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An Introduction to Copyright for Small and Medium-sized Enterprises



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Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

CREATIVE EXPRESSIONS

An Introduction to Copyright
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- 4. Creative Expressions: An Introduction to Copyright for Small and Medium-sized Enterprises.**

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PREFACE

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

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

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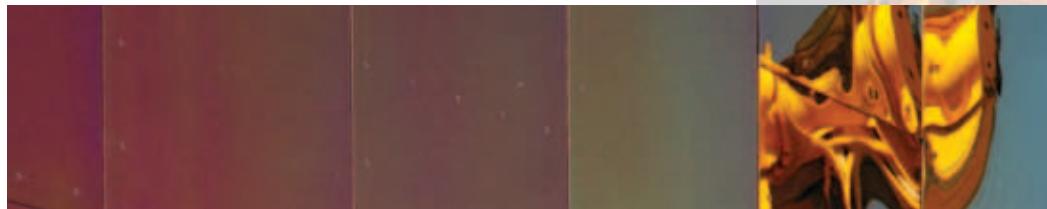
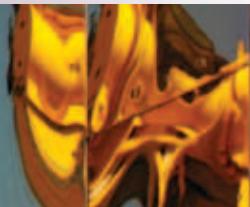


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1. COPYRIGHT AND RELATED RIGHTS

What is copyright?

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

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

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

What are related rights?

“Related rights” refer to the category of rights granted to performers, phonogram producers and broadcasters. In some countries, such as the United States of America and the United

Kingdom, these rights are simply incorporated under copyright. Other countries, such as Germany and France, protect these rights under the separate category called “neighbouring rights.”

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

There are three kinds of “related rights”:

- **Rights of performers** (e.g. actors, musicians etc.) in their performances. A performance includes any mode of visual or acoustic presentation of a work, including any such presentation by the operation of a loudspeaker, a radio, television or diffusion receiver or by the exhibition of a cinematograph film or by the use of a record or by any other means, and in relation to lectures, speeches and sermons, including delivery thereof. Notably a performance does not include broadcasting or rebroadcasting or transmitting a work in a diffusion service. The work performed need not be previously fixed in any medium or form, and may be in the public domain or protected by copyright. The performance may also be an improvised one, whether original or based on a pre-existing work.
- Rights of **producers of sound recordings** (or “phonograms”) in their recordings (e.g. compact discs). A sound recording includes any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with a cinematograph film.
- Rights of **broadcasting organizations** in their radio and television programs transmitted over the air. A broadcast refers to a telecommunication service of transmissions consisting of sounds, images, signs or signals which –

- (a) takes place by means of electromagnetic waves of frequencies of lower than 3 000 GHz transmitted in space without an artificial conductor; and
- (b) is intended for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite and, when used as a verb, shall be construed accordingly.

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

How are copyright and related rights relevant to your business?

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

Example:

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

- Performances of the musicians and singers who perform the song;
- Sound recording of the producer in which the song is included; and
- Broadcast program of the organization that produces and broadcasts the program containing the song.

- **Control commercial exploitation of original works**
such as books, music, films, computer programs, original databases, advertisements, content on websites, video games, sound recordings, radio and television programs or any other creative works. Works protected by copyright and related rights may not be copied or exploited commercially by others without the prior permission of the right holder. Such exclusivity over the use of copyright and related rights protected works helps a business to gain and maintain a sustainable competitive edge in the market place.
- **Generate income:** Like the owner of a property, the owner of copyright or related rights in a work may use it, give it away by way of sale, gift or inheritance. There are different ways to commercialize copyright and related rights. One possibility is to make and sell multiple copies of a work protected by copyright or related rights (e.g. prints of a photograph); another is to sell (assign) your copyright to another person or company. Finally, a third – often preferable – option is to license, that is, permit another person or company to use your copyright-protected-work in exchange for payment, on mutually agreed terms and conditions (see page 62).
- **Raise funds:** Companies that own copyright and related rights assets (e.g. a portfolio of distribution rights to a number of movies/films) may be able to borrow money from a financial institution by using such a bundle of rights as collateral by letting investors and lenders take a “security interest” in them.
- **Take action against infringers:** Copyright law enables right holders to take legal action against anyone encroaching on the exclusive rights of the copyright holder

(called infringers in legal parlance) for obtaining monetary relief, destruction of infringing works, and recovery of attorneys' fees. In South Africa, criminal proceedings are also available in certain instances see page 90).

- **Use works owned by others:** Using works based on the copyright and related rights owned by others for commercial purposes may enhance the value or efficiency of your business, including enhancing its brand value. For example, playing music in a restaurant, bar, retail shop or airlines, adds value to the experience of a customer while using a service or while visiting a business outlet. In most countries, including South Africa, prior permission must be obtained from the right holder by means of a license to use the music for a specified purpose. Understanding copyright and related rights laws will enable you to know when authorization is required and how to go about obtaining it. Obtaining a license from the copyright and/or related rights owners to use a work for a specific purpose is often the best way to avoid disputes that may otherwise result in potentially time consuming, uncertain, and expensive litigation.

How are copyright and related rights obtained?

Practically all countries, worldwide, have one or more national law concerning copyright and related rights. As there are important differences amongst the copyright and related

Most businesses print brochures or publish advertisements that rely on copyright protected materials.

rights laws of different countries, it is advisable to consult the relevant national copyright and/or related rights law(s) and/or take legal advice from a competent professional before taking any key business decision involving copyright and/or related rights.

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

A large number of countries, including South Africa, are signatories to several important **international treaties** that have helped to harmonize, to a considerable extent, the level of copyright and related rights protection amongst countries. South Africa is a member of the Berne Convention and the TRIPS agreement. It has signed but not yet ratified the WIPO Copyright Treaty. This has made it possible for works to benefit from copyright protection **without any formalities or requirement of registration**. A list of the main international treaties is provided in Annex III.

Are there other legal means for protecting original creations?

