.

5.7 Administering the questionnaire

Because of limited time and financial resources available for this study and in order to be more expedient and cost-effective, electronic mail (e-mails) were used for the completed and checked questionnaire (see Appendix H) and the covering letter of consent (see Appendix I) as e-mails are inexpensive and time efficient. The questionnaires were sent out between the 12th and 16th of March 2009 to all the members of the population.

Initially the researcher telephoned most of the participants as a matter of courtesy so as to establish contact, obtain e-mail addresses and to introduce herself and the topic. Many of the respondents appeared to have found the questionnaire rather daunting and were trying to look up the answers. The researcher reassured them that there was no need for this as the aim of the questionnaire was to ascertain what knowledge the music librarians had concerning copyright issues. The researcher later telephoned the respondents and engaged in informal telephonic interviews in which the respondents were able to discuss relevant issues. The respondents were not too knowledgeable concerning music copyright laws and so it was deemed unnecessary (especially in view of the expense) to travel to interview the respondents personally.

The respondents were asked to return the completed questionnaires as soon as possible via e-mail. Reminders had to be sent in most cases.

Eighteen responses were received, giving a response rate of 81.8 %. However, it must be noted that the 18 responses included responses from participants who had been recommended at institutions, namely an archivist and a subject collection developer for musicology. Their inclusion helped to enrich the study and responses. Unfortunately some music librarians were overseas or not available. The researcher was thus unable to telephonically contact three librarians after several attempts to verify receipt of the e-mails and one librarian was unwilling to partake in the survey.

5.8 Data analysis

Given the relatively small number of respondents (18) the quantitative data was analysed manually by means of a calculator. The number of responses received for each question was divided by the total questionnaires sent out (18) and multiplied by 100 to obtain the percentage.

In terms of analyzing the qualitative data, Bertram (2003:44) states that "qualitative researchers integrate the operation of organizing, analyzing and interpreting data and call the entire process 'data analysis' [in which] three activities take place at the same time: data reduction, data display and drawing conclusions.'' Bertram continues that "data reduction means that the researcher looks for topics that emerge from the data."

In this study, the interviews and secondary data (literature reviews) were analysed using thematic analysis whereby trends and patterns were identified. Bertram states that "qualitative data is usually presented in text through quotes or short case studies, but it can also be presented in diagrams, matrices, tables or graphs." In this study the researcher deemed the presentation of the qualitative data findings by means of text through tables and quotes to be the most appropriate format.

5.9 Evaluation of the methodology

The survey research instrument in the form of a self-administered questionnaire was used to guide the research procedure. Pre-testing the questionnaire before collecting the data minimized the possibility of ambiguity of the data collection instrument.

As outlined in Chapter 1 (1.3), one of the main purposes of the research was to investigate the level of understanding the music librarians had of South African digital music copyright laws and whether or not they were able to interpret this knowledge and put it into practice. The aim was to collect as much information as possible. However, the research was small-scale which limited the amount of data obtained. One of the major limitations of survey methods is the fact that findings in a self-administered questionnaire can be negatively affected by non-responses.

The level of non-responses to questions in this study was often fairly high, as is evidenced in Chapter 6 which outlines the research results.

The response rate for the questionnaires sent out was good. Eighteen of the twenty two questionnaires (81.8%) which were e-mailed (to save time and expense) were returned.
The vast majority of the respondents were Afrikaans speaking (13), that is (72%), but they all coped well with their understanding of the English questionnaire, although their responses were not always grammatically correct.

More than one method of collecting data for the study was used so as to enhance the validity and reliability of the results. However, the researcher had originally intended to conduct formal face to face interviews with the respondents but a problem emerged which resulted in the interviews not being as successful as the researcher had anticipated. It became evident from the self-administered questionnaires that the digital music copyright knowledge of the respondents was too limited to warrant travel expenses. It was therefore decided to conduct informal telephonic interviews. In order not to jeopardize the confidence of the respondents no probing was done. Respondents were free to discuss relevant issues if they so wished during introductory and follow-up telephonic calls. Many of the respondents apologized for their lack of knowledge on digital copyright laws but were enthusiastic and welcomed the study.

5.10 Summary

This Chapter described the population of the study which consisted of music and law librarians and outlined the methods and techniques that were used in order to gather the data to address the research questions. The survey method was the main research method used by the study. The reason as to why particular instruments for data collection were selected, namely the questionnaire and informal interviews, were discussed. Validity and the methods used for data collection and analysis were also discussed in this Chapter. The results of the investigation are presented in the following Chapter entitled ‘research results’.

CHAPTER 6

RESEARCH RESULTS

Introduction

The purpose of the study was to ascertain what problems South African music librarians encounter with regard to digital music copyright laws for sound recordings and to assess their level of interpretation in the practice and implementation of these laws.

This Chapter presents and analyses the data obtained from the study which was conducted by means of a self-administered questionnaire and informal telephonic interviews. Two types of questions were used in the questionnaire, namely closed-ended questions (1-12a) and open ended questions (12b-18) (see Appendix H). The informal telephonic interviews were loosely structured according to information volunteered by the respondents. It was decided not to probe too deeply when it became obvious that the respondents knowledge of music copyright laws was extremely limited, which was a finding in itself.

The data results are presented in this Chapter in quantitative form using descriptive statistics in the form of both text and tables and qualitative form by means of descriptive text and quotes.

6.1 The response rate

A total of twenty two questionnaires were administered and 18 were completed and received, giving a response rate of 81.8%. Considering that Babbie and Mouton (2001:261) state that a response rate of 50% is acceptable for analytical purposes, 60% is considered good and 70% very good, and especially in view of the fact that the questionnaires were administered via e-mail which does not always yield a good return, the researcher was well satisfied with the high response.

6.2 The questionnaire results

The results of the questionnaire are described below according to the sequence of the questionnaire, namely Section A "On copyright legislation and guidelines"; Section B "On general issues involved in copyright"; Section C "On content of copyright rules as applied to libraries"; and Section C "On general questions."

All the percentages have been rounded off to one decimal place.

Section A. On copyright legislation and guidelines

Question 1 **The South African Copyright Act 98 of 1978 governs copyright in South Africa. Are you familiar with the copyright legislation in South Africa concerning sound recordings? [that is, both analogue and digital as mentioned in the questionnaire] If yes, could you please elaborate**

Eleven (61%) of the respondents were familiar with sound recording copyright legislation in South Africa while seven (39%) were not familiar with sound recording copyright legislation in South Africa.

Nine of the respondents who stated that they were familiar with copyright legislation concerning sound recordings in South Africa were able to elaborate with comments such as:

- just the basic guidelines
- information gleaned from a master's thesis
- fair use policy: individual or educational institution may make one copy of a recording they own i.e. have purchased so as to ensure the quality and life of the original
- I have a copy of the Act on hand should I get confronted with any copyright issues regarding sound recordings
- no, not enough. I know more about the US law and sort of follow some of it whilst realizing we do not have the equivalent of fair use

- four respondents stated that it is illegal to copy, 'burn' or reproduce sound recordings for commercial gain, one adding that it is okay to make a copy for your own use if it is not used in any public place. Another added that one cannot make recordings/ copies of recordings without permission from copyright holders (e.g. individual of origin, institution of origin, institution of regulation/ registration such as SAMRO etc.) [and] being involved in the archiving of radio broadcasts and recordings we are dealing with rights issues on a regular basis. We are not experts, but we do have a basic understanding of the law.

Question 2 **To your knowledge has South Africa implemented legislation covering copyright in the digital environment? If yes, which legislation?**

Seventeen (94%) of the respondents did not know whether legislation covering copyright in the digital environment had been passed while one (6%) answered no, South Africa had not implemented digital copyright legislation.

Section B. On general issues involved in copyright

Question 3 **How long is the term of protection for copyrights related to music in South Africa i.e. the composition and the sound recording?**

Ten (56%) of the respondents gave the correct answer while eight (44%) did not know how long copyright exists for a musical composition.

Question 4 **Who owns the copyright in the old analogue sound recordings which preceded digital formats?**

Eight (44%) were unable to answer the question while ten (56%) offered a variety of answers to this question, which included:

- the most common answer (nine) was the original people involved which included the producer/record label or company, recording company, composers or their trusts. Comments such as the following were added: with a percentage of the returns from sales going to the composers or their trusts and the performers
- sometimes the recording company if the artist was paid a one-off payment at the time the recording was made; performers, publisher if rights sold by individual to the publisher otherwise the individual, presumably the recording studios and not the artists themselves; institution of regulation/registration such as SAMRO, institution by whom work is commissioned
- individuals/institutions/bodies indicated in bequests, wills and other documents – if it is specifically stipulated as such.

Question 5 **If copyright is held by a record label, it may be in an analogue format. How is copyright affected if the music is transferred to a digital format?**

Ten of the respondents (56%) were unsure/did not know the answer while eight (44%) offered a variety of answers as follows:

- the same record company owns the copyright
- if [the] publisher transfers to digital, copyright is with the publisher
- it shouldn't be affected simply because the format has changed
- permission is required from [the] recording company that holds [the] record label
- one doesn't know who owns copyright
- depends on who is doing the digital format. New agreements need to be negotiated
- a question: not sure - would the label retain the copyright or would the artist hold it?

Section C. On content of copyright rules as applied to libraries

Question 6 **Does copyright differ between the old sound recordings and the new digital formats? If yes, in what ways does it differ and how does that affect the music librarian?**

Table 1 Difference between copyright in the analogue and digital formats

Responses	*No.*	*%*
Did not know the answer	12	66.7
No, copyright does not differ	5	27.8
Yes, copyright can affect the librarian	1	5.5
Total	*18*	*100*

The respondent who stated 'yes, copyright can affect the librarian' elaborated: "this can affect the music librarian because anyone can make a copy, also in the privacy of your own home."

One respondent, who did not know the answer, stated: "I think you need to indicate what you consider old and what you consider new or only music accessible via a computer database or online as digital, NB generational perceptions."

Question 7 **Are you aware of the copyright rules as they apply to the copying of sound recordings from one medium to another in libraries, especially regarding analogue records to digital format e.g. computer disc format (CD)?**

For example:

(i) Making copies for interlibrary loan

(ii) Copying to replace damaged copies

(iii) Copying of an unpublished sound recording for preservation purposes

(iv) Copying of a published sound recording for preservation purposes

(v) Copying of a published sound recording which is now out of print

(vi) Copying for private use

Table 2 Copyright rules applicable to the copyright of sound recordings

Responses	*No.*	*%*
Non response	1	5.6
No to all the options	9	50
Yes to all the options	6	33.3
Simply commented	2	11.1
Total	*18*	*100*

When the respondents elaborated on their positive answers, there were general comments such as

- I know there are rules for this but [I am] not sure what they are
- get permission from copyright holders (e.g. individual of origin, institution of origin, institution of regulation/registration such as SAMRO etc.)
- as a library we would not make copies for ILL
- not one of the above is legal [as] no copying is allowed without [the] consent of the record company [no matter] from which medium
- I am aware that there is copyright for any recording and we were considering trying to replace damaged copies at one stage and I think we contacted our copyright librarian who is quite clued up on these things.

Only two respondents (11.1%) simply commented on each category separately (and were the closest to answering correctly) as follows:

(i) We do not make copies for ILL. We do not supply any sound recordings on ILL

(ii) We do not copy to replace damaged copies – we try and buy the original as far as possible

(iii) and (iv) As far as I know this is allowed if you have the original in your collection and if you do not make any money from it – in other words – you are not going to sell the copy or [make money] out of any performance that may stem from it

(v) You have to get permission from the copyright holder

(vi) Not more than 10%.

and the second commented:

(i) Not permitted

(ii Not permitted if digital copy is in print

(iii),(iv) and (v) Permission still to be obtained from copyright holder

(vi) Only section of the work, not the core; no percentage attached i.e. does not mean you can copy 10% will depend on the nature of the work

Unfortunately there were no elaborations done by those who answered 'no'.

Question 8 **Does copyright legislation in South Africa cover the lending of sound recordings? If so, please explain the terms of any restrictions.**

Table 3 Copyright legislation pertaining to the lending of sound recordings

Responses	*No.*	*%*
Unsure	14	77.8
Yes	3	16.7
No	1	5.5
Total	*18*	*100*

The three respondents who stated yes, there are copyright restrictions elaborated as follows:

- only if they are going to be used for study purposes
- according to copyright no lending out directly or indirectly is legal. Libraries in this case cannot lend any music except with the consent of the record company
- I would assume the same rules apply.

Question 9 **How have users been affected by copyright in terms of digital sound recordings? For example, users can copy illegally at home.**

Seven of the respondents (38.9%) were unsure/unable to answer while 11 (61.1%) offered comments which included:

- there is the argument that if I own the item I may make a recording for my car, but I am not sure whether this holds any legal standing (this is based on the 'first sale of doctrine law' which applies in the US)
- recordings are more freely available. In some instances one would find that there are limits to downloading music

- although the Act stipulates clearly that no copying may take place, illegal copies/piracy has escalated tremendously. However, we need to remember that this was the case when cassette recordings became popular. It was for this reason that ASAMI added a levy to each cassette sold to try and overcome the problem
- most individuals/library patrons are aware that they should not be copying or burning [discs of] sound recordings which they have borrowed and do not own but, added another respondent, they ignore it
- they've always been able to do that [and another respondent added] they aren't aware and I suspect they copy in private
- performers and recording companies lose all the sales of illegally copied material
- users are not affected, they copy illegally and another added that copying is illegal under all circumstances, except where the record companies have approved
- what do you mean users? Obviously being able to make illegal copies of CDs has had a negative effect on sales and therefore a negative effect on income from royalties due to artists.

Question 10 **If the copyright is held by the musician or a family member, and a digital version is created, does the archive/library have the right to loan this version? If you answered yes or no above, please explain.**

Table 4 The right to loan digital versions

Responses	*No.*	*%*
Non response	1	5.5
Unsure/unable to answer	10	55.6
No	2	11.1
Yes	5	27.8
Total	*18*	*100*

The respondents who answered yes, the library does have the right to loan this version, explained:

- with permission [and the one added] from the musician/ family member
- yes, if you mean the library has purchased the CD. If available online via computer the library cannot copy or pay for access and then make it freely available via the library, it can only with the consent of the musician
- the archive can loan the version if the artist or artist's family have given permission for such use
- will depend on the negotiations between the copyright holder and the maker of the digital copy.

Question 11 **Have music copyright laws affected the librarian's ability to organize and provide long term access to music resources [both the recording and the composition] in South Africa? If you answered yes or no, please elaborate.**

Table 5 Copyright laws and the effect on the loan of music material

Responses	*No.*	*%*
Non responses	2	11.1
Did not know	7	38.9
No	5	27.8
Yes	4	22.2
Total	*18*	*100*

Only one of the respondents who answered 'no' elaborated: "not really. It rather assists the librarian once copyright is understood. For now, if we would move into the 75 year copyright [period] as is the case in the USA and discussed in the EU, we might have issues with re-issuing material etc."