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

- **Trademarks.** A trademark provides exclusivity over a sign (such as a word, logo, color or combination of these) which helps to distinguish the products of a business from those of others.

- **Registered designs.** Exclusivity over the aesthetic or ornamental features of a product may be obtained through protection as a registered design. It is also possible in South Africa to obtain protection for functional designs.
- **Patents** may protect inventions that meet the criteria of novelty, inventive step and industrial applicability.
- **Confidential business information** of commercial value may be protected as a trade secret, as long as reasonable steps are taken by its owner to keep the information confidential or secret. While South Africa does not provide for the registration of trade secrets and there is no dedicated legislation protecting undisclosed information or so-called trade secrets, an action for disclosure of a trade secret may be based on breach of contract and/or delict.
- **Unfair competition** law provides a measure of protection against unfair business behavior by competitors and could provide protection over and above the protection under copyright law. An action based on unfair competition requires that the right holder stand in competitive relationship with the infringer and that the infringer has achieved an unfair advantage as a result of the infringement. However, protection under specific intellectual property laws is stronger than the protection available under unfair competition law.



2. SCOPE AND DURATION OF PROTECTION

What categories or types of works are protected by copyright?

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

- Literary works (e.g. books, magazines, newspapers, technical papers, instruction manuals, catalogs, tables and compilations of literary works);
- Musical works (a work consisting of music exclusive of any words or actions);
- Dramatic works (includes not only plays but also, for example, a sales training program captured on videocassettes);
- Artistic works (such as paintings, sculptures, drawings, engravings and photographs; works of architecture, being either buildings or models of buildings or works of craftsmanship, not falling within either of the above);
- Photographic works (both on paper and in digital form);

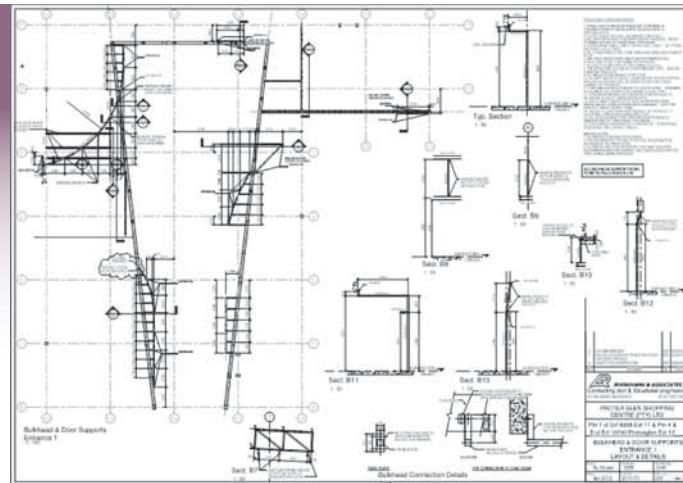
- Computer programs;
- Some types of databases;
- Maps, globes, charts, diagrams, plans and technical drawings;
- Advertisements, commercial prints and labels;
- Cinematographic works, including motion pictures, television shows, and webcasts;
- Multimedia products.

Copyright protects works that are expressed in **print** as well as those created or stored in **electronic or digital media**.

The fact that a work in its digital form can only be read by a computer – because it consists only of ones and zeros – does not affect its copyright protection.

Example: Literary works such as books are protected by copyright





An example of a technical drawing protected by copyright.

Drawing courtesy of Rosnovanu & Associates.

PROTECTION OF COMPUTER PROGRAMS AND SOFTWARE

From a digital point of view, there is absolutely no distinction between text, sounds, graphics, photographs, music, animations, videos and software. But one vital difference separates computer programs from all the rest. While text, sounds, graphics, etc. are generally **passive** in nature, programs, by contrast, are essentially **active**. Therefore, there is much debate about the suitability of copyright law for protection of computer programs.

In practice, there are many ways to protect different elements of a computer program.

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

a computer qualifies as a computer program and would be protected by copyright law.

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

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

However, it is likely that South African courts will be guided in their interpretation by international case law that has in certain instances recognised patents on computer programs. Some countries provide the possibility to protect software related inventions under patent law. However, the South African Patents Act specifically excludes a program for a computer from the definition of an invention. In the absence of case law in South Africa, it is not clear how this will be interpreted by the courts. It is likely however that South African courts may be guided in their interpretation by international case law that provides instances in which patents on computer programs have been accepted.

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

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

An agreement governed by contract law remains a central form of legal protection, complementing or possibly even substituting for intellectual property rights. Often, such additional protection through a contract or license agreement is labeled as “super-copyright”. Most computer software

packages are sold with license documents contained therein which purport to bind the purchaser even though the purchaser does not himself actually sign the licence agreement. In South Africa, these licenses are known as shrink wrap agreements. While these agreements are widely used, there is no precedent in South Africa of a shrink wrap licence agreement having been enforced but there is no reason why these agreements will not be enforced under the general principles of contract law.

In recent years, many countries are increasingly using criminal law for regulating access to information technologies, including software. The dealing in infringing copies of computer software constitutes a criminal offence in terms of the South African Copyright Act. The penalties on conviction are a fine of up to R5 000.00 or imprisonment for a period of up to 3 years. These penalties are for a first conviction, with the penalties for a second conviction being even higher. Notably, the fine or imprisonment relates to each infringing article.

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

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

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

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

Whether one considers legal or technological measures, today's landscape affords software producers unprecedented protection over their products provided they care to understand and use it as a part of their business strategy. There is an accompanying challenge too. A perfect copy of a digital work can be made and sent anywhere in the world with a few mouse-clicks or keystrokes on a personal computer and an Internet account.

It is important to note that, with today's large, complex computer programs, most copyright infringement consists of the word for word copying or unauthorized distribution of a computer program. In most cases, the question as to whether any similarities are expression (protected by copyright) or function (not protected by copyright) does not need to be considered.

What criteria must a work meet to qualify for protection?