The respondents who answered yes to the question, elaborated with the following points:

- music libraries cannot operate like a book library because of the copyright laws
- if you hire music you also pay for the duration of the music
- yes, greater clarity is needed regarding music copyright laws, and this information has not always been freely available. Thus librarians may have acted cautiously, and, for example, original cassette recordings may have deteriorated
- places restrictions on accessibility, due to timely and often costly administrative processes.

One comment was: "We certainly still have the ability to organize and provide access. What is a thorny issue is our responsibility re what users are doing with the recording. There is a case in the US where the record label has decided that a particular recording would only be available in download format. Such a ruling would influence our ability to provide access."

Section D. General questions

Question 12(a) **How is copyright in sound recordings different from print? (Are copyright laws applying to print adapted and revised for music recordings?)**

Table 6 Copyright in sound recordings versus print

Responses	*No.*	*%*
Non response	1	5.5
Unsure/did not know	12	66.7
Stated that it is different without elaborating	2	11.1
Stated yes, print laws are adapted and elaborated	3	16.7
Total	*18*	*100*

The three respondents who elaborated stated that

- the Act does not really differ that much
- same rules of permission and copyright period apply
- due to lack of specific legislation I would apply the same rules.

No respondents stated that there are separate copyrights for the composition and the actual sound recording.

Question 12(b) **How does this impact on the librarian who is the interface between the library/archive collection and the user?**

Table 7 How different copyright laws (if applicable) can impact on the librarian

Responses	*No.*	*%*
Non response	3	16.7
Unsure/did not know	10	55.6
Responded with comments	5	27.7
Total	*18*	*100*

Comments from the librarians included:

- results in lack of good advice and practice
- very difficult in the digital age
- the librarian has to be conscious of rights all the time and has to understand that the law is there to actually protect the artist/composer/author. But, it is a tedious process to try and get permission when music or works are being reissued for commercial use (e.g. Miriam Makeba and the Skylarks)
- places restrictions on accessibility, due to timely and often costly administrative processes.

One respondent listed the following points:

- Heavily. With printed works there are huge photocopiers with copyright signage and it is possible to stop someone in the process; with digital works control is far more difficult. Although the library is not responsible for the actions of the user, one always feels responsible to do as much as possible to prevent illegal use of material
- It is more difficult to define 'a reasonable' portion of a digital work.
- The technology allows the user to copy with so much ease.

Question 13 **Do you have any experience of, or know of any conflict between libraries and music rights holders in South Africa?**

Table 8 Conflict situations

Responses	*No.*	*%*
Non response	3	16.7
No	12	66.6
Yes	3	16.7
Total	*18*	*100*

The problems which the three respondents cited were:

- [there is] debate over recording of indigenous music, and whether future Rand percentage [is] due to the original artist or their family gets paid e.g. was the original artist paid, how much? or verbal agreement. Did [the] artist know their rights? Who is benefitting from present sales of recordings?
- Hugh Tracey (deceased) and ILAM. Andrew Tracey and ILAM [the reader is referred to McConnachie (2008) who discusses issues relating to ILAM]
- just from my own experience I know that SAMRO does not like the SABC hiring out music scores of arrangements of light music, originally done by composers/arrangers for specific use in the SABC (including broadcasting etc.) I am not sure, but should think

that the arrangers hold the copyright, so we always consult with the arrangers where available, or ask the clients to get permission from the arrangers.

Question 14 **What problems do South Africa librarians encounter with regard to digital copyright laws?**

Table 9 Problems encountered regarding digital copyright laws

Responses	*No.*	*%*
Non responses	3	16.7
Unsure/did not know	10	55.6
Problems cited regarding digital laws	5	27.7
Total	*18*	*100*

The problems which the five respondents cited were as follows:

- [there are] no definite guidelines
- places restrictions on accessibility, due to timely and often costly administrative processes
- I know of no copyright laws that are specific to digital material
- government needs to make known the laws i.e. alert individuals in the music industry and in institutions that have music departments
- lack of direction.

Question 15 **What are the most important problems that you would like to resolve as regards music copyright in South Africa?**

Table 10 Music copyright problems to be resolved

Responses	*No.*	*%*
Non responses	6	33.3
Did not know	1	5.6
Problems to resolve	11	61.6
Total	*18*	*100*

The problems that the 11 respondents wished to see resolved regarding music copyright in South Africa were:

- clear and basic guidelines was a common requirement (three respondents)
  I would like to know more about copyright on printed music, and how it will affect me in future, whether I shall be able to ever make scores available on-line etc.
- the issue of transfer of material to a digital platform and the ethics in terms of [the] owner
- clarity on what is allowed and what no
- in my job I do not deal with copyright issues
- is every orchestral body or entertainment facility bound by the same rules? Is a blanket licence a good or a bad thing?
- no knowledge of the field
- ease of accessibility without unnecessary time-consuming administration specifically for libraries, archives and documentation centres for research/academic study purposes. Things can be put in place to prevent the dissemination of these recordings for commercial purposes
- there is no mechanism I know of to ensure that artists are aware of their rights under copyright law. There should be a public awareness campaign and workshops for artists to teach them about copyright law.

One respondent suggested the following:

- allow copying into e-learning environments
- allow making compilations for listening lists. It will alleviate the workload on short staffed small libraries. It will also alleviate wear on collections which is costly to replace all the time.

Question 16 **When you have a copyright problem, from whom do you obtain expert advice?**

Table 11 Access to expert advice

Responses	*No.*	*%*
Non response	2	11.1
Do not know who to contact	2	11.1
Various sources of guidance	14	77.8
Total	*18*	*100*

Fourteen of the respondents responded with various sources of guidance of which the South African Music Rights Organization was the most common source followed by the Artistic and Literary Rights Organization (DALRO) ; information services librarians; SABC legal advisors and other experts known to the respondent; musicologists; administrative department/intellectual property offices that deal with copyright at university and colleagues.

Question 17 **Copyright currently protects private rather than public interest which tends to restrict librarians in their role of disseminating knowledge. Please comment on this statement.**

Eight (44%) of the respondents did not respond (two stated that they did not know enough to comment) and 10 (56%) of the respondents commented as follows:

- we work with broadcast material, which is often recorded , and it is part of our daily work to deal with copyright issues. I do not have knowledge of the law protecting private rather than public interest. We are able to disseminate regardless. Our frustration currently is with contracts not being available or people not understanding copyright issues
- just like those of the author of a book the creator's rights have to be protected even if libraries feel inhibited by this
- I would agree (two responses)
- important that private interest must be protected
- if the public abuses the rules of copyright, librarians are restricted more as their stock diminishes through stealing or abuse. The private sector does not appreciate why there is copyright
- people will copy anything in order not to have to pay
- once we have proper guidelines we can overcome this problem
- I think there is no problem with dissemination of knowledge. People can get the information they want if they try
- copyright is necessary in order to avoid exploitation. It can still be implemented for ease of accessibility without unnecessary time-consuming administration specifically for libraries, archives and documentation centres (especially in the context of library staff shortages in the country) for research/academic/study purposes. Things can be put in place to prevent the dissemination of these recordings for commercial purposes.

Question 18 **Please add any other information about music copyright which you consider important and relevant and which none of the above questions have given you the opportunity to supply.**

Fifteen (83.3%) of the respondents did not respond (one apologized for not being very informed) while three (16.7%) responded, of which one queried music downloaded as downloadable files from the Internet. One respondent rather conscientiously stated that "if there have been amendments to the copyright law with regard to the digital transfer of information, I would like to see it. I am not aware of any amendments and it would be a serious oversight on my part." The final respondent commented: "I think this is an extremely valuable and much needed project you are about to embark on. Thank you (in advance) and I wish you all the best."

6.3 Interview results

The respondents were again telephoned with regard to the questionnaires and given an open opportunity to discuss copyright and digital music issues should they so wish without any probing by the researcher since the researcher had deduced that the music librarians were not very familiar with digital music copyright laws. All the 18 respondents (100%) had made it clear that their knowledge in this field was very limited. Of interest was the fact that the two legal librarians also had very limited knowledge concerning digital music copyright laws. One respondent stated that she travels regularly to America and is more familiar with American copyright laws than with South African copyright laws. This in itself was a finding and probing was not considered a suitable tactic since it could result in a reluctance on the part of the music librarians to communicate and/or complete the questionnaire because of possible embarrassment. One respondent (5.5%) actually stated that she felt foolish about her limited knowledge in copyright laws and had to be reassured by the researcher that she was not alone in this regard and 13 of the respondents (72.2%) actually apologized concerning their lack of knowledge in this field. All the respondents were, however, extremely co-operative, courteous and supportive of the study and the necessity for digital copyright guidelines for sound recordings.

It was on the above basis that the original idea of conducting structured face-to-face interviews was discarded. All the respondents spoken to (18 or 100%) intimated or clearly stipulated that guidelines on digital music copyright laws were necessary for reference purposes.

6.4 Summary

This Chapter has documented the analysis and presentation of the data obtained from the survey results which were obtained by means of a self-administered questionnaire to ascertain the level of understanding of digital copyright law for sound recordings and highlighted problems encountered by the South African music librarians surveyed. Informal telephonic interviews were conducted which revealed that the music librarians had limited knowledge on digital copyright issues.

CHAPTER 7

DISCUSSION OF THE RESULTS

Introduction

This Chapter discusses the major findings of importance in view of the research problem and the literature review.

The primary goal of the literature review was to investigate two key questions namely: 'Which copyright laws in South Africa have a bearing on the topic and what are the implications of these laws'? and 'What is the situation regarding digital music copyright laws for sound recordings in other countries and what lessons can be learnt which are applicable to the South African situation'?

The primary goal of the survey was to investigate two key questions namely: 'What problems do South African music librarians encounter with regard to digital copyright laws?' and 'Are digital music copyright laws clearly interpreted and put into practice when the material is copied from analogue to digital format? The researcher was unable to identify any similar studies in South Africa relating to these two key questions. Given the specific South African focus of the empirical part of the study, the international literature regarding this was not perused. However, the questionnaire was modelled on an international questionnaire relating to these two key questions (International Association of Music Libraries 2004). The discussion will focus on the above four key questions with reference to relevant points in the literature.

7.1 General copyright principles

As was discussed under the conceptual framework in Chapter one (1.6) the study concerns copyright issues, which are legal in nature and South African copyright laws are governed by the South African Copyright Act 98 of 1978.

The key question regarding copyright laws in other countries and the lessons that can be learnt which are applicable to the South African situation necessitated reference to other relevant international acts and treaties, such as the Berne Convention, the Digital Millenium Copyright Act and the World Intellectual Property Organization (WIPO) as frameworks which could offer guidance towards best international and South African copyright practice. The Berne Convention (to which South Africa is a signatory) is an international agreement which offers copyright protection for literary and artistic works. The treaty standardizes basic copyright protection among over 100 signatory countries. A member country affords the same treatment to an author from another country as it does to authors in its own country. Of concern is the fact that South Africa, according to McConnachie (2008:34), has not updated the Berne Convention list of signatory countries since 1996 which is in contravention of the Berne Convention which "stipulates that member countries are afforded reciprocal rights, which means that when a new country signs the convention it should be protected by South African Copyright Law." McConnachie adds that in 2007 43 new countries had not been protected. McConnachie points out that this is an "issue which affects both local and foreign copyright owners" who will not have copyright protection.

Another principle of concern (mentioned in Chapter two (2.1.4)) regards the interpretation of legal and professional guidelines pertaining to copyright law. The problem with the law is that its restrictions are not always visible and accessible. Music librarians/archivists should be in possession of legal copyright guidelines pertaining to sound recordings. In this study this was a major request by the respondents. The respondents in this study were unfamiliar with basic South African copyright principles which are contained in the South African Copyright Act No 98 of 1978 such as the duration of copyright, the formalities required to obtain copyright and how to determine who owns copyright. These laws are often changed and/or amended and librarians need to keep pace with changes, especially as technology evolves at a rapid pace. A problem identified in the literature is that technology has the ability to be a key factor in enabling copyright infringements in the electronic age where it is so easy to reproduce work by photocopying and scanning. This has resulted in the many acts and statutes being passed so as to protect copyright holders. As Oddie (1999:239) says "copyright management has become a problem for which few countries are prepared" and Hannabuss (1998:190) aptly describes the

situation: “the law is there and should be known. The law keeps changing and we must keep up with it.”

7.2 Copyright in the digital age: addressing the balance between copyright holders and the public good as relates to libraries and archives

Of concern is the concept that copyright laws presently tend to protect private authors rather than the public interest (users) which in turn restricts libraries in their role of disseminating knowledge. Thus one of the rights and exceptions of copyright which need to be balanced in the digital age is the balance between copyright holders and the public good. With reference to the literature (Chapter 2.1 above) we are reminded that Seadle (2001:194) states that “there are times when the U.S. copyright laws seem to stem from a culture that puts little value on providing public access to its own past.” Dietz (2000) in Moss (2005:107) posed the pertinent question: “What’s at stake if we don’t collect, archive, and somehow save these cultural memories?” to which he answers that “the downside is a huge lacuna in our cultural memory, if we don’t try to save some kind of representation of this tremendously fertile and important moment.”

These observations have direct relevance to the importance of preserving our unique South African music heritage in order to enable its use. From the point of view of preservation it is essential that national heritages of recorded sound are not put at risk. Copyright law should not create barriers between copyright holders and users. Copyright should expire at determined dates and fall into the public domain for public access. The argument put forward by The Board of Directors for the Association for Recorded Sound Collections (2005) (see Appendix C(i) is that, although creators need to be rewarded for their works and awarded temporary exclusive rights from the exploitation of those recordings and which encourages them to create, at the same time excessively long monopoly periods hinders public access. The dates for copyright duration should therefore not be excessively long so that living generations can benefit and have access to the resources without the often tedious process of seeking copyright permission from family members as copyright holders are often deceased. The Association is also concerned that, regarding the preservation of sound recordings, the current laws (relating to the US but can apply equally to the South African situation and SAMAP in particular as it is in the process of

preserving our cultural recordings) should be modified, especially concerning the limits to duplication of materials that are already damaged or deteriorating thereby depriving archives of sufficient copies. Dissemination needs to be facilitated so as to foster recorded cultural heritages to insure their survival for perpetuity.

Another concern expressed in the literature is that of 'orphan works', whereby the copyright holder cannot be traced which renders permission to reproduce the work unobtainable. The laws concerning copyright accessibility of orphan works need to be revised.

The rights of copyright holders and fair use for libraries and educational purposes remains a thorny issue in the digital age. As Masango (2005:132-133) says:

> The fair dealing exemption seems unsuitable in the digital realm because when the exemption was being designed it warranted that both the reproduced and original text from where the reproduction was done had to be in a physical format... The incorporation of the same fair dealing exemption that exists in the print environment to the digital environment seems incongruous, as the fair dealing exemption that is applied in the print environment has no clear definition.

Thus "the future of copyright enforcement will likely continue to be a function of technology [and] the technology race between infringers and rights holders will continue to evolve" (Seadle 2008). It is up to the librarians and archivists concerned to keep themselves informed of the law.

7.3 Problems encountered by South African music librarians with regard to digital music copyright laws

Concerning sound recording copyright legislation in South Africa it was evident that the copyright legislation knowledge of the librarians is varied and rather vague. Some librarians are, however, slightly more knowledgeable than others concerning legislation. None of the respondents were aware of any legislation covering South African copyright laws. However one respondent stated that "there is documentation but no legislation. As far as I know DISA's guidelines for this use of their material may give some answers to some questions."

In an informal telephonic interview, one respondent stated that she travels regularly to America and is more familiar with American copyright laws than with South African copyright laws.

Interestingly only one respondent had the correct answer as to how long the protection of copyright lasts for a sound recording and thus was able to distinguish between copyright in a musical composition and that of a sound recording. When asked how copyright in sound recordings is different from print only two respondents (11.1%) stated it is different but were unable to elaborate. Again, the study identified that a high percentage of respondents were unsure of the difference between print and sound recording copyright rules.

Concerning who owns the copyright in the old analogue sound recordings which preceded digital formats, judging from the variety of answers it can be assumed that many librarians were uncertain of the answer and were hazarding guesses. A high percentage, almost half of the respondents, did not know who owns copyright in the old analogue format.

As mentioned earlier the literature states that it is most important for librarians to be able to interpret legal and professional guidelines pertaining to copyright law and to (of necessity) draw on the South African Copyright Act 98 of 1978 as a legal framework. As is discussed above the study revealed that in most instances the music librarians surveyed were ignorant of the law and, as a reminder of what was discussed in the literature review, "ignorance is no defence under the law" (Hannabuss 1998). Librarians need to know, for example, what a 'reasonable portion' for copying constitutes and what users intend doing with copyright material. It is also to their advantage to have an understanding of basic copyright principles such as those pertaining to how long copyright lasts, the formalities (such as licences) which are required for a library to loan out copyright material, especially sound recordings, and to be able to determine who owns the copyright. The librarian needs to keep pace with changes or amendments to these laws, especially in this electronic age where (as was previously highlighted) "technology is changing so rapidly that frequent updates to the law will probably become the norm" (Samuels 2000:54).

7.4 Are digital music copyright laws clearly interpreted and put into practice when the material is copied from analogue to digital format?

One of the aims of the questionnaire was to establish the current practice of the librarians as a benchmark against best practice, that is, the librarians' knowledge and interpretation of digital copyright laws in sound recordings and whether they put them into practice. It is interesting that in some covering letters (and telephonically) respondents apologized for their lack of knowledge and stated that they have tried their best in answering the questionnaire but they are largely uninformed concerning South African digital copyright laws in sound recordings. Only one respondent, in a covering letter, mentioned the importance to display copyright warnings in libraries. After apologizing for being uninformed in a covering letter she stated the following:

> Our rules might have something to do with this! We have copyright notices all over the library and are quite strict. We do not copy for ILL [interlibrary loan] purposes – in fact, do not supply sound recordings at all on ILL. It is policy that we do not supply any copies – printed or sound – even if the work is out of copyright. Only music lecturers can take out sound recordings – all the other clients must use the listening facilities in the library. We have two computers where clients can copy 10% or less of a sound recording for study purposes, but it is password controlled so definitely not a free for all.
>
> We have copied for preservation purposes, but we still have all the originals in the library. We've spoken to an expert before we did the project. I won't start any project which involves copying without consulting the law and the experts.

This quote leaves one to ponder how many music librarians are this cautious?

One respondent, who was very enthusiastic concerning this study, stated that she was thinking of sticking copyright warnings onto all CDs. The copyright notice (see Appendix D) could assist her and any other music librarians who wish to follow this useful idea.

Under half, eight (44%) of the music librarians were aware of the very important fact that changing the format does not change copyright which remains with the original owner. Again, the survey indicates that there is a high percentage of music librarians who are unfamiliar with digital copyright law and therefore unable to put it into practice.

With regard to the transferral of music from analogue to digital format one respondent had strong views, stating:

> I have strong views on this issue, which is not shared by all. In my view nothing should change. It is merely a digital transfer from one platform to another. However, there are institutions who do claim rights due to certain sound restoration elements - in their view they have changed the recording and therefore have become the new owners. From an ethical point of view, I think it is not correct. Analogue recordings could not have done anything to ensure that they still hold the rights.

Librarians need to be aware of the exceptions and fair dealings (especially for educational use) whereby permission is not required from the copyright owner to use particular works. For example, "there are instances where people can legally utilize musical recordings, quotes from literary works or samples from musical tracks without prior permission." "These exceptions are referred to as **fair dealings** in South Africa (Section 12 of the Act) and '**fair use'** in the United States and are documented in Section 107 of the United States Copyright Act of 1976" (McConnachie 2008). McConnachie (2008) further states that "Article 9 (2) of the Berne Convention allows member states to permit the duplication of works in certain cases provided that the reproduction does not prejudice the interests of the owner." McConnachie (2008) adds that "in South Africa no royalty payment is required for the use of a musical work for the purposes of fair dealing which includes (amongst others) research and private study, review, newspaper and magazine articles, broadcast and cinematograph film – as long as the source is properly referenced (Section 12 (1)(a)(b)(ci & c2)".

However, music librarians must take cognizance of the fact that (whether in the US, UK or South Africa) "copies cannot be made of sound recordings, films and videos **even for preservation,** although permission can be sought" (Seadle 2008).

The librarian should also be familiar with the works which are out of copyright and in the **public domain**. The laws which apply to sound recordings in the public domain in the United States are, however, particularly complex and often difficult to comprehend (see literature review and Appendix (B) and McConnachie 2008.

7.5 General observations

One of the key findings highlighted by the survey is that South African music librarians are definitely encountering problems on a number of fronts.

A striking feature of this survey (which was a finding in itself) is that the majority (if not all) of the respondents either stated or implied that they were unaware of where to turn to for guidelines on digital copyright laws on sound recordings for music librarians and they are in dire need of them. Judging from the survey the high percentage of music librarians who are unaware of copyright rules as they apply to the copying of sound recordings from analogue to digital format validates the necessity for guidelines.

In a telephonic interview with Mr Rob Allington (2009) formerly the archive manager of GALLO Records South Africa, he confirmed that there are basically two **main** copyrights in sound recordings, firstly the copyright in the composition which exists for the life of the author plus fifty years from the end of the year in which the author dies; and in the actual sound recording itself copyright exists for fifty years from the end of the year in which the recording was first published or made. Thereafter the composition and recording fall into the public domain.

Secondly, there is no difference between copyright in the analogue and digital formats. If copyright exists in the analogue format, it then certainly continues in the new digital format if the sound is transferred from analogue to digital format. It is a false notion that copyright ceases if the recording is transferred to digital format. The digital format thus does not affect the legal principles and tenets of the South African Copyright Act which includes CDs and downloading.

In a telephonic discussion with Ms Gail Nair (2009) from SAMRO she also confirmed that there are two copyrights and copyright permission has to be obtained from the copyright holder for sound recordings to be transferred from analogue to digital formats.

However, it is important to note that although there are two main **types** of copyrights for sound recordings, one for the composition, musical score and lyrics and the other for the sound

recording itself, there are four potential copyrights which need to be taken into consideration. The University of Melbourne (see 4.1.1) and UK copyright (see 4.2.4) clearly state that there are separate copyrights in the literary work (the lyrics), the musical work (composition) and the actual sound recording itself. Further to this, artwork or cover designs are also subject to copyright.

Allington (2009) states that if a collection of recordings were recorded in, for example, 1930, and now fall in the public domain, it is possible to 'bundle' them together into a new compilation. However, it is violating copyright law to publish the same album with the same sleeve design and title.

As long as libraries (or the public) are not replicating sound recordings for monetary gain, the copyright holders may 'turn a blind eye' to once-off copies (even though it is certainly illegal and breaching the law) as it is almost unenforceable to apply the letter of the law on an individual level. It is the purpose and the quantity of the duplication that matter with 'one-offs' i.e. as long as there is no monetary gain. Copying of old recordings will, however, become problematic if it affects the mainstream revenue of the artist (Mr Allington 2009).

Allington (2009) concluded that from 1911 until 1976 South Africa's copyright laws (as an ex colony) closely resembled British copyright law. After 1978 the South African Copyright Act differs in some aspects from that of the EU and Britain, such as the duration of copyright for publishing which is 50 years in South Africa and 75 years in the EU and Britain.

Question 17 of the questionnaire (see Appendix H) which stated that 'copyright currently protects private rather than public interest which tends to restrict librarians in their role of disseminating knowledge' presented surprising answers in favour of copyright laws (10 of the respondents - 56%) agree with protecting the private interest with comments such as: "I would agree. Important that private interest must be protected" and "there is a need for seminars/workshops to educate the artists on their rights as well." This supports the protection of private interests even if this inhibits libraries in their ability to disseminate knowledge.

7.6 Conclusion

It is evident from the findings of this survey that, although the survey was limited in scope and complexity, the information gathered from the 16 music and two law librarians surveyed provided clear patterns of analysis in relation to the key questions: librarians are encountering many problems with regard to digital copyright laws because they are unfamiliar with the laws and thus unable to correctly interpret them in order to put them into practice. This clearly highlights the need for clear guidelines relating to digital copyright and sound recordings for music librarians.

This Chapter highlighted and discussed the results of the study. The discussion has included the problems faced by the music librarians concerning digital music copyright law and the difficulty that the librarians have in implementing the law owing to their limited knowledge in the field.

CHAPTER 8

CONCLUSION AND RECOMMENDATIONS

Introduction

The purpose of this study was to investigate the four major research questions, namely:

- Which copyright laws in South Africa have a bearing on the topic (that is, copyright and digital music collections in South Africa) and what are the implications of these laws?
- What is the situation regarding digital music copyright laws in other countries and what lessons can be learnt which are applicable to the South African situation?
- What problems do South African music librarians encounter with regard to digital music copyright laws?
- Are digital copyright laws clearly interpreted and put into practice when the material is copied from analogue to digital format?

In order to answer the first two questions, the study employed an in-depth literature search. The study employed a self-administered questionnaire and informal telephonic interviews to survey the South African music librarians so as to establish any problems which they may be encountering in the understanding and implementing of the digital music copyright laws.

The purpose and focus of these questions was (once the level of understanding of the South African music librarians was established) to make recommendations based on the findings of the study and to present practical guidelines to assist the music librarians in their interpretation and implementation of digital music copyright laws as they apply to sound recordings.

8.1 Overview of the study

In addressing the above research questions the researcher presented a literature overview which detailed definitions of sound recordings, general copyright principles, international copyright laws, concentrating on the United States of America, the United Kingdom and Australia and, most importantly as pertaining to this study, the South African digital music copyright laws for sound recordings. The study also addressed the issue of balancing the interests of private rights versus the public good.

In a nutshell, according to the South African Copyright Act of 1978, copyright is conferred on original works in the following categories: **literary** (this should include the composition of songs), **musical**, and artistic works, **sound recordings**, cinematograph films and published editions. The work in question needs only to be in writing or some other material form, and it is immaterial whether or not the work is offered for sale.

It is important to note that copyright in South Africa comes into existence automatically on creation of the original work and does not depend for its existence on any registration or any copyright marking or warning.

Section 12(i) of the Act allows the making of a single copy of a reasonable portion of work for research or private study. A reproduction of less than a substantial part of a work is not an infringement. However, 'substantial' is both a qualitative measure and a quantitative one e.g. a single line from a poem or one page from a book might be judged to be substantial if it is the crux or essence of the work. Usually a reasonable portion of not more than 10% of the whole work may be reproduced. No work in its entirety may be reproduced without prior authorization of the owner.

8.2 The significant findings

This study presented an account of the problems which are encountered by South African music librarians with regard to digital copyright laws, their interpretation of current South African digital copyright laws and their ability to practice and implement these laws.

The most significant finding of the survey was the fact that South African music librarians are not at all familiar with digital music copyright laws in sound recordings and this has the potential to hinder their implementation thereof.

Another interesting and surprising finding is the fact that the majority of South African music librarians surveyed tended to favour the interests of private rights above that of the public good, even if this inhibited the librarians in their role as disseminators of knowledge.

8.3 Conclusions

Having established (by means of a questionnaire (see Appendix G)) that music librarians are not very familiar with South African digital copyright laws pertaining to sound recordings and are therefore handicapped in their ability to interpret and implement these laws, it can be concluded that, based on these findings, the study has revealed that a set of guidelines would be useful for the music librarians to consult, especially with reference to the transferral of music from analogue to digital format. These guidelines are listed under 8.6 below.

8.4 Recommendations

It is clear that based upon the findings of the survey it can be recommended that workshops/seminars are offered as often as possible by legal experts to assist music librarians with copyright issues. These need to be well advertised. Dr Owen Dean (South Africa's foremost copyright expert) mentioned to the researcher telephonically that he has given copyright talks to librarians and Ralph van Niekerk from Von Seidels (intellectual property attorneys) has mentioned via an e- mail that he intends offering a short course in Digital Rights Management

and File Sharing this year (2009) at the University of Cape Town (UCT). Librarians are encouraged to attend.

It is especially recommended by the researcher that copyright law modules are included in librarian diplomas so that librarians can have the knowledge of South African copyright laws at their fingertips.

Finally, it needs to be noted that at present there is lobbying for a change in certain South African copyright laws (see The South African Intellectual Property Amendment Bill 2008 as previously discussed in the literature review under 3.6) and especially concerning the Traditional Knowledge Bill. It is recommended that future studies take cognizance of possible future changes and/or amendments to the South African copyright laws.

Since technology is advancing at such a rapid pace and copyright laws need to evolve and adapt to these new developments, amended guidelines may need to be researched in the near future. A useful site and blog which keeps pace and offers the latest available courses and current discussions concerning copyright issues can be found at
http://www.copyrightlawscom.blogspot.com/

8.5 Concluding remarks and observations

We are reminded that Hannabuss (1998:186) clearly states that "copies cannot be made of sound recordings, films and videos, even for preservation purposes, although permission can be sought."
The study has stressed the importance that sound recording copyright issues are legal in nature and can be most complex, especially if they are not properly understood.