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

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

PROTECTION OF DATABASES

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

In some countries (e.g. the United States of America) copyright only protects a database if it is selected, coordinated, or arranged in such a way that it is sufficiently **original**. However, exhaustive databases and databases in which the data is arranged according to basic rules (e.g. alphabetically, as in a phone directory) are usually not protected under copyright law in such countries (but may sometimes be protected under **unfair competition law**).

In other countries, mostly in Europe, **non-original databases** are protected by a unique right called the **database right**. This gives a much greater protection to databases. It allows makers of databases to sue competitors if they extract and reuse substantial (quantitatively or qualitatively) portions of the database, provided there has been a **substantial investment** in obtaining, verifying, or presenting the data contents. If a database has a sufficient level of originality in its structure, it is also protected by copyright.

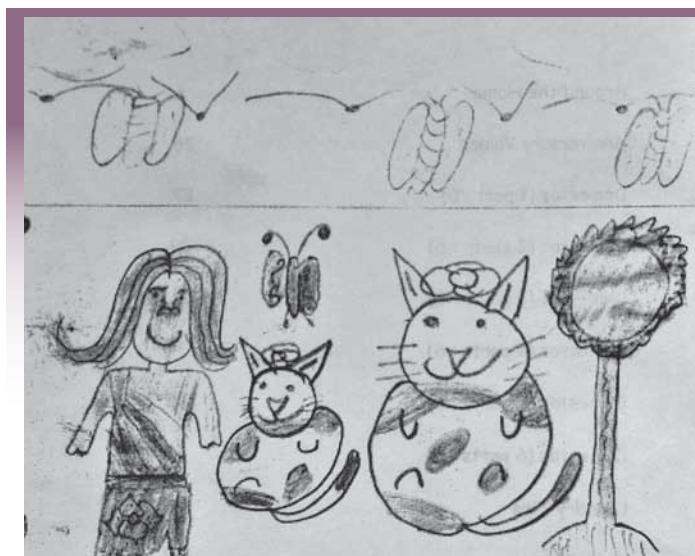
When a database is protected by copyright, this protection extends **only to the manner of selection and presentation** of the database and not to its contents.

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

In South Africa, a work except a broadcast or programme-carrying signal, shall not be eligible for copyright unless the work has been “written down, recorded, represented in digital data or signals or otherwise reduced to a material form”.

Broadcasts or programme-carrying signals shall not be eligible for copyright until, in the case of a broadcast, it has been broadcast and, in the case of a programme-carrying signal, it has been transmitted by a satellite.

Copyright protects both published and unpublished works. Creating an original work involves labor, skill, time, ingenuity, selection or mental effort. Even so, a work enjoys copyright protection **irrespective of its creative elements, quality or value**, and does not need to have any literary or artistic merit. Copyright also applies to, for example, packaging labels, recipes, purely technical guides, instruction manuals or engineering drawings as well as to the drawings of, say, a three-year-old child.



Sketches and technical drawings for architectural works, engineered items, machines, toys, garments, etc are protected by copyright.

What aspects of a work are not protected by copyright?

- **Ideas or concepts.** Copyright law only protects the way ideas or concepts are expressed in a particular work. It does not protect the underlying idea, concept, discovery, method of operation, principle, procedure, process, or system, regardless of the form in which it is described or embodied in a work. While a concept or method of doing something is not subject to copyright, written instructions or sketches explaining or illustrating the concept or method are protected by copyright.
- **Facts or information.** Copyright does not protect facts or information – whether scientific, historical, biographical or news – but only the manner in which such facts or information is expressed, selected or arranged.
- **Names, titles, slogans and other short phrases** are generally excluded from copyright protection. However, some countries allow protection if they are highly creative. The name of a product or an advertising slogan will usually not be protected by copyright but may be

Example:

Your company has copyright over an instruction manual that describes a system for brewing beer. The copyright in the manual will allow you to prevent others from copying the way you wrote the manual and the phrases and illustrations that you have used. However, it will not give you any right to prevent competitors from

- (a) using the machinery, processes, and merchandising methods described in the manual; or
- (b) writing another manual for a beer brewery.

Example:

A biography includes many facts about a person's life. The author may have spent considerable time and effort discovering things that were previously unknown. Still, others are free to use such facts as long as they do not copy the particular manner in which the facts are expressed. Similarly, one can use the information in a recipe to cook a dish but not make copies of the recipe, without permission.

protected under trade mark law or the law of unfair competition. A logo, on the contrary, may be protected under copyright as well as by trade mark law, if the respective requirements for such protection are met. In South Africa, titles, names, short phrases, slogans, and works consisting entirely of information that is common property and containing no original authorship cannot be protected by copyright. It may be possible however to protect these elements through trade mark law.

- **Official government works** (such as copies of statutes or judicial opinions) have no copyright protection in some countries. The South African Copyright Act provides that no copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in news of the day that are mere items of press information.
- **Works of applied art.** In some countries, copyright protection is not available to works of applied art. In such countries, the ornamental aspects of the work may be protected as an industrial design under industrial design law. However, copyright protection will cover

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

WHAT IS AN “ARTISTIC WORK” IN TERMS OF SOUTH AFRICAN COPYRIGHT LAW?

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

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

ARTISTIC WORKS AND REVERSE ENGINEERING

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

What rights does copyright protection provide?

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

What are economic rights?

Economic rights give the owner/holder of copyright the **exclusive right** to authorize or prohibit certain uses of a work.