The researcher has undertaken this study in the capacity of a student in Information Studies and has attempted to produce guidelines as accurately as possible. However, she is not a legal authority on copyright issues. The researcher recommends the following advice from a previous survey:

In an international survey on music copyright rules as applied to libraries by the International Association of Music Libraries, in answer to the question *When you have a copyright problem, from whom do you obtain expert advice,* a respondent from the USA stated*: "Music librarians should seek answers from their institutions' legal counsel. Although the Music Library Association list does field a number of questions, none of us have legal authority"* (International Association of Music Libraries 2004).

8.6 Sound recording guidelines for music librarians: specific provisions for libraries

One of the aims of the study (see 1.3 above) was to provide clarity and clear guidelines pertaining to digital copyright regulations for South African music librarians with regard to sound recordings, especially concerning the transferral of music from analogue to digital formats. One of the results of the survey (as indicated in Chapter 6 question 15 above) was that respondents voiced the necessity for copyright guidelines relating to the transferral of music from analogue to digital formats.

Two sets of guidelines are provided below. The first set applies to libraries and print and the second set to libraries and the actual sound recordings.

8.6.1 Guidelines concerning libraries and print for music librarians (for example, the lyrics and composition of songs but excluding the actual sound recordings)

It is of utmost importance to include both the print and sound recording guidelines since it is essential to remember that sound recordings constitute both the composition of the songs as well as the actual recordings and both are subject to separate copyrights as was discussed under 'discussion of the results' in 7.5. We are reminded of the earlier literature discussion whereby U.K. Copyright Service stated that "sound recordings will have an individual copyright separate to the underlying composition. However, it is important to repeat here that, although there are two main **types** of copyrights for sound recordings, one for the composition, musical score and

lyrics and the other for the sound recording itself, there are four potential copyrights which need to be taken into consideration. The University of Melbourne (see 4.1.1) and UK copyright (see 4.2.4) clearly state that there are separate copyrights in the literary work (the lyrics), the musical work (composition) and the actual sound recording itself. Further to this, artwork or cover designs are also subject to copyright.

Another important point is that if the underlying composition is in the public domain it does not follow that a sound recording is." However, as Samuels (2000:44) very importantly reminds us there is usually also a separate copyright in the cover art of the record or CD.

Section 13 of the South African Copyright Act has specific but limited exceptions for educational purposes.

> a librarian may make one (1) copy of a work or obtain an interlibrary loan copy for a user (within the permitted amounts), as long as it is for research or private study, or for personal or private use. A librarian may not make multiple copies for users.
>
> A library or archive has certain restricted rights to make copies for archive/reference purposes only (Section 13 of Act/Regulation 3) (Nicholson 2009)

Tanya Pretorius' Bookmarks (2004) states:

> A library or archive depot has certain specific restricted rights to make copies of certain works for archive or reference purposes only and may:
>
> duplicate a published work in its entirety for the purpose of replacement of a work that is lost, stolen, damaged or deteriorating if the library or archives, after reasonable effort, determined that an unused replacement cannot be obtained at a fair price.
> make copies for patrons.
> make copies for other libraries' patrons for the purposes of interlibrary loan.

> There is a lack of clarity regarding copying in the library short loan and reserve sections since nothing in the existing Copyright Act or Regulations directly address this issue.

The researcher acknowledges a previous set of guidelines (Musiker 1989) which is based on Section 13 of The Copyright Act of South Africa No 98 of 1978 and reproduction regulations published in Government Gazette 6252 of 22 December 1978 (see Appendix G). These regulations make provision for exceptions, when acts which would otherwise infringe copyright, are permitted.

- **Making of copies for interlibrary loan**

The reproduction of **one** copy (not multiple) for an interlibrary loan is permissible provided the reproduction does not constitute a substitution for the purchase of a work and it is for research or private study, or for personal or private use.

- **Copying to replace damaged copies**

The library is permitted to make a copy of a work which the library possesses that has deteriorated physically or been damaged for the sole purpose of replacement. The library should, however, show that it could not after reasonable efforts, get an unused replacement at a fair price. (This permission therefore does not apply to a work that was not previously in the library). (Section 13 of Act/Regulation 3, states that a library or archive has certain restricted rights to make copies for archive/reference purposes only).

- **Copying of an unpublished work for preservation purposes**

A copy of unpublished works may be made by a library for preservation, security, for research use, for the collection of their own or another library, but not for an individual.

- **Copying of a published work for preservation purposes**

A library may duplicate a published work in its entirety for the purpose of replacement of a work that is lost, stolen, damaged or deteriorating if the library or archives, after reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

- **Copying of a published work which is now out of print**

If the library is unable to obtain the work elsewhere at a fair price after reasonable attempts, it is permissible for the library to make a copy of a substantial part or even an entire work for a user. The copy then becomes the property of the user for his/her private study or research purposes. It must be noted that the library must at all times display the prescribed copyright warning (see Appendix (D).

- **Copying for private study**

The making of a single copy of a reasonable portion of a work (see above) is permitted but only for private study or research by a user, as long as the legitimate interest of the copyright owner is not prejudiced.

- **Reserve and short loan collections**

Libraries are not permitted to make multiple copies and to place these items on reserve or in short-loan collections. It is wise to obtain the permission of the copyright owner before reproduction as the copying exclusions do not protect a library where it is aware or has substantial reason to believe that it is engaging in the related or concerted multiple copying of the same material. Compatible with fair practice, multiple copies for teachers for teaching purposes (one per pupil) may be made, providing the source and author are mentioned. As mentioned above, there is a lack of clarity regarding short loan and reserve collections since the Act does not address this issue directly.

- **Does copyright legislation in South Africa cover the lending of material?**

Libraries can, in their normal capacity, lend works. However, the prescribed "copyright warning" (see Appendix (D) must be displayed prominently and in its entirety at all libraries and should be incorporated in order forms in the same size type as that used predominantly throughout the form.

- **In what way is copyright in sound recordings in South Africa different from print?**

It is not different from print because, according to the South African Copyright Act of 1978, the precise nature of the material form is unimportant, whether it is a literary work embodied

in a sound recording, computer tape of floppy disc (as mentioned above) they are all fully protected by copyright.

8.6.2 Guidelines concerning libraries and the actual sound recordings for music librarians

The transference of sound recordings in libraries from one format to another **is not permissible without the consent of the copyright holder.** (The reader is referred to Appendix (A) the South African Copyright Act No. 98 of 1978 Section 12 (1,2,3,4,5, and 12) which relate to musical works and Section 14 exceptions for musical works.

In the **composition** the copyright exists for the life of the author plus fifty years from the end of the year in which the author dies.

In **sound recordings** copyright exists for 50 years from the end of the year in which the recording was first published or made available to the public.

The person who first makes or creates the work (i.e.) the author of an original work or his/her assignee) owns the copyright in the old analogue sound recordings which preceded digital formats. However, as publishers often act on the author's behalf, it is advisable to address requests to the publisher.

If copyright is held by a record label and is in analogue format and then transferred to a digital format, copyright remains as above, that is, the person who first created the work (or the publisher acting on the author's behalf) remains the owner of the copyright.

Copyright generally prohibits, in relation to a work or any substantial part of it (substantial being rather difficult to quantify) unauthorized reproduction **in any manner or form, publication or making an adaption.** The term 'reproduction' has a wider meaning than 'copy' and includes recording or filming of a literary work and an adaptation includes a translation and a serialization.

Copyright cannot differ between old sound recordings and digital formats because, according to the South African Copyright Act of 1978 the precise nature of the material form is unimportant, for example, a literary work embodied in a sound recording, computer tape of floppy disc is fully protected by copyright. Copyright applies independently to the categories of works of film (cinematographic and video) sound recordings (disc and cassette) and broadcasts (sound and television) that is, in addition to the copyright in the basic literary or musical work which forms the basis of or features in the film, sound recordings or broadcast. It must be noted that even if a work is out of copyright a new edition may not be reproduced without permission. For example, as mentioned previously, Allington (2009) stated that even if recordings are in the public domain, if they are "bundled" together into a new compilation [or edition] it is violating copyright law to, for example, publish the same album with the same sleeve design and title without permission.

Concerning copyright rules as they apply to the copying of **sound recordings** from one medium to another in libraries (especially regarding analogue records to digital format)
(i) Making copies for interlibrary loan is **not** permitted without the permission of the copyright holder.
(ii) Copying to replace damaged copies is **not** permitted without the permission of the copyright holder The provisions for copying in libraries and archives are for literary, dramatic and musical works only. The musical work is the score as written or printed, not a sound recording of it.
(iii) Copying of an unpublished sound recording for preservation purposes is **not** permitted without the permission of the copyright holder
(iv) Copying of a published sound recording is **not** permitted without the permission of the copyright holder
(v) Copying of a published sound recording which is now out of print is **not** permitted without the permission of the copyright holder
(vi) Copying for private study is **not** allowed.

Libraries are allowed to lend sound recordings provided they hold a licence or an agreement with the producer/copyright holder.

How have users been affected by copyright in terms of digital sound recordings? For example, users can copy illegally at home.

Again, users are warned of the South African Copyright regulations by the libraries which should prominently display copyright warnings. Copyright infringements apply to any format of sound recordings as mentioned above.

If the copyright is held by the musician or a family member, and a digital version is created, does the archive/library have the right to loan this version?

If the library owns the digital version with permission from the copyright holder, the library may provide users with this version providing the copyright warnings are prominently displayed.

It is wise to take heed of the following suggestion from Bieleford and Cheeseman (1997:107) who advise "that safe course of action is to buy the number of sound recordings that are needed … or to obtain permission to use the material."

8.6.3 United Kingdom guidelines for sound recordings

South Africa, as an ex colony of Britain, has close historical copyright ties. According to Dean (1987:1-3) "the Act of 1916 incorporated as a schedule the United Kingdom Copyright Act of 1911 (generally referred to as the 'Imperial Copyright Act') ... was given full force and effect in the Union of South Africa." "The Act of 1916 was repealed by the Copyright Act 63 of 1965... [and] this Act was very closely based on the British Copyright Act of 1956." The Act of 1965 was eventually repealed by the Copyright Act 98 of 1978. According to Dean (1987:1-3) although the South African Act of 1978 departed from the British Act in several material respects it "shows a degree of similarity to the British Copyright Act of 1956."

It is based on these grounds that the researcher has included the following guidelines (taken in verbatim as questions to ensure clarity) from Cornish (2001:31-32 and 112-121). Although they are from a UK perspective, they provide useful guidelines concerning sound recordings for our South African situation.

Musical works

Does 'musical work' mean anything with music included?

No. Musical work means only the music and excludes the words (which are a literary work) and any actions which go with the music (because they are dramatic works).

Example: *West side story* will have three separate copyrights:

- In the words
- In the actions and movements of the singers
- In the musical notes.

This may sound complicated but it is important because the people who composed the three elements will each own a separate copyright which may expire at different times. So the music might go out of copyright but not the words, or vice versa.

Does 'musical work' include a recording of the music?

No. That is separately covered as a sound recording.

Sound recordings (Cornish 112-121)

What is the definition of a sound recording?

The definition of a sound recording is not limited in any way by format. It is any form of recording of sounds from which sounds may be reproduced. It includes wax cylinders, vinyl discs, audio cassettes, compact discs and DVDs. It also includes sounds recorded and stored in digital form from which sounds can be reproduced.

Authorship

Who is the author of a sound recording?

The producer

Does the producer of a sound recording enjoy moral rights?

No.

Who counts as the producer?

This term is defined as the "person" by whom the arrangements necessary for the making of the sound recording are made.

Ownership of copyright

Who owns the copyright in a sound recording? Is it owned by the record company that produced the disc?

It is very important to distinguish between the copyright in the sound recording and the copyright in the material recorded.

Examples: A recording of a song by the Beatles will have all sorts of copyrights – the song, the music, the arrangement and the performance. In addition, there is a copyright in the actual sound recording which is quite separate. Similarly, an interview for an oral history project will have will have a copyright in what the person said, which will belong to the person interviewed. There will also be a copyright in the recording made of that interview, which will be owned by the person who made the arrangements for making the recording. A recording of Beethoven's Fifth Symphony will have a copyright in the recording although there is no longer any copyright in the music as such.

Who owns the copyright in an interview?

The speaker owns the copyright in what is said but there is no copyright in the material until it has been recorded. Once it has been recorded the speaker owns the copyright in what has been said but the person making the recording owns the copyright in the sound recording. If the interview is transcribed then the person making the transcription may also be entitled to copyright in their transcription.

Is it necessary to get permission to make such recordings for archives?

It is advisable to obtain the permission of the speaker when the recording is made and stipulate the purposes the recording will be used for.

Duration of copyright

How long does copyright in a sound recording last?

Essentially 50 years from the year in which the sound recording was made or, if it was released during that period, 50 years from the end of the year in which it was released.

Does 'released' mean published?

Not quite. Released means not only published in the usual sense but also if the sound recording is played in public, broadcast or included in a cable television programme. This is important for sound archive material which is lent to broadcasting organizations. The transmission of the

material will mean it has been published or released and the copyright in it will expire 50 years from that time rather than 50 years from when it was made.

Do sound recordings have extended and revived copyright?

No. Duration of sound recordings is not linked to a human being so the period was not extended as for some other works.

Owner's rights

What rights does the copyright owner have?

The owner has the same rights as for literary, dramatic, musical or artistic works.

To copy the work

The copyright owner has the exclusive right to make copies of the work.

Does this include copying from one medium to another?

Yes. To make a copy of a vinyl disc onto a tape is copying the work.

Supposing the medium on which the work is stored is obsolete? Can copies be made onto a usable type of equipment?

Not without permission or infringing copyright.

Fair dealing

Is there fair dealing in sound recordings?

Only for very restricted purposes. There is no fair dealing in sound recordings for the purposes of research or private study.

What can be done for a student who needs a copy of a sound recording for study purposes?

There is no legal way that such a copy can be provided. The only thing to do is to obtain permission from the copyright owner.

Sound recordings can be used for reporting current events. Short extracts from appropriate recordings can be used for news items and there is no need to acknowledge their source. Sound recordings can also be used for criticism or review, so long as the source is acknowledged.

Library and archive copying

Can libraries and archives copy sound recordings?

No. The provisions for copying in libraries and archives are for literary, dramatic and musical works only. The musical work is the score as written or printed, not a sound recording of it.

Can a library or archive copy sound recordings for preservation purposes?

No. These allowances are for literary, dramatic or musical works only.

What can be done if a record or tape is deteriorating rapidly and will be lost if it is not copied?

Legally, nothing if it is still in copyright. If the owner can be traced, permission can be sought but otherwise the library or archive may take a risk and produce a substitute copy. It is a matter of fine judgement whether the original copyright owner would take action if this were discovered.

What happens if someone wishes to record a folksong for an archive?

There are several rules for this. In the first place the song must be of unknown authorship and be unpublished i.e. a real original folksong. If so, then a recording can be made, so long as the performer does not prohibit this.

Can copies be made from these recordings?

Yes, provided that the archivist is satisfied that they are for research or private study only and not more than one copy is supplied to any one person.

Can they make copies for other archives?

Not under copyright law. They may have other agreements with production companies which allow this.

If a library has a collection of sound recordings and wishes to put on a public performance of them, is this allowed?

This can be done either with non-copyright material (i.e. too old to be protected) or with material in which the library or archive holds the copyright or if the library is covered by a Performing Rights Licence.

If the library or archive holds oral history recordings, can these be played publicly?

Only if the library/archive owns the copyright in both the words spoken and the sound recording itself.

How can the library or archive obtain the copyright in the actual words spoken?

This is best done by way of an agreement with the interviewee at the time of the interview. Failure to do this could lead to infringement of the speaker's copyright.

If the library has a collection of sound recordings, can they be played on the library's premises?

They can be played for private listening in carrels or somewhere similar provided that not more than one person has access to the same recording at the same time, otherwise this could be considered a public performance. Otherwise they can be played only if the library (or the library authority) has a Performing Rights Licence which covers that building. Outside these limitations, public playing of copyright material is an infringement. This also applies to films, television broadcasts and radio.

Presumably libraries and archives do not have to worry about restrictions on broadcasting?

Not true. There is an increasing interest in local studies and live comments from the past, as well as folk music and recent broadcast interviews. Where this material has been prepared, recorded or given to the library or archive, it may well be in demand from local or national broadcasting stations. To allow this to be used in this way is an infringement unless the original owner gave express permission when the recording was made.

Lending and rental

As this right includes lending as well as rental, does this mean that lending services for audio materials are not allowed?

Basically, yes. Sound recordings may not be rented to the public without the copyright owner's permission. They can be lent by prescribed libraries provided the fee charged only covers the cost of administration but they cannot be lent by public libraries without a licence of some kind.

Supposing a work is held by a library in both printed form and, say, an audiocassette. What is the position then?

This causes an anomaly. The printed book may be subject to Public Lending Right but the audiocassette is controlled by the licensing scheme offered by the producers of audio materials, probably through the BPI (British Phonographic Industries) licence. There are currently plans to introduce a separate licence for spoken word materials through the Spoken Word Publishers Association (SWPA). There is a further anomaly in that the money for the Public Lending Right

royalty comes from the government and goes to the author, while any money which may be generated by the audio licensing scheme (if there is one) is paid by the library and will probably go to the producer of the cassette.

Does this mean that libraries may no longer lend records?

Not altogether. This restriction applies only to material acquired on or after 1 August 1989. Secondly, there are special agreements with the production industries to allow lending facilities under agreed terms. It is best to check the condition of purchase for particular materials in the library.

Why are public libraries excluded?

Because the Copyright Act stipulates that lending by public libraries of these materials is an infringement. Furthermore, the regulations on lending and rental prohibit public libraries from lending material not covered by the Public Lending Right Scheme.

What about the rights that performers have in sound recordings such as singers or instrumentalists?

If it is allowed to lend the sound recording then no rights of performers are infringed by that act of lending.

Publication right

How does publication right apply to sound recordings?

It is not applicable. There is no publication right for sound recordings.

Educational copying

Is copying for educational purposes allowed?

Only in two specific cases. Copying for examinations is allowed and copying for the purposes of giving instruction in the making of films or film soundtracks is allowed provided it is done by the person giving the instruction.

Copying as a condition of export

Do the special arrangements for copying materials of historic or cultural importance before export apply to sound recordings?

Yes. If the condition of export is that a copy is made and deposited in a library or archive, then this is not an infringement and the library or archive can make the copy, or receive the copy made elsewhere.

Material open to public inspection
Sound recordings may be copied for judicial proceedings, Parliamentary proceedings and statutory inquiries.
The issuing of copies to the public is an exclusive right of the owner.
The owner has the exclusive right to perform the work.
Broadcasting the work is the exclusive right of the owner.
Adaptation is an exclusive right of the owner.

8.7 Suggestions for further research

- This study has focused on music librarians and copyright laws regarding sound recordings. The study lays a basis for further research into the knowledge which librarians in general have regarding print and copyright laws

- It would be interesting to conduct similar comparative studies concerning librarians in other countries so as to ascertain their knowledge of copyright laws.

- It is suggested that a further study be conducted concerning the continually evolving fair use copyright laws and resolutions between the rights of copyright holders and the public good in the preservation of knowledge in the digital age. As Besek (2003) reminds us that achieving a balance between copyright owners and users is "a topic of ongoing debate" and that further studies on this issue are necessary.

- "The issue of a National Digitisation Policy is unlikely to be resolved soon" and so Page-Shipp (2009:15) recommends that "pending the formulation of a National Policy on Digitisation, professional organisations should formulate their own best practice consensus for the guidance of members."

- Follow-up research is recommended concerning the formulation of a National Digitization policy in South Africa.

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APPENDICES

Appendix A

Clarida (2001) succinctly describes the situation regarding pre-1972 sound recordings in the US as follows:

> Regarding the ownership of pre-1972 sound recordings they are "protected either by statute or by common law. Under common law, the featured performer or bandleader was often held to own the exclusive right to reproduce the recorded performance, but that right could be conveyed to the record producer by express or implied agreement Such agreement could be found simply from the physical transfer of the original master recording...Thus, sound recordings were subject to the same general rule often applied to paintings and literary manuscripts i.e. that transfer of the original tangible object embodying the work was held to effect a transfer of the reproduction rights as well...Ownership of state law rights in pre-1972 sound recordings can thus be established much more informally than ownership of a federal copyright, which is independent of the tangible object in which it is embodied (section 202) and which cannot be transferred without a signed writing(section 204).
>
> [Regarding restoration]: despite the general rule precluding federal copyright protection for pre-1972 sound recordings, the 1994 GATT/TRIP amendments, codified at Section 104A of the Copyright Act, extend protection to such recordings when they (a) were first published ina country that is a signatory to the Berne Convention, the WIPO Performances and Phonograms Treaty, or is a member of the WTO, and (b) were not subsequently published in the United States during the 30-day period following that initial publication. Section 104A(f)(6)(C)-(E). Consequently, these foreign recordings are protected by federal copyright despite their fixation prior to 1972, and their term of protection is the same s it would have been hadthey been protected under US federal law ab initio, i.e. 95 years from publication. Virtually all works "restored" under this provision will therefore lapse into the public domain sooner than domestic recordings, which will enjoy state law protection until 2067 regardless of their initial publication date.

The following chart from the Cornell Copyright Information Center (2008) summarizes the latest US copyright laws relating to sound recordings and the public domain:

Sound Recordings

(Note: The following information applies only to the sound recording itself, and not to any copyrights in underlying compositions or texts.)

Date of Fixation/Publication	*Conditions*	*What was in the public domain in the U.S. as of 1 January 2008*[3]
Unpublished Sound Recordings, Domestic and Foreign		
Prior to 15 Feb. 1972	Indeterminate	Subject to state common law protection. Enters the public domain on 15 Feb. 2067
After 15 Feb. 1972	Life of the author + 70 years. For unpublished anonymous and pseudonymous works and works made for hire (corporate authorship), 120 years from the date of fixation	Nothing. The soonest anything enters the public domain is 15 Feb. 2067
Sound Recordings Published in the United States		
Date of Fixation/Publication	*Conditions*	*What was in the public domain in the U.S. as of 1 January 2008*[3]
Fixed prior to 15 Feb. 1972	None	Subject to state statutory and/or common law protection. Fully enters the public domain on 15 Feb. 2067
15 Feb 1972 to 1978	Published without notice (i.e, ℗, year of publication, and name of copyright owner)[15]	In the public domain
15 Feb. 1972 to 1978	Published with notice	95 years from publication. 2068 at the earliest

1978 to 1 March 1989	Published without notice, and without subsequent registration	In the public domain
1978 to 1 March 1989	Published with notice	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation. 2049 at the earliest
After 1 March 1989	None	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation. 2049 at the earliest
Sound Recordings Published Outside the United States		
Prior to 1923	None	Subject to state statutory and/or common law protection. Fully enters the public domain on 15 Feb. 2067
1923 to 1 March 1989	In the public domain in its home country as of 1 Jan. 1996 or there was US publication within 30 days of the foreign publication	Subject to state common law protection. Enters the public domain on 15 Feb. 2067
1923 to 15 Feb. 1972	Not in the public domain in its home country as of 1 Jan. 1996. At least one author of the work was not a US citizen or was living abroad, and there was no US publication within 30 days of the foreign publication	Enters public domain on 15 Feb. 2067
15 Feb. 1972 to 1978	Not in the public domain in its home country as of 1 Jan. 1996. At least one author of the work was not a US citizen or was living abroad, and there was no US publication within 30 days of	95 years from date of publication. 2068 at the earliest

	the foreign publication	
1978 to 1 March 1989	Not in the public domain in its home country as of 1 Jan. 1996. At least one author of the work was not a US citizen or was living abroad, and there was no US publication within 30 days of the foreign publication	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation
After 1 March 1989	None	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation
Special Cases		
Fixed at any time	Created by a resident of Afghanistan, Eritrea, Ethiopia, Iran, Iraq, San Marino, and published in one of these countries[13]	Not protected by US copyright law because they are not party to international copyright agreements
Fixed prior to 1996	Works whose copyright was once owned or administered by the Alien Property Custodian, and whose copyright, if restored, would as of 1 January 1996 be owned by a government[14]	Not protected by US copyright law

Appendix B

The following articles from the Berne Convention are relevant to sound recordings: (Wikipedia 2008)

Article 9
Right of Reproduction:
1. Generally; 2. Possible exceptions; 3. Sound and visual recordings

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 11
Certain Rights in Dramatic and Musical Works:
1. Right of public performance and of communication to the public of a performance;
2. In respect of translations

(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Article 13
Possible Limitation of the Right of Recording of Musical Works and Any Words Pertaining Thereto:
1. Compulsory licenses; 2. Transitory measures;
3. Seizure on importation of copies made without the author's permission

(1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(2) Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date two years after that country becomes bound by this Act.

(3) Recordings made in accordance with paragraphs (1) and (2) of this Article and imported without permission from the parties concerned into a country where they are treated as infringing recordings shall be liable to seizure.

Appendix C (i)

The Board of Directors Resolutions (Association for Recorded Sound Collections) regarding the relaxing of copyright laws for the preservation of historical sound recordings

- The Association recognizes the valid purposes of copyright in rewarding creators of recordings with a temporary exclusive right to the exploitation of those recordings, thus encouraging them to create. However, the Association believes strongly that neither creators nor the public are served by excessively long monopoly periods, especially those that exceed the period of commercial viability, or by restrictions on access to recordings that rights holders do not wish to exploit. The Association believes that both state and federal copyright terms for sound recordings are excessively long
- Regarding preservation, the Association believes that current copyright laws and regulation should be modified to eliminate many of the restrictions present in the law. For example, current law limits duplication to materials that are already damaged or deteriorating (sec. 108(c)), which virtually assures sonically deficient archive copies; and limits archives to no more than three backup copies, which does not take into account the need for distributed copies, mirror sites, and backups in order to responsibly maintain digital repositories of files created in a preservation environment
- There should be no legal barriers to the professional reformatting and preservation of published and unpublished historical recordings, with copies of the best possible quality sustained in perpetuity so that humanity's aural heritage may remain accessible for study and enjoyment
- Regarding dissemination, the Association believes that copyright law should encourage and facilitate the widest possible dissemination of out-of-print recordings, whether by physical reissues using modern technology (e.g., CDs), Internet availability, or other means
- The Association is concerned about the large number of older recordings originally produced for commercial purposes that are now virtually inaccessible due to current laws. The Association notes that hundreds of thousands of historical recordings are controlled

by rights holders who have shown little commitment to the preservation or dissemination of these recordings

- The Association believes that when rights holders choose not to make historical recordings accessible, or are unknown, institutions and individuals should be permitted and encouraged to make those recordings available, on reasonable terms and without undue risk or encumbrance
- The Association believes that facilitating dissemination would serve to foster appreciation of our recorded cultural heritage by making recordings generally available for study, as well as increase the likelihood of the survival of the sounds embodied in those recordings
- The Association strongly urges that these concerns be taken into consideration in copyright legislation.

Appendix C (ii)

The following extract from the National Humanities Alliance principles (1997) and the response by the Society of American archivists are pertinent concerning ***maintaining a balance between the interests of copyright owners and the public good:***

1. Copyright law provisions for digital works should maintain a balance between the interests of creators and copyright owners and the public that is equivalent to that embodied in current statute. The existing legal balance is consonant with the educational ethic of responsible use of intellectual properties, promotes the free exchange of ideas, and protects the economic interests of copyright holders.

Although archivists agree that copyright law should protect the interests of both copyright owners and the public, we recognize that there are other interests beyond the realm of copyright law that must also be safeguarded. Archivists deal with records that frequently contain sensitive information and believe that the privacy of individuals whose names and other confidential information may be included in records must also be protected. Protecting privacy rights is particularly important in an age when records may be copied and transmitted widely using electronic means. Archivists reaffirm their Code of Ethics statement that "archivists respect the privacy of individuals who created, or are the subjects of, documentary materials of long term value." While copyright law should not be used to protect privacy, the privacy rights of those who are the subject of records must at some point be taken into account.

4. Copyright law should promote the maintenance of a robust public domain for intellectual properties as a necessary condition for maintaining our intellectual and cultural heritage.

While the archival profession would agree with all of the comments of the NHA on this principle, three are of particular concern. First, the NHA suggests that "copyright terms should expire on dates that are certain and easy to determine." This is of fundamental importance to archivists. Many of the documents in archival collections were created by every-day citizens whose hopes, fears, dreams, and stories as revealed in the documents are an important part of America's history. It is often impossible to tell, however, when the common citizen authored the

document or when he or she died. A copyright expiration date that is difficult to determine erects a barrier to use of these stories.

Secondly, the NHA notes that "copyright law should facilitate preservation and migration to new media as technologies change." Archivists agree that the current law must be changed to allow for a reasonable number of preservation copies to be made. We hope that a dialogue may also begin on how and when these preservation copies may be used. Few institutions today can commit to the expensive process of maintaining digital files if those files can only be used at some far-off date in the future. Even access to digitized material from a few local workstations probably would not justify the expense of digitization. In the digital environment, preservation without use is economically unfeasible.