Exclusive means no one may exercise these rights without a copyright owner's prior permission. The scope of these rights, and their limitations and exceptions, differ depending on the type of work concerned and the relevant national copyright law. The economic rights are more than simply a "right to copy"; the emphasis is not solely on this right, but on several different rights to prevent others from unfairly taking advantage of the creative work of the original owner of the copyright. Generally, economic rights include the exclusive rights to:

- **Reproduce a work** in various forms. For example, copying a CD, photocopying a book, downloading a computer program, digitizing a photo and storing it on a hard disk, scanning a text, printing a cartoon character on a T-shirt, or incorporating a portion of a song into a new song. This is one of the most important rights granted by copyright.
- **Distribute copies of a work to the public.** Copyright allows its owner to prohibit others from selling, leasing

WORKS OF APPLIED ART – OVERLAP BETWEEN COPYRIGHT AND DESIGN RIGHTS

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

Drawings of a technical nature (eg. engineering drawings) and works of craftsmanship of a technical nature (eg. prototypes) enjoy copyright in South Africa, not only against reproduction of the drawings in 2-dimensions but also against reproduction of the works (eg. machines, spare parts) in 3-dimensional form. However, if the copyright owner introduces 3-dimensional reproductions to the market, which “authorised” reproductions are works which primarily have a utilitarian purpose and are made by an industrial process, their copyright protection against copying the authorised reproductions (so called “reverse engineering”) is lost.

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



or licensing unauthorized copies of the work. But there is an important exception: In most countries, including South Africa, the right of distribution comes to an end on the first sale or transfer of ownership of a particular copy. In other words, a copyright owner can control only the “first sale” of a copy of a work, including its timing and other terms and conditions. But, once a particular copy is sold, the copyright owner has no say over how that copy is further distributed in the territory of the relevant country. The buyer can resell the copy, or give it away, but cannot make any copies or prepare derivative works (see below) based on it.

- **Rent copies of a work.** This right generally applies only to certain types of works, such as cinematographic works, musical works, or computer programs. However, the right does not extend to computer programs which are part of an industrial product, for example the program controlling the ignition in a rental car.
- **Make translations or adaptations of a work.** Such works are also called **derivative works**, which are new works that are **based on a protected work**. For example, translating an instruction manual in English into other languages, turning a novel into a film (motion picture), rewriting a computer program in a different computer language, making different musical arrangements, or making a toy based on a cartoon figure. In many countries, including South Africa, there are however important exceptions to the exclusive right to create derivative works, e.g. if you lawfully own a copy of a computer program, you may adapt or modify it only for its regular use.

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

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

What are moral rights?

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

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

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

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

The South African Copyright Act recognizes moral rights in literary works, musical or artistic works, cinematograph films

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

In some countries an author or creator may waive his/her moral rights by written agreement, whereby he/she agrees not to exercise some or all of his/her moral rights. South African law provides however that moral rights are akin to personality rights in that they attach to the author itself and cannot be transferred or inherited. Moral rights can however be waived and the author may elect not to enforce them. While not decided on by the courts, it would appear that moral rights can only exist in a work for which copyright subsists.

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

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

What rights do “related rights” provide?

Performers (e.g. actors, musicians, dancers) have the right to prevent the broadcast, fixation or reproduction of their performance in terms of the Rome Convention. In South Africa, the Performers Protection Act grants performers exclusive rights to prevent certain acts from being committed in relation to their performances without their consent. The Act provides that a performer has the right to prevent anyone from broadcasting or communicating to the public his unfixed performance and from making a fixation of his unfixed performance. Furthermore, a performer's rights are also infringed if anyone, without the performer's consent, makes a reproduction of a fixation of a performance if the original fixation was made without the performer's consent; the reproduction was made for purposes other than those for which the performer gave his consent originally; or the

COPYRIGHT IN CINEMATOGRAPH FILMS

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

original fixation was made in accordance with the so-called “fair use” provisions and the reproduction thereof is made for purposes not included within these provisions. While the Act does not, as in the case of some other countries, provide for specific types of rights, the rights provided for are in the nature of non-property rights and economic rights.

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

Notably South Africa does not provide moral rights to performers.

Producers of phonograms (record producers or manufacturers) have the exclusive right to authorize or prohibit the reproduction, use or distribution of their recordings. The most important right is the right to control the reproduction of their phonograms. The other rights may include the right to receive a fair remuneration when



the phonograms are broadcast, the making available right (available at a time chosen by individual members of the public), or the right to communicate to the public. In South Africa, the Performers Protection Act defines phonograms as any exclusively aural fixation of sounds of a performance or of other sounds. The South African Copyright Act defines sound recordings as any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with a cinematograph film.

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

RIGHTS OF RECORD MANUFACTURERS

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

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

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

In South Africa, record manufacturers have the exclusive right to authorize or prohibit the broadcast of their records. For more information on this see the discussion above on the Producers of Phonograms.

- Making, directly or indirectly, a record embodying the sound recording;
- Letting, or offering or exposing for hire by way of trade, directly or indirectly, a reproduction of the sound recording;
- Broadcasting the sound recording;
- Causing the sound recording to be transmitted in a diffusion service, unless that service transmits a lawful broadcast, including the sound recording and is operated by the original broadcaster;
- Communicating the sound recording to the public.

In the absence of an agreement to the contrary, no person may broadcast, cause the transmission of or play a sound recording as contemplated in the last three bullets above, without payment of a royalty to the owner of the relevant copyright. The owner of the copyright who receives payment of a royalty in terms of this section shall share such royalty with any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard under the Performers Protection Act. The amount of such royalty shall be determined by agreement between the user of the sound recording, the performer and the owner of the copyright, or between their representative collecting societies. In the absence of an agreement the user, performer or owner may refer the matter to the Copyright Tribunal or they may agree to refer the matter for arbitration. The South African Music Performance Rights Association (SAMPRA) is a collecting society that represents the Recording Industry of South Africa (RISA). SAMPRA administers the rights to communicate

sound recordings to the public, diffuse sound recordings and broadcast sound recordings.

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

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

Copyright in a broadcast belongs to the person who first broadcasts it.

Broadcaster rights are administered in South Africa by the National Broadcasters Association (NBA).

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

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

In many countries, the broadcaster of a television communication signal has the exclusive right to authorize or prohibit to communicate to the public, for example, to perform it in a place open to the public on payment of an entrance fee. The rights to authorize or prohibit the cable retransmission of a broadcast are generally exercised through a collective management organization (CMO) (see page 67), except where they are exercised by a broadcasting organization in respect of its own transmissions. In South Africa, copyright in programme carrying signals vest the exclusive right to undertake, or to authorize, the direct or indirect distribution of such signals by any distributor to the general public. The National Broadcasters Association (NBA) administers the rights of broadcasters.