Finally, archivists support the commitment to the public domain articulated in the NHA commentary. One common question is whether a digital scan of a public domain document is itself copyrightable. Archivists advise that the practice followed when microfilming public domain documents be followed when making digital surrogates, namely that only value-added information be copyrighted, and not the microfilm or digital copies themselves

6 . Copyright law should assure that respect for personal privacy is incorporated into access and rights management systems.

9. New rights and protections should be created cautiously and only so far as experience proves necessary to meet the Constitutional provision for a limited monopoly to promote the "Progress of Science and useful Arts."

The National Humanities Alliance (1997) is most concerned about the need for legislation to be “crafted to assure that the rights of individuals to access copyrighted works without recording personal identities are comparably protected in the digital environment.” Furthermore, “academic freedom and the Constitutional guarantees of freedom of thought, association, and speech require that individual privacy be respected... In the print environment, individuals may examine works in libraries and examine and purchase them in sales outlets without leaving records of their identities.”

Appendix D

In South Africa, in addition to a "Copyright Warning" the following notice may be displayed where orders are accepted by libraries and where unsupervised equipment is located:

COPYRIGHT

IN TERMS OF THE REGULATIONS PROMULGATED UNDER THE COPYRIGHT ACT, NO 98 OF 1978 (AS AMENDED), MATERIAL REQUIRED FOR STUDY OR RESEARCH PURPOSES MAY BE REPRODUCED, SUBJECT TO THE FOLLOWING CONDITIONS:

1.NOT MORE THAN ONE COPY MAY BE MADE OF NOT MORE THAN ONE ARTICLE OR OTHER CONTRIBUTION APPEARING IN A PERIODICAL ISSUE OR OTHER COLLECTION

2.FROM OTHER WORKS, ONLY A REASONABLE PORTION MAY BE REPRODUCED (IT IS ACCEPTED THAT A "REASONABLE PORTION" MEANS: NOT MORE THAN 10 PER CENT OF THE WHOLE WORK, HAVING REGARD FOR THE TOTALITY AND MEANING OF THE WORK).

NOTE: NO WORK MAY BE REPRODUCED IN ITS ENTIRETY WITHOUT PRIOR AUTHORIZATION BY THE COPYRIGHT OWNER.

USERS DISREGARDING THE ABOVEMENTIONED CONDITIONS ARE LIABLE TO PROSECUTION

Bieleford and Cheeseman (1997:161-163) give an example of a copyright notice in the U.S. situation which needs to be displayed in a library or archive and is to be included on printed forms supplied by certain libraries and archives and used by their patrons for ordering copies of **phonorecords.**

> THE COPYRIGHT LAW OF THE UNITED STATES (TITLE 17 US CODE) GOVERNS THE MAKING OF PHOTOCOPIES OR OTHER REPRODUCTIONS OF COPYRIGHTED MATERIAL. UNDER CERTAIN CONDITIONS SPECIFIED IN THE LAW, LIBRARIES AND ARCHIVES ARE AUTHORIZED TO FURNISH A PHOTOCOPY OR OTHER REPRODUCTION. ONE OF THESE SPECIFIC CONDITIONS IS THAT THE PHOTOCOPY OR REPRODUCTION IS NOT TO BE "USED FOR ANY PURPOSE OTHER THAN PRIVATE STUDY, SCHOLARSHIP, OR RESEARCH." IF A USER MAKES A REQUEST FOR, OR LATER USES, A PHOTOCOPY OR REPRODUCTION FOR PURPOSES IN EXCESS OF "FAIR USE," THAT USER MAY BE LIABLE FOR COPYRIGHT INFRINGEMENT. THIS INSTITUTION RESERVES THE RIGHT TO REFUSE TO ACCEPT A COPYING ORDER IF, IN ITS JUIDGEMENT, FULFILMENT OF THE ORDER WOULD INVOLVE VIOLATION OF COPYRIGHT. THE PERSON USING THIS EQUIPMENT IS LIABLE FOR ANY INFRINGEMENT

Appendix E (i)

Section 108 of the US constitution states the 'Limitations on exclusive rights: reproduction by libraries and archives.'

The music library association (2005) stated the following concerning **US copyright laws:**

> *Copyright in the United States is established by the U. S. Constitution, and is articulated in Title 17 of the United States Code. The laws identified here comprise an attempt to summarize those which are the most relevant to copyright in a music library setting.*

17 U.S.C. §108: Reproduction by libraries and archives

Section 108 of the copyright code grants certain exemptions from copyright restrictions to libraries and archives. Among these are clauses which under very specific circumstances allow libraries to make copies for preservation, to replace lost or damaged materials, and for interlibrary loan purposes. For further details of the relevant US copyright laws concerning libraries and archives, the reader is referred to **17 U.S.C.**

§108: Reproduction by libraries and archives.

The section applies only to single copies (with an exception for preservation), and only when:

1. *The reproduction or distribution is made without any purpose of direct or indirect commercial advantage;*
2. *"the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and*
3. *the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by*

copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.

The conditions under which libraries may make such copies are spelled out in subsections (b) through (i). Subsections (b) and (c) apply to preservation copies, subsections (d) and (e) apply to interlibrary loan copies and copies for researchers. It is especially important for music libraries to note that, with the exception of subsections (b) and (c), the provisions of §108 do not apply to musical works.

Section 109 of the US constitution outlines the 'limitations on exclusive rights: effect of transfer of particular copy or phonorecord.'

17 U.S.C. §109: Effect of transfer of particular copy or phonorecord

This is the codification of the "First Sale Doctrine" in U.S. law. The exclusive rights identified in 17USC 106 include the right to "distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." If the law stopped there, libraries' practice of lending materials to patrons would require permission from the copyright owner and/or license fees. Section 109 states that once title on an individual copy of a work has been transferred—after the first sale—each subsequent owner has the right to sell or otherwise dispose of that copy without permission.

There are important exceptions to the law. Subsection (b) of the law states that media containing sound recordings or computer programs are not subject to first sale rights, though it allows libraries those rights provided they meet certain requirements. The law also explicitly states that first sale rights do not apply in cases where the title for the copy has not transferred (i.e., when the copy is loaned, rented, leased, etc.). There are also exceptions which restrict the first sale rights on works whose copyright was restored.

Appendix E(ii)

The following study by Crews is interesting concerning the complexities of the application of Section 108 of the US Copyright Act and especially concerning sound recordings and cites common situations:

Crews was named as the Director of the newly established Copyright Advisory Office at Columbia University at the beginning of 2008. He previously held a chaired position on the faculty at Indiana University School of Law, Indianapolis, where he directed the university's copyright Management Centre. He has written several books on copyright and can be considered an authority on the subject of copyright and libraries (Crews 2007).

In the article Crews (2001) prepared in furtherance of the Digital Music Library Project, Crews explores the following scenarios which raise questions concerning the application of section 108 of the US Copyright Act with particular reference to its potential implications for the Digital Music Library (DML).

The researcher has quoted the common situations by Crews (2001) verbatim below because they highlight the complexity of the situation regarding libraries and the copying of phonorecords in the US:

Common Situations

The following extracts are Crew's summaries of the problem situations:

"Any library seeking to have the benefit of Section 108 must comply first with a set of requirements. Most are general conditions that most academic and public libraries already meet: the library must be open to outside researchers, and the copies must not be for commercial purposes. Two other conditions require the library to take watchful steps: the

library must avoid "systematic" copying of the same work, and the library must place an appropriate copyright notice on each copy.

Section 108 allows the library to make and distribute copies of works only for the three purposes detailed in the statute. If the copy is for any other purpose, this statute does not apply.

If the library is making the copies for purposes of preservation, the library can apply the law to the full range of possible materials in the collection, including artworks, computer programs, sound recordings, musical scores, and multimedia. By contrast, if the library is making the copies for a user's research or to send through interlibrary loan, the materials are generally limited to textual works and sound recordings. A special problem with sound recordings, however, is that the recording is often of a separately copyrighted musical work, and the statute does not explicitly permit the reproduction of the musical work. Thus, the recording may be of text, speeches, or other non-musical works.

For some purposes and under some conditions, an entire work-even a lengthy work-may be reproduced in full. Most notably, the preservation provisions are again the most generous in their application. For the purpose of copies for individual study, however, the copies are often limited to short items-typically a journal article or one excerpt from a larger work.

Section 108 is replete with detailed conditions, and those conditions vary depending on the activity that the library is pursuing. For example, if the library is making copies for individual research, the decision can depend on knowledge of the user's plans and whether the work in question is available on the market. Copies for interlibrary loan are conditioned on the requesting library hold to limits on the quantity of copies requested from a single journal within each year. Congress recently added further conditions if the library is making preservation copies in a digital format. The overall list of conditions is lengthy, but the statute is reasonably clear in specifying them and in conveying their meaning."

Regarding **preservation in digital format** Crews (2001) states:

> Preservation copies of both published and unpublished works are now explicitly permitted under the conditions already described in this paper. In addition, however, "any such copy or phonorecord that is reproduced in digital format" may not be "made available to the public in that format outside the premises of the library or archives." One can infer from this language that Congress's concept of a "library" is a defined physical space. Congress apparently has not been prepared to address the subtleties of a "virtual library." ... The practical reality is that Section 108 is a clear permission to use digital technologies for preservation, but with some limits. While one can infer from Section 108 enormous potential for the DML to engage in a digital preservation program, the law also challenges the ability of a digital library to make the preserved works widely available. To use these provisions of Section 108, the library must define its "premises" and permit access to the files only from inside those boundaries.

Regarding **copies for private study,** Crews (2001) summarizes his findings as follows:

> This provision does not require that the work be for private study, nor does it require that the library investigate the user's purpose. Rather, it only requires that the library have no knowledge that the purpose is other than private study. If the library has no information about the use, the library has met this requirement. This negative requirement is consistent with the general expectation that librarians not inquire about a patron's purpose or need for requested information. If the patron volunteers, however, that his or her need is not consistent with this requirement, then the library may not be able to provide this service.

"If the library is planning to copy an entire work or a substantial part of it, Section 108(e) adds one more condition to the list: The library must conduct a reasonable investigation to conclude that a copy cannot be obtained at a fair price. This language is similar to a condition raised earlier with respect to copies of published works for preservation purposes, but here it is actually more demanding. The preservation requirement calls on the library to search the market for an "unused replacement." When the library is making the copy for private study, however, the library must search the market for any copy, even a used copy."

Regarding **copies for interlibrary loans** (Crews (2001) states:

> When a library makes copies of materials to send though "interlibrary loan," it is engaged in simply a variation on the service of making copies for the benefit of a researcher. Accordingly,

> whether the request comes from the researcher at the library, or at another library submitting the request, the library that is responsible for making the copy is first obliged to adhere to the general requirements above regarding the making of copies for a user's private study. The library fulfilling the request must apply and meet all the standards regarding notices, quantity, and detailed requirements.

Crews continues that "Section 108 is typical of the statutory exceptions to the rights of the copyright owners. It offers benefits only to a designated class of persons (libraries and librarians), it applies only to certain uses of the works (preservation and private study), it applies only to certain works (often limited to textual works and sound recordings), and it is subject to detailed conditions and requirements (the list is lengthy). Like the other exceptions, this statute is the product of vigorous debate and negotiation among diverse interest groups. Congress clearly acted to support the work of libraries, but it also did not want to impair the economic interests of copyright owners. Hence, the law becomes filled with restraints and limits and becomes narrow in its application."

Yet Section 108 remains valuable and important, and it may well exhibit sufficient flexibility to be able to evolve from the print media that Congress considered most closely in 1976 to the digital media of the DML. The most likely benefits of Section 108 to the success of digital libraries-as well as the most significant barriers to the usefulness of Section 108-can be summarized as follows:

Research Copies: Section 108 grants to libraries the right to make copies for private study by the library users, but the statutory provisions are narrow in their application and constraining in their scope. For the DML in particular, the law will pose challenges simply because it does not apply to musical works, which constitute the most significant content expected to be stored in the system. For any digital library, Section 108 is problematic for several reasons. The most important is that the law applies only to the making and delivery of single copies of individual works at the request of an individual user. This situation is far from the long-term storage and general accessibility of content that a digital library generally provides.

Like many of the other exceptions in the Copyright Act, Section 108 is both good news and bad news from a variety of perspectives. When a library service fits within its parameters, the law is an enormous benefit. When it does not fit, the law is a source of frustration and disappointment. In that event, the library continues to have many of the same alternatives that it faces in other circumstances. The library can seek permission for the desired use. The library can deploy the service only with respect to materials that are in the public domain and no longer subject to the restrictions of copyright. The library can also turn to yet another exception-the law of fair use-to determine its scope and applicability to the situation at hand. Fair use will be the subject of the next stage of copyright research in furtherance of the DML project."