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

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

COPYRIGHT AND RELATED RIGHTS FOR MUSIC

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

The licensed public performance or use of music is paid for by major television networks, local television and radio stations, cable and satellite networks and systems, public broadcasters, Internet web sites, colleges and universities, night clubs, restaurants, background music services, fitness and health clubs, hotels, trade shows, concert presenters, shopping centers, amusement parks, airlines, and music users in a wide variety of other industries, including the telephone industry (ring tones).

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

If the music and lyrics are composed by two different people then most likely, a national law will treat the song as consisting of two works – a musical work and a literary work. However, in most cases a license can be obtained from one collective management organization for the broadcasting of the entire song. In South Africa copyright will be recognized in both the literary work (the lyrics) and the musical work (the music). The Southern African Musical Rights Organisation (SAMRO) is a collective management organization that manages the license for use of songs.

The **music publishing rights** include the right to record, the right to perform, the right to duplicate, and the right to include the work in a

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

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

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

The right to print and sell a single song and multiple songs or copies of sheet music of musical compositions is the **print right**, which is licensed by the publisher.

A **mechanical right** refers to the right to record, reproduce and distribute to the public a copyrighted musical composition on phone records (which includes audiotapes, compact discs and any other material object in which sounds are fixed, except those accompanying motion pictures and other audiovisual works). The licenses granted to the user to exploit the mechanical rights are called **mechanical licenses**.

The right to record a musical composition in synchronization with the frames or pictures in an audiovisual production, such as a motion picture, television program, television commercial, or video production, is called the **synchronization (“synch”) right**. A **synchronization license** is required to

permit the music to be fixed in an audiovisual recording. The grant of this license permits the producer to incorporate a particular piece of music into an audiovisual work. This license is traditionally obtained by the television producer, through direct negotiation with the composer and the lyric writer or, more commonly, their publisher.

Apart from the license needed to be obtained from a composer for the use of music in an audio-visual recording, a separate “sync” license needs to be secured from the owner of the sound recording, which embodies or contains the musical work.

The term **master recording** (or **master** for short) refers to the originally produced recording of sounds (on a tape or other storage media) from which a record manufacturer or producer makes CD's or tapes, which it sells to the public. **Master recording rights** or **master use rights** are required to reproduce and distribute a sound recording embodying the specific performance of a musical composition by a specific artist.

The use of musical works as mobile ringtones has been a rapidly growing area of music use. It has become a fun and hugely popular way to personalize your mobile phone. The popularity of ringtones has proved to be more widespread and enduring than many initially expected and has placed this new form of music use at the forefront of a predicted growth in ‘paid-for’ content for mobile devices. A ringtone is a file of binary code sent to a mobile device via SMS or WAP. The license for ringtones usually covers the creation and delivery of both ‘monophonic’ and ‘polyphonic’ ringtones.

“Digital Rights Management” (DRM) tools and systems (see page 46) play an important role in online management of music sales to prevent piracy. For example, Apple's FairPlay technology and Microsoft's Windows Media build restraints into digital music so that copyright holders are compensated for sales and so that the making of digital copies is curtailed.

How long do copyright and related rights protections last?

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

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

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

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

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

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

The duration of protection for **related rights** is usually shorter than for copyright. In some countries, related rights are protected for a period of **20 years** from the end of the calendar year in which the fixation was made or the performance or broadcast took place. Many countries, however, protect related rights for 50 years from the end of the calendar year after the performance, fixation or broadcast, as the case may be. In South Africa, the term of protection accorded to performers shall commence on the day the performance first took place; or if incorporated in a phonogram, when it was first fixed on

such phonogram; and shall continue for a period of 50 years calculated from the end of the year in which the performance took place or was incorporated in a phonogram. Unlike many other countries, South Africa specifically provides that protection will commence with immediate effect as soon as the performance takes place, or from when it is first fixed in a phonogram. Copyright in sound recordings last for 50 years from the end of the year in which the recording is first published and in broadcasts, fifty years from the end of the year in which the broadcast first takes place.

*Courtesy: Alison
Levesley*



PHOTOGRAPHS

In some countries, photographs are protected for only 5 or 15 years from the publication date. However, in South Africa photographs are protected for 50 years from the end of the year in which the photograph was either made available to the public or first published, whichever is the longer (or failing such an event within 50 years from the making of the work, 50 years from the end of the year in which the work was made).



3. PROTECTING YOUR ORIGINAL CREATIONS

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

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

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

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

- Some countries have a national **copyright office** that provides an option to deposit and/or register your works for a fee (see Annex II for a list of websites of some national

copyright offices). Doing so provides evidence of the existence of a valid claim to copyright protection. In some of those countries, you can more effectively pursue a lawsuit for copyright infringement if you have registered the work at the national copyright office. South Africa however does not provide for registration of copyright in works other than cinematograph films. It is advisable however to register your copyright in a cinematograph film as it eases the evidential burden in the case of a dispute.

- You may deposit a copy of your work with a **bank or lawyer**. Alternatively, you could **send yourself a copy** of your work in a sealed envelope by special delivery post (which results in a clear date stamp on the envelope), leaving the envelope unopened upon delivery. However, not all countries accept this practice as valid evidence. The matter has yet to be considered by the courts in South Africa.

COPYRIGHT PROTECTION FOR MULTIMEDIA PRODUCTS

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

- Works that are published should be marked with a **copyright notice**.
- It is also advisable to mark your work with specific standard **identification numbering systems**, such as the International Standard Book Number (ISBN) for books; the International Standard Recording Code (ISRC) for sound recordings; the International Standard Music Number (ISMN) for printed music publications; the International Standard Musical Work Code (ISWC) for musical works of the kind which are within repertoires mostly controlled by collective management organizations; the International Standard Audiovisual Number (ISAN) for audiovisual works, etc.

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

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

When businesses provide copyright-protected works online, such works are generally subject to a “**mouse-click contract**” (also called “click-wrap contract” or “shrink-wrap license”) that seeks to limit what the user can do with the content. Such restrictions typically limit use to a single user and allow that user only to read/listen to a single copy. Redistribution or reuse is generally prohibited.

In addition, many businesses employ technological measures to protect their copyright in digital content. Such measures are generally referred to as “**Digital Rights Management**” (DRM) tools and systems. They are used for defining, tracking and enforcing permissions and conditions through electronic means and throughout the content lifecycle.

There are two ways in which DRM tools and systems can help control copyright in digital works:

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

Example:

Digital works such as CDs are easily copied and unlawfully transmitted



Rights management information

There are various ways to identify your copyright protected material:

- You may **label** the digital content, for example, with a copyright notice or a warning label such as “May be reproduced for non-commercial purposes only.” It is good practice also to include a copyright statement on every page of your business website that spells out the terms and conditions for use of the content on that page.
- The **Digital Object Identifier** (DOI) is a system for identifying copyright works in the digital environment. DOIs are digital tags/names assigned to a work in digital form for use on the Internet. They are used to provide current information, including where the work can be found on the Internet. Information about a digital work may change over time, including where to find it, but its DOI will not change. (See www.doi.org).
- A **time stamp** is a label attached to digital content (works), which can prove what the state of the content

CHOOSING THE RIGHT DRM TOOLS

There are many techniques that can be used to lower the likelihood of copyright infringement through the application of DRM tools and systems. Each has different strengths and weaknesses as well as acquisition, integration and maintenance costs. The choice of particular techniques is best determined by your assessment of the level of risk associated with the use of the work.

was at a given time. Time is a critical element when proving copyright infringement: when a particular e-mail was sent, when a contract was agreed to and when a piece of intellectual property was created or modified.

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

Technological protection measures (TPMs)

Some businesses prefer to use technology to limit access to their works to only those customers who accept certain terms and conditions for the use of the works. Such measures may include the following:

- **Encryption** is often used to safeguard software products, phonograms and audiovisual works from unlicensed use. For example, when a customer downloads a work, DRM software can contact a clearinghouse (an institution which manages the copyright and related rights) to arrange payment, decrypt the file, and assign an individual “key” – such as a password – to the customer for viewing, or listening to, the content.
- An **access control or conditional access system**, in its simplest form, checks the identity of the user, the content

files, and the privileges (reading, altering, executing, etc.) that each user has for a particular work. An owner of a digital work may configure access in numerous ways. For example, a document may be viewable but not printable, or may be used only for a limited period of time.

- **Releasing only versions of lower quality.** For instance, businesses can post photographs or other images on their website with sufficient detail to determine whether they would be useful, e.g. in an advertising layout, but with insufficient detail and quality to allow reproduction in a magazine.

USE CARE WHEN IT COMES TO TPMs

Businesses that offer digital content may consider implementing TPMs if there is a need to protect against unauthorized reproduction and distribution of the digital works. The use of TPMs, however, should be balanced with other considerations. For example, TPMs should not be used in ways that violate other laws that may apply, such as laws of privacy, laws protecting consumers, or laws against anti- competitive practices.

Businesses that make use of other people's digital content are encouraged to obtain all licenses or permissions necessary for the desired use (including authorization to decrypt a protected work, if necessary). This is because a business or individual who circumvents a TPM and then uses the protected work may be liable for violating an anti- circumvention law as well as for copyright infringement.

What protection do you have abroad?

Most countries are members of one or more international treaty to ensure, amongst other things, that a copyright work created in one country is **automatically protected in all countries that are members of such international treaty**.

The most important international treaty on copyright is the **Berne Convention for the Protection of Literary and Artistic Works**. If you are a national or a resident of a country party to the Berne Convention (see list of members in Annex III), or if you have published your work in one of the member countries, your work will automatically enjoy the level of copyright protection granted in the Berne Convention in all other countries that are party to this Convention. South Africa is party to the Berne Convention.

However, copyright protection remains **territorial** in nature. Therefore your work will only enjoy copyright protection if it **meets the legal requirements of the copyright law of the relevant country**. So while your work may automatically be protected by copyright in many countries (because of international treaties), you still have a separate copyright protection system in each country, which varies considerably amongst countries.

Is a copyright notice on the work obligatory?

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

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

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

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

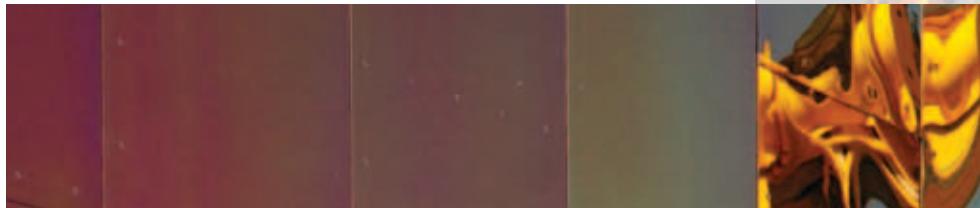
If you significantly modify a work, it is advisable to update its copyright notice by adding the years of each modification. For example, “2000, 2002, 2004” indicates that the work was created in 2000 and modified in 2002 and 2004.

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

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

(e.g., on CDs or audio tapes) in order to be protected in that country.

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



4. OWNERSHIP OF COPYRIGHT

Is the author always the owner of a copyright work?

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

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

- a literary, musical or artistic work, the person who first makes or creates the work;
- a photograph, the person who is responsible for the composition of the photograph;
- a sound recording, the person by whom the arrangements for the making of the sound recording were made;
- a cinematograph film, the person by whom the arrangements for the making of the film were made;
- a broadcast, the first broadcaster;
- a programme-carrying signal, the first person emitting the signal to a satellite;
- a published edition, the publisher of the edition;

- a literary, dramatic, musical or artistic work or computer program which is computer-generated, the person by whom the arrangements necessary for the creation of the work were undertaken;
- a computer program, the person who exercised control over the making of the computer program.