Crews (2007) states that:

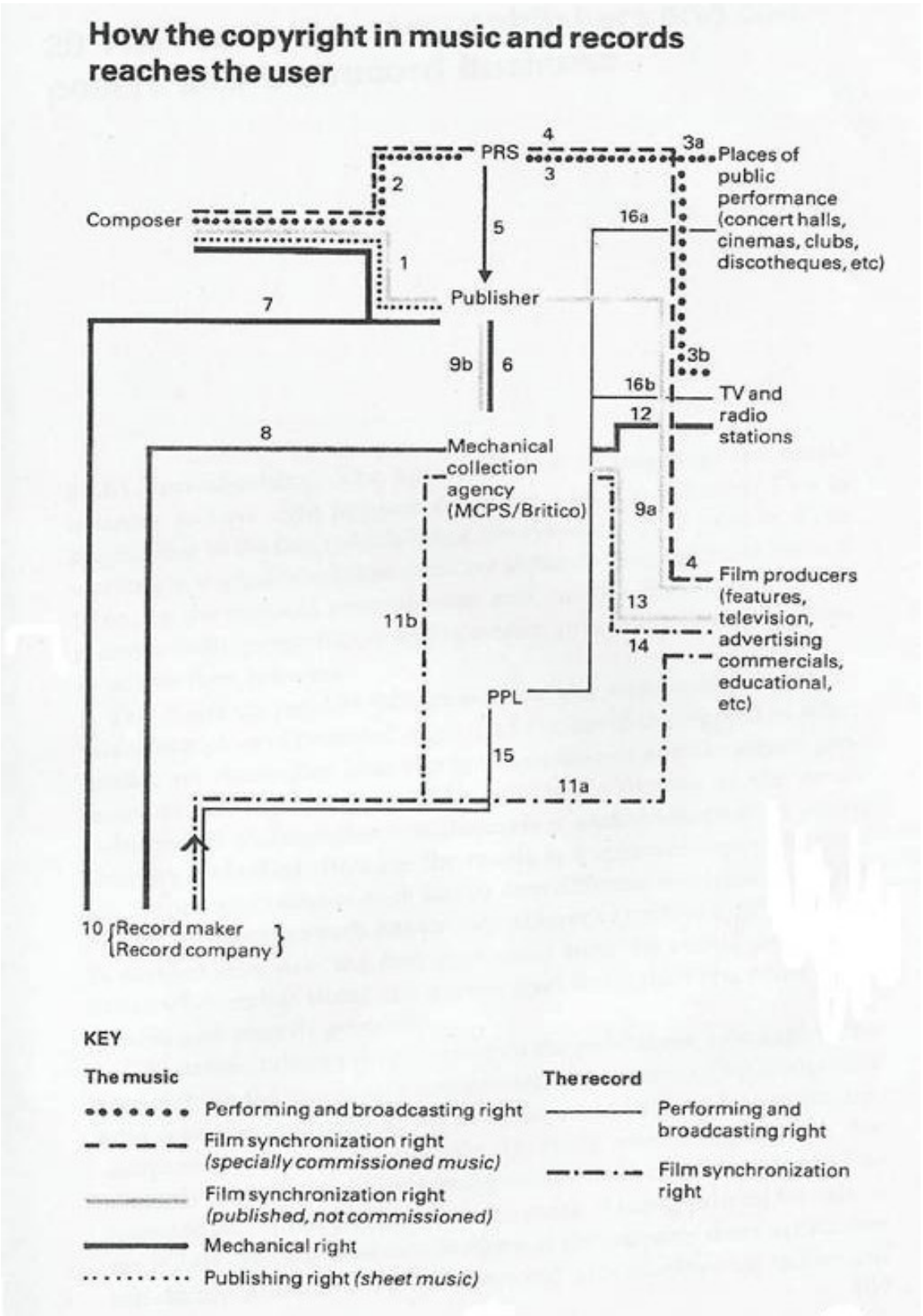
> The current language of Section 108 permits the application of digital technologies to the making and delivery of copyrighted materials. Changes in the statute to permit new technologies are not essential. Moreover, the statute and the voluntary practices of libraries serve to safeguard the interests of copyright owners. Consistent with much of the Copyright Act, the existing provisions of Section 108 may be adapted through practice to meet the changing needs of libraries, researchers, publishers, and authors with respect to new technologies. For Congress to revise the statute with that objective is not only unnecessary, but also hazardous. Technologies and needs will constantly change. A revision of the law today may actually remove much of the flexibility that Congress wisely endorsed in 1976; revisions made in the context of current technology are also likely to become obsolete in the near term.

Regarding fair use, (Crews 2007) states:

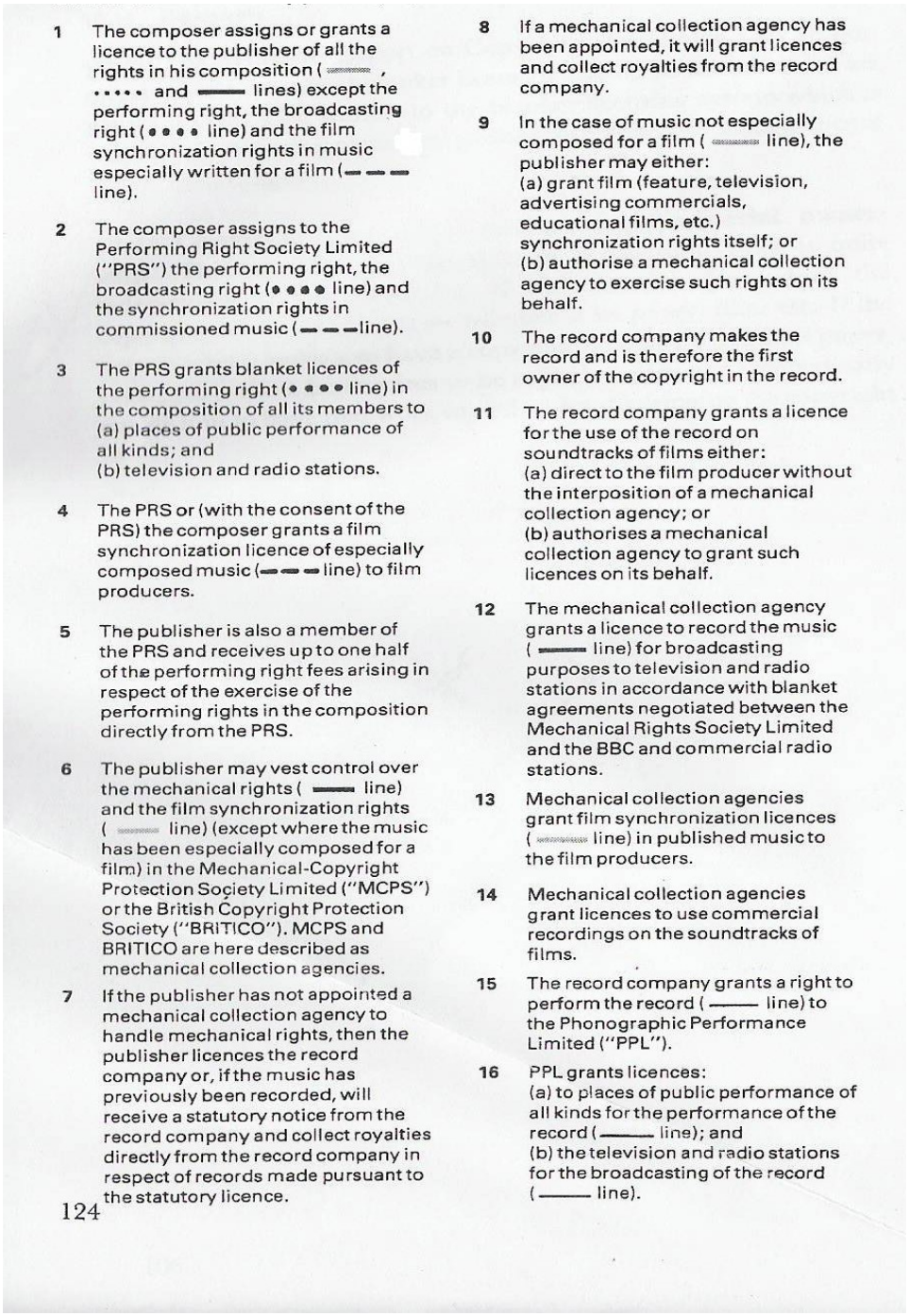
> If copyright were merely a set of rights belonging exclusively to owners, we would have to seek permission for every use. But the law also grants a right of "fair use" to the public. Fair use is both a privilege and source of confusion. Nearly everyone will disagree on what is "fair," and no one has a definitive, legally binding "answer." In fact, Congress deliberately created an ambiguous fair use statute that gives no exact parameters--fair use depends on the circumstances of each case. The law offers four factors to consider: (1) the purpose of the use, including a non-profit educational purpose; (2) the nature of the copyrighted work; (3)the amount of the copying; and (4) the effect of the copying on the potential market for, or value of, the original work. Some of the most difficult questions relate to uses of copyrighted works at universities and their libraries: multiple photocopies for classroom distribution, access to software by multiple users or at multiple

locations, use of videotapes or broadcasts of television programs, circulation of tapes or software in libraries, and access to unpublished manuscript collections. Courts also have provided little guidance on most fair use issues. Developments in the law, however, have been far from strictly favorable to the academe. For example, courts have ruled that a teacher may not draft new arrangements of copyrighted music and distribute copies to a school choir,[1] and an educational television station cannot broadcast a protected motion picture without permission.

Appendix F


How the copyright in music and records reaches the user
PRS
Composer
Publisher
Mechanical collection agency (MCPS/Britico)
PPL
Places of public performance (concert halls, cinemas, clubs, discotheques, etc)
TV and radio stations
Film producers (features, television, advertising commercials, educational, etc)
10 Record maker Record company
KEY
The music
Performing and broadcasting right
Film synchronization right (specially commissioned music)
Film synchronization right (published, not commissioned)
Mechanical right
Publishing right (sheet music)
The record
Performing and broadcasting right
Film synchronization right

The paragraph numbers of the following notes refer to the numbers on the chart above
Flint (1979:124-125)



1 The composer assigns or grants a licence to the publisher of all the rights in his composition (▬▬ , ••••• and ▬▬ lines) except the performing right, the broadcasting right (• • • • line) and the film synchronization rights in music especially written for a film (— — — line).

2 The composer assigns to the Performing Right Society Limited ("PRS") the performing right, the broadcasting right (• • • • line) and the synchronization rights in commissioned music (— — —line).

3 The PRS grants blanket licences of the performing right (• • • • line) in the composition of all its members to
(a) places of public performance of all kinds; and
(b) television and radio stations.

4 The PRS or (with the consent of the PRS) the composer grants a film synchronization licence of especially composed music (— — — line) to film producers.

5 The publisher is also a member of the PRS and receives up to one half of the performing right fees arising in respect of the exercise of the performing rights in the composition directly from the PRS.

6 The publisher may vest control over the mechanical rights (▬▬ line) and the film synchronization rights (▬▬ line) (except where the music has been especially composed for a film) in the Mechanical-Copyright Protection Society Limited ("MCPS") or the British Copyright Protection Society ("BRITICO"). MCPS and BRITICO are here described as mechanical collection agencies.

7 If the publisher has not appointed a mechanical collection agency to handle mechanical rights, then the publisher licences the record company or, if the music has previously been recorded, will receive a statutory notice from the record company and collect royalties directly from the record company in respect of records made pursuant to the statutory licence.

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8 If a mechanical collection agency has been appointed, it will grant licences and collect royalties from the record company.

9 In the case of music not especially composed for a film (▬▬ line), the publisher may either:
(a) grant film (feature, television, advertising commercials, educational films, etc.) synchronization rights itself; or
(b) authorise a mechanical collection agency to exercise such rights on its behalf.

10 The record company makes the record and is therefore the first owner of the copyright in the record.

11 The record company grants a licence for the use of the record on soundtracks of films either:
(a) direct to the film producer without the interposition of a mechanical collection agency; or
(b) authorises a mechanical collection agency to grant such licences on its behalf.

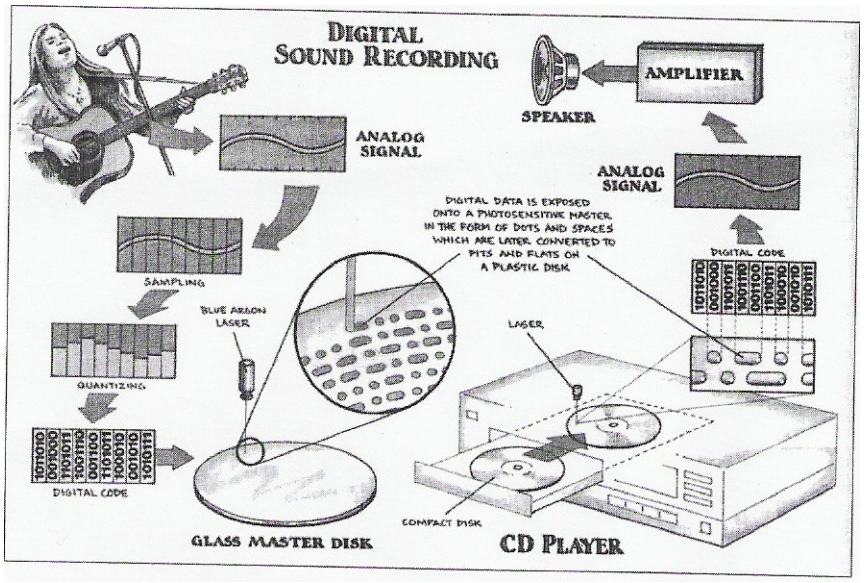
12 The mechanical collection agency grants a licence to record the music (▬▬ line) for broadcasting purposes to television and radio stations in accordance with blanket agreements negotiated between the Mechanical Rights Society Limited and the BBC and commercial radio stations.

13 Mechanical collection agencies grant film synchronization licences (▬▬ line) in published music to the film producers.

14 Mechanical collection agencies grant licences to use commercial recordings on the soundtracks of films.

15 The record company grants a right to perform the record (—— line) to the Phonographic Performance Limited ("PPL").

16 PPL grants licences:
(a) to places of public performance of all kinds for the performance of the record (—— line); and
(b) the television and radio stations for the broadcasting of the record (—— line).



Samuels (2000:47)

How an analog sound wave is converted to binary code and then recorded on a CD.

Digital sound recording is fundamentally different from analog sound recording. Instead of the pattern of the sound waves being reproduced in the grooves of a record or the patterns of magnetism on a tape, *information* about those sound waves is stored in the form of digital signals. To do this, the sound is sampled thousands of times a second. At each sampling, the amplitude of the wave is noted and converted to a binary representation. . . .

The data on a compact disk is recorded as a series of closely spaced pits in the surface of the disk. The pits are arranged in a spiral track whose total length is more than 3.5 miles. To play back the CD, a laser retraces the spiral track, starting at the center. When it hits a pit the light is scattered; when it hits a smooth spot it's reflected.

—Steven Lubar

Appendix G

SOUTH AFRICAN COPYRIGHT REGULATIONS, 1978

Government Notice no R2530 published in *Government Gazette* no 6252 of 22 December 1978

COPYRIGHT REGULATIONS, 1978

As amended by:
Government Notice no R1211 published in*Government Gazette* no 9775 of 7 June 1978 and amended by Government Notice no 1375 published in *Government Gazette* no 9807 of 28 June 1978.

REGULATIONS

The Minister of Economic Affairs has, by virtue of the powers vested in him in terms of section 39 of the Copyright Act, 1978 (Act 98 of 1978), made the following regulations and with the concurrence of the Minister of Finance prescribed the matters in respect of which fees shall be payable and the tariff of such fees set forth in Schedule 2 hereto:

INTERPRETATION

1. In these regulations, unless the context otherwise indicates-
(i) 'archives depot' means an archives depot referred to in section 5 of the Archives Act, 1962 (Act 6 of 1962);
(ii) 'Commissioner' means the person performing the functions of the Tribunal referred to in Chapter 4 of these regulations;
(iii) 'cumulative effect' means-
(a) not more than one short poem, article, story or essay or two excerpts copied from the same author or more than three short poems, articles, stories or essays from the same collective work or periodical volume for the purpose of instructing a particular class during any one term; and
(b) not more than nine instances of such multiple copying for one course of instruction to a particular class during any one term;
(iiiA) 'local authority' means-
(a) any institution, council or body contemplated in section 84(1)*(f)* of the Provincial Government Act, 1961 (Act 32 of 1961), and includes
(b) any statutory body designated as a local authority in terms of paragraph *(c)* of the definition of 'local authority' in section 1 of the National Building Regulations and Building Standards Act, 1977 (Act 103 of 1977).53
(iv) 'teacher' means any person giving instruction or doing research at any school, university or any other educational institution, by whatever name he may be called;
(v) 'the Act' means the Copyright Act, 1978 (Act 98 of 1978), and any expression to which a meaning has been assigned in the Act bears the same meaning when used in these regulations;
(vi) 'the office' and 'the Registrar' mean, respectively, the office of the Registrar of Patents where the court records of the Tribunal shall be kept, and the Registrar of Patents as defined by section 7 of the Patents Act, 1978 (Act 57 of 1978);
(vii) 'the Tribunal' means the Copyright Tribunal established by section 29 of the Act.