Notably, the South African courts have accepted that only a natural person can be the author of a literary, musical or artistic work.

The issue of authorship is especially relevant in connection with moral rights and in order to determine the date on which protection expires.

Copyright ownership is a different issue. The **owner** of the copyright in a work is the person who has the exclusive right to exploit the work, for example, to use, copy, sell, and make derivative works. Generally, copyright in a work initially belongs to the person who actually created it, that is to say, the author. The South African Copyright Act specifies that the ownership of copyright generally vests in the author, or in the case of work of joint authorship in the co-authors of the work, except in the following circumstances:

- Where a literary or artistic work is created **in the course of employment** by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, and is so made for the purposes of publication in a newspaper, magazine or similar periodical. In this case, the proprietor shall be the owner of the copyright in the work in so far as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of it being so published, but in

all other respects the author shall be the owner of any copyright subsisting in the work.

- Where a person **commissions** the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or making of a sound recording and pays for it in money or moneys worth and the work is made in pursuance of that commission. In this case the person who commissioned the work is the owner of the copyright in the work;
- In any other instance than those mentioned above, where a work is made in the course of the author's employment under a contract of service or apprenticeship, that other person shall be the owner of any copyright subsisting in the work.

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

Who owns moral rights?

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

Example:

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

inherited. It is therefore only the author of a work who can own moral rights under South African law.

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

Who owns the copyright in works created by an employee?

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

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

Who owns the copyright in commissioned works?

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

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

WORKS CREATED FOR GOVERNMENTS

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

Who owns the copyright in works created by several authors?

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

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

- **Joint works.** When two or more authors agree to merge their contributions into an inseparable or interdependent combination of the individual contributions, a “joint work” is created. An example of a joint work is a textbook in which two or more authors contribute separate components that are intended to be combined into a single work. In a joint work, the contributing authors become the **joint owners of the entire work**. The copyright law of many countries, including South Africa, requires that all joint owners must consent to the exercise of copyright. In other countries, any one of the joint owners may exploit the work without permission of the other co- author(s) (but may have to share the profits generated from such use). A **written agreement** among

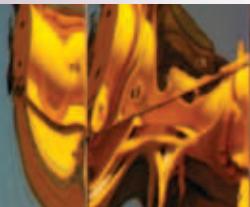


The Da Vinci Code movie is a derivative work of the Da Vinci Code book. Therefore, the producer of the Da Vinci Code movie required Dan Brown's permission to make and distribute the film.

the authors or owners is usually the best course of action, specifying such issues as ownership and use issues, rights to revise the works, marketing and sharing of any revenue, and warranties against copyright infringement.

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

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



5. BENEFITING FROM COPYRIGHT AND RELATED RIGHTS

How can you generate income from creative works?

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

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

There are many ways to commercialize creative works:

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

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

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

Copyright is distinct from the right of possession of the physical object in which the work is fixed. Merely selling a copyright work (e.g. a computer program or a manuscript) does not automatically transfer copyright to the buyer.

Copyright in a work generally remains with the author unless he expressly assigns it by a written agreement to the buyer of the work.

However, in some countries, including South Africa, if you sell a copy of a work or the original (e.g. a painting), you lose some of your exclusive rights out of the bundle of rights associated with copyright. For example, the buyer of the copy has the right in South Africa to further dispose of the copy but not to reproduce it or make an adaptation of the work. What

rights will be lost or kept varies significantly from country to country and it is advisable to check the applicable laws before selling copies of a work in a particular country.

What is a copyright license?

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

What is the difference between an exclusive and a non-exclusive license?

A license may be exclusive or non-exclusive. If you grant an **exclusive license**, the licensee alone has the right to use the work in the ways covered by the license. In most countries, including South Africa, an exclusive license must be in writing and signed by the assignor to be valid. An exclusive license may also be restricted, for example, to a specified territory, for a period of time, for limited purposes, or the continuation of the exclusivity may be conditional upon other types of performance requirements. In South Africa, exclusive licenses can be restricted by some only of the acts which the owner of the copyright has the exclusive right to control, or to a part only of the term of the copyright, or to a specified country

or other geographical area. Exclusive licenses are often a good business strategy for getting a copyright product distributed and sold on the market, if you lack the resources to effectively market your work yourself.

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

What happens when you sell your copyright?

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

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



An assignment shall be of no effect unless it is in writing and signed by the assignor. It is possible to assign the copyright in a future work, or the copyright in an existing work in which copyright does not subsist but will come into being in the future.

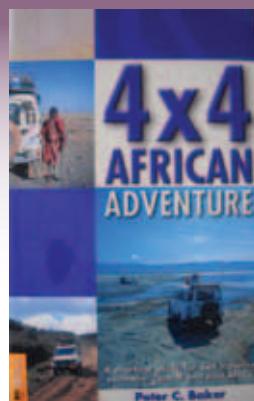
Licensing Strategy

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

Example:

The 4x4 African Adventure, is a book written by traveller and vet, Peter Cornell Baker. He is the author and the owner of the copyright. Struik is the publishing house which published the book. Generally, the publishing house will have an exclusive licence to publish the book, thereby preventing any other publishing houses from publishing the book. If photographs are included in a literary work, permission needs to be obtained to use them unless the author of the literary work is also the author of the photograph.

Courtesy of Peter Baker



Sometimes, however, absolute control over a work represents a business security for the licensee or an essential part of its business strategy. In such situations, an exclusive license or an assignment of all your rights in exchange for a one-time fee may be the best deal. But you should consider such negotiations only after having exhausted all other possible alternatives, and make sure that you are paid adequately for it. Once you assign the copyright in a work you lose all its future income-earning potential.

What is merchandising?