CHAPTER 1
REPRODUCTION REGULATIONS
(Section 13)

Permitted reproduction

2. The reproduction of a work in terms of section 13 of the Act shall be permitted-
(a) except where otherwise provided, if not more than one copy of a reasonable portion of the work is made, having regard to the totality and meaning of the work.54
(b) if the cumulative effect of the reproductions does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author.

Reproduction by library or archive depot

3. Subject to the provisions of regulation 2, a library or archives depot or any of its employees acting within the scope of their employment may, after reproduction of a copy of a work, distribute such copy on the following conditions:
(a) The reproduction or distribution shall not be made with any intention of deriving direct or indirect commercial advantage;
(b) the collections of the library or archive depot shall be open to the public or available to researchers affiliated to the library or archive depot or to the institution of which it is a part, and to other persons doing research in a specialised field;
(c) the reproduction of the work shall incorporate a copyright warning;
(d) the rights of reproduction and distribution shall apply to a copy of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit, for research use, in another library or archive depot: Provided that the copy reproduced is to be placed in the collection of the library or archive depot;
(e) the right of reproduction shall apply to a copy of a published work duplicated in facsimile form solely for the purpose of replacement of a copy that is deteriorating or that has been damaged, lost, or stolen: Provided that the library or archive depot has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price;
(f) the rights of reproduction and distribution shall apply to a copy, made from the collection of a library or archive depot to which the user addressed his request or from that of another library or archive depot, of not more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy of a reasonable portion of any other copyrighted work: Provided that the copy shall become the property of the user and the library or archive depot has had no notice that the copy would be used for any purpose other than for private study or the personal or private use of the person using the work;
(g) the library or archive depot shall display prominently, at the place where orders are accepted, and include on its order form, a copyright warning in terms of regulation 6;
(h) the rights of reproduction and distribution shall apply to the entire work, or to a substantial portion of it, copied from the collection of a library or archive depot to which the user addressed his request or from that of another library or archive depot, if the library or archive depot has first determined, on the basis of a reasonable investigation, that an unused copy of the copyrighted work cannot be obtained at a fair price: Provided that-
(i) the copy shall become the property of the user, and the library or archive depot has had no notice that the copy would be used for any purpose other than private study or the personal or private use of the person using the work; and
(ii) the library or archive depot shall display prominently, at the place where orders are accepted, and include on its order form, a copyright warning in terms of regulation 6.

Exemptions and savings

4. Nothing in these regulations contained-
(a) shall be construed as imposing any liability for copyright infringement upon a library or archive depot or its employees for the unsupervised use of reproducing equipment located on its premises: Provided that a notice that the making of a copy may be subject to the Copyright Act, 1978, shall be prominently displayed on such equipment;
(b) shall absolve any person who uses such reproducing equipment or who requests a copy under regulation 3*(f)* from liability for copyright infringement for any such act, or for any later use of such copy, if it exceeds the extent of the copying permitted under the Act;
(c) shall in any way affect any contractual obligations assumed at any time by the library or archive depot when it obtained a copy of a work for its collection.

Multiple copies

5.-
(1) The rights of reproduction and distribution shall extend to the isolated and unrelated reproduction or distribution of a single copy of the same material on separate occasions, but shall not extend to cases where the library or archive depot or its employee-
(a) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies of the same material, other than periodical articles of a scientific or technical nature, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or
(b) engages in the systematic reproduction or distribution of single or multiple copies of material described in regulation 3*(f)*, other than periodical articles of a technical or scientific nature: Provided that nothing in this regulation shall prevent a library or archive depot from participating in interlibrary arrangements that are not designed to or do not have the effect of providing the library or archive depot receiving such copies for distribution with such aggregate quantities that they are a substitute for a subscription to or purchase of such work.
(2) The rights of reproduction and distribution shall not apply to works other than literary works, except that no such limitation shall apply with respect to rights under regulation 3*(d)* and *(e)*, or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with regulation 3*(f)* and *(h)*.

Copyright warning

6.-
(1) A warning of copyright shall consist of a verbatim production of the notice in this subregulation in such size and form and displayed in such manner as to conform to subregulation (2). Copyright warnings shall be displayed at the place where orders for copies are accepted by libraries and archive depots and shall be incorporated in all forms supplied by libraries and archive depots and used by their subscribers or the general public for ordering copies, and where unsupervised equipment is located.

COPYRIGHT WARNING

The Copyright Act, 1978, governs the making of photocopies or other reproductions of copyrighted material. Under the provisions of the Act libraries and archive depots are authorised to supply photocopies or other reproductions. One of these provisions is that the photocopy or reproduction is not to be used for any purposes other than private study or personal or private use.

If a user makes a request for, or later uses, a photocopy or reproduction for purposes not permitted by the Act, that user may be liable for copyright infringement. This institution reserves the right to refuse to accept a copying order if, in its opinion, fulfilment of the order might involve violation of the Act.

(2) Copyright warning required to be displayed by subregulation (1) shall be printed on heavy paper or other durable material in type at least 18 points in size, and shall be displayed prominently, in such manner and position as to be clearly visible, legible and comprehensible to a casual observer in the immediate vicinity of the place where orders are accepted or where unsupervised equipment is located.
(3) The copyright warning required to be incorporated in order forms by subregulation (1) shall be printed within a box located prominently on the order form itself, either on the face of the form or immediately adjacent to the space calling for the name or signature of the person using the form. The notice shall be printed in type size no smaller than that used predominantly throughout the form, and in no case shall the type size be smaller than 8 points. The notice shall be printed in such a manner as to be clearly legible, comprehensible and readily apparent to a casual reader of the form.

Multiple copies for class-room use

7. Subject to the provisions of regulation 2, multiple copies (not exceeding one copy per pupil per course) may be made by or for a teacher for class-room use or discussion.

Copies for teachers

8. Subject to the provisions of regulation 2, a single copy may be made by or for a teacher, at his request, for research, teaching or preparation for teaching in a class.

Prohibitions on copies for class-room use or for the use of teachers

9. Notwithstanding the provisions contained in regulations 7 and 8, the following copying shall be prohibited:
(a) Copies may not be used to create or replace or substitute anthologies, compilations or collective works;
(b) no copies may be made of or from works intended to be ephemeral, including workbooks, exercises, standardised tests and test booklets and answer sheets and similar ephemeral material;
(c) copying may not-
(i) be used as a substitute for the purchase of books, publishers' reprints, or periodicals; and
(ii) be repeated in respect of the same material by the same teacher from term to term;

South African Copyright Act No. 98 of 1978 Section 12 (1,2,3,4,5, and 12 relate to musical works and Section 14 exceptions for musical works:

> Definition of musical work: "musical work means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with music."

General exceptions from protection of literary and musical works

12. (1) Copyright shall not be infringed by any fair dealing with a literary or musical work—

(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;

(b) for the purposes of criticism or review of that work or of another work; or

(c) for the purpose of reporting current events—

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film:

Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.

(2) The copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the

purposes of a report of judicial proceedings.

(3) The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.

(4) The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching:
Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.

(5) (a) The copyright in a literary or musical work shall not be infringed by the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy thereof is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work.

(b) Any reproduction of a work made under paragraph (a) may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work.

(12) The copyright in a literary or musical work shall not be infringed by the use thereof in a bona fide

demonstration of radio or television receivers or any type of recording equipment or playback equipment to a client by a dealer in such equipment.

Special exception in respect of records of musical works

14. (1) The copyright in a musical work shall not be infringed by a person (in this section referred to as the "manufacturer") who makes a record of the work or of an adaptation thereof in the Republic, whether from an
imported disc, tape, matrix or otherwise, if—

(a) records embodying the work or a similar adaptation of the work were previously made in or imported into the Republic for the purposes of retail sale and were so made or imported by, or with the licence of, the owner of the copyright in the work;

(b) before making the record the manufacturer gave the prescribed notice to the owner of the copyright of his intention to make it;

(c) the manufacturer intends to sell the record by retail or to supply it for the purpose of resale by retail by another person or to use it for making other records to be so sold or so supplied; and

(d) in the case of a record which is sold by retail or supplied for the purpose of resale by retail, the manufacturer pays to the owner of the copyright, in th prescribed manner and at the prescribed time, the prescribed royalties.

(2) Where a record comprises, with or without other material, a performance of a musical work or of an adaptation of a musical work in which words are sung or are spoken that are incidental to, or in association with, the music and no copyright subsists in that work or, if copyright does subsist therein, the conditions specified in subsection (1) are fulfilled in relation to such copyright and—

(a) the words consist or form part of a literary work in which copyright subsists; and

(b) the records referred to in subsection (1) (a) were made or imported by or with the licence of the owner of the copyright in that literary work; and

(c) the conditions specified in subsection (1) (b) and (d) are fulfilled in relation to the owner of that copyright,

the making of the record shall not constitute an infringement of the copyright in the literary work.

(3) For the purposes of this section an adaptation of a work shall be deemed to be similar to an adaptation thereof embodied in a previous record if the two adaptations do not substantially differ in their treatment of the work, either in respect of style or, apart from any difference in number, in respect of the performers required to perform them.

(4) A manufacturer may for the purposes of paragraph (a) of subsection (1) make the prescribed enquiries in order to ascertain whether the previous records referred to in that paragraph were previously made in or imported into the Republic, and if the owner of the copyright fails to reply to such enquiries within the prescribed period, the said previous records shall be taken to have been made or imported, as the case may be, with the licence of the owner of the copyright.

(5) The preceding provisions of this section shall apply also with reference to Records of a part of a work or an adaptation thereof: Provided that the provisions of subsection (1) shall not apply with reference to—

(a) a record of the whole of a work or an adaptation thereof unless the previous records referred to in paragraph (a) of that subsection were records of the whole of the work or of a similar adaptation; or

(b) a record of a part of a work or an adaptation thereof unless the records previously made in or imported into the Republic as contemplated in paragraph (a) of that subsection were of, or included, that part of the work or of a similar adaptation.

Appendix H

QUESTIONNAIRE ON DIGITAL MUSIC COPYRIGHT IN SOUTH AFRICA

The purpose of this questionnaire is to assess your knowledge and understanding of digital music copyright laws in South Africa. Please note, however, that this is not a formal test! Please try to answer the questions as best you can. If you do not know or are unsure of an answer, it is not a problem – please simply indicate this on the questionnaire or you are welcome to leave it out. Kindly indicate the [yes] [no] [don't know] answers by placing a cross over the answer which applies.

Please note that 'sound recordings' refers to both analogue and/or digital recordings.

A. On copyright legislation and guidelines

1. The South Africa Copyright Act 98 of 1978 governs Copyright in South Africa. Are you familiar with the copyright legislation in South Africa concerning sound recordings?
   [yes] [no]
   If yes, could you please elaborate.

2. To your knowledge has South Africa implemented legislation covering copyright issues in the digital environment?
   [yes] [no] [don't know]
   If yes, which legislation?

B. On general issues involved in copyright

As mentioned above, if you do not know or are unsure of the answers to any of the following three questions, please indicate this.

3. How long is the term of protection for copyrights related to music in South Africa? i.e. the composition and the sound recording.

4. Who owns the copyright in the old analogue sound recordings which preceded digital formats?

5. If copyright is held by a record label, it may be in an analogue format. How is copyright affected if the music is transferred to a digital format?

C. On content of copyright rules as applied to libraries

6. Does copyright differ between the old sound recordings and the new digital formats?
   [yes] [no] [don't know]
   If yes, in what ways does it differ and how does that affect the music librarian?

7. Are you aware of the copyright rules as they apply to the copying of sound recordings from one medium to another in libraries (especially regarding analogue records to digital format e.g. computer disc format (CD))?
   For example:

   making copies for interlibrary loan
   [yes] [no]

   copying to replace damaged copies
   [yes] [no]

   copying of an unpublished sound recording for preservation purposes
   [yes] [no]

   copying of a published sound recording for preservation purposes
   [yes] [no]

   copying of a published sound recording which is now out of print
   [yes] [no]

   copying for private study
   [yes] [no]

If you answered yes to any of the categories above, please could you elaborate.

8. Does copyright legislation in South Africa cover the lending of sound recordings? If so, please explain the terms of any restrictions.

9. How have users been affected by copyright in terms of digital sound recordings? For example, users can copy illegally at home.

10. If the copyright is held by the musician or a family member, and a digital version is created, does the archive/library have the right to loan this version?
    [yes] [no] [don't know]
    If you answered yes or no above, please explain.

11. Have music copyright laws affected the librarian's ability to organize and provide long term access to music resources in South Africa?
    [yes] [no] [don't know]
    If you answered yes or no, please elaborate.

D. General questions

Again, if you do not know or are unsure of any of the answers to the following questions, please indicate this.

12a. How is copyright in sound recordings different from print? (Are copyright laws applying to print adapted and revised for music recordings?)

b. How does this impact on the librarian who is the interface between the library/archive collection and the user?

13. Do you have any experience of, or know of any conflict between libraries and music rights holders in South Africa?

14. What problems do South African librarians encounter with regard to digital copyright laws?

15. What are the most important problems that you would like to resolve as regards music copyright in South Africa?

16. When you have a copyright problem, from whom do you obtain expert advice?

17. Copyright currently protects private rather than public interest which tends to restrict libraries in their role of disseminating knowledge.
    Please comment on this statement.

18. Please add any other information about music copyright which you consider important and relevant and which none of the above questions have given you the opportunity to supply.

Many thanks for completing this questionnaire. Please send it back to me electronically at fiona@iuncapped.co.za

Appendix I
Letter of consent

Dear Participant

I am a Masters student at the University of KwaZulu-Natal investigating copyright and digital music collections in South Africa.

I am inviting you to participate in the research because of the valuable contribution you can make in terms of highlighting the problems that music librarians can encounter with regard to digital copyright laws pertaining to the transferring of music from the old analogue format to the new digital formats.

If you agree to participate I would like you to complete an attached questionnaire. The questionnaire will be e-mailed to you personally.

I commit myself to keeping the information you provide confidential. You have the right to withdraw at any point of the study, for any reason, and without any prejudice, and the information collected will be turned over to you.

There are no known risks from being in this study. Taking part in the research is completely voluntary.

I appreciate your participation in this research, partly in light of your time-constraints. If you have any questions about the research study itself, please contact me.

Thank you.
Sincerely

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