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

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

- Companies that manufacture low-priced mass produced goods, such as coffee mugs, candies or T-shirts, may make their products more attractive by using a famous character, artistic work, or other appealing element on them.
- Merchandising requires prior authorization to use the various rights (such as a copyright protected work, an

design or a trade mark) on the merchandised good. Extra caution is necessary when celebrities' images are used for merchandising, as they may be protected by privacy and publicity rights.

How do you license your works?

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

One option is to **handle all aspects of the process of licensing yourself**. You may negotiate the terms and conditions of the licensing agreement individually with every single licensee or you may offer licenses on standard terms and conditions that must be accepted as such by the other party if it is interested in exploiting your copyright or related rights works.

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

In practice, it is often difficult for a copyright or related rights owner, and even for licensing agents, to monitor all the different uses made of their works. It is also quite difficult for users, such as radio or TV stations, to individually contact each author or

copyright owner in order to obtain the necessary permissions. In situations where individual licensing is impossible or impracticable, joining a **collective management organization** (CMO) may be a good option, if available for the specific category of works involved. CMOs monitor the uses of works on behalf of creators of certain categories of works, and are in charge of negotiating licenses and collecting payment. You may join a relevant CMO in South Africa and/or in other countries where such an organization exists.

How do collective management organizations work?

CMOs act as intermediaries between users and a number of copyright owners who are members of the CMO. Generally, there is one CMO per type of work and per country. However, CMOs exist for only some types of works, such as film, music, photography, reprography (all kinds of printed material), television and video and visual arts. On joining a CMO, members notify the CMO about the works that they have created or own. The core activities of a CMO include: 1) documentation of works of its members, 2) licensing and collecting royalties on behalf its members, 3) gathering and reporting information on the use of works, 4) monitoring and auditing, and 5) distribution of royalties to its members. The works included in the repertoire of the CMO are consulted by persons or companies interested in obtaining a license for their use. To enable the copyright or related rights owners to be represented internationally, CMOs enter into reciprocal agreements with other CMOs throughout the world. The CMOs then grant licenses on behalf of their members, collect the payments, and redistribute the amount collected, based on an agreed formula, to the copyright owners.

The practical advantages of collective management are as follows:

- Collective licensing has many benefits for users and rights-holders. A **one-stop shopping** greatly reduces the administrative burden for users and rights-holders; not only does collective management provide right-owners access to economies of scale with respect to administration costs but also in making investments in research and development for creating digital systems that allow a more effective fight against piracy. Further, collective licensing is a great equalizer; without a collective system in which all market operators participate, small and medium-sized right-holders and small and medium-sized users would be simply locked out of the market.
- It also allows owners of protected works to use the power of **collective bargaining** to obtain better terms and conditions for the use of their works as a CMO is able to negotiate on a more balanced basis with numerous, more powerful and often dispersed and distant user groups.
- Businesses that want to use others' copyright or related rights are able to deal with only one organization and may be able to get a **blanket license**. A blanket licence allows the licensee to use any item in the CMO's catalogue or repertoire for a specified period of time, without the need to negotiate the terms and conditions for the rights of each individual work.
- It offers a useful tool for businesses which want to license material in digital form, while making it simpler to obtain those rights.
- Many CMOs also play an important role outside of their immediate licensing business. For example, they are

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

- Details of the relevant CMOs in a country may be obtained from an international federation of CMOs (see Annex I) or from a national copyright office (see Annex II), from the relevant industry association or from one of the international non-governmental organizations listed in Annex I. In South Africa, information on CMOs can be obtained from SAMRO at www.samro.org.za or NORM at www.norm.co.za. Alternatively, interested parties can contact the CIPC at www.cipc.co.za for advice.

MANAGING COPYRIGHT AND RELATED RIGHTS

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

- The owner of the rights;
- An intermediary, such as a publisher, producer or distributor; or
- A collective management organization (CMO). In some cases, management by a CMO may even be mandated by law.

COLLECTIVE MANAGEMENT IN THE MUSIC INDUSTRY

Collective management of rights plays a central role in the music business due to the different types of rights in the music business chain.

Mechanical rights collected on behalf of authors, composers and publishers; **Performance rights** collected on behalf of authors, composers and publishers; and, **Performance rights** collected on behalf of performers and phonogram producers. No wonder, thousands of small and medium-sized record companies, music publishers and artists in their respective countries rely on local and/or distant collective licensing organizations to represent their interests and negotiate with powerful users of music (large communication groups, radio, TV, telecom groups or cable-operators) to ensure an adequate reward for their creative activities. At the same time, all licensees, regardless of size, have access to all repertoires without having to negotiate with a large number of individual right holders.

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

In most countries, a broadcasting corporation must pay for the **right to broadcast music**. The payment is made to the composer, but generally in an indirect way. In practice, the composer assigns his or her rights to an organization (CMO), which negotiates with all those interested in publicly performing music. The CMO, representing a membership of a large number of composers, pays royalties to its members in accordance with the number of times a particular work is performed in public. Broadcasting organizations negotiate an overall annual payment to the CMO and provide the CMO with sample returns from individual stations, which allow the calculation, for the purpose of paying royalties to composers, of the number of times

a record has been played. This CMO can be any performing right society. For example, for Commonwealth broadcasters, the most relevant are the Australasian Performing Right Association, or the Performing Right Society, based in the Untied Kingdom. Both societies are in a position to give licenses to broadcasters for virtually any music composed anywhere in the world. The Australasian Performing Right Association (APRA), for example, controls not only the music which its own members assign to it within Australia, New Zealand and the South Pacific, but also the music written by United Kingdom composer and publisher members of the Performing Right Society. Similar agreements give control to APRA in Australia and New Zealand over musical works written by the various composer members of the United States' Societies, as well as societies in such countries as France, Germany, Italy, Spain, Holland, Greece and others.

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

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

COLLECTIVE MANAGEMENT IN REPROGRAPHY

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

In response to the need to license large-scale photocopying, authors and publishers have established in many countries Reproduction Rights Organizations (RROs) – a type of CMO – to act as intermediaries and facilitate the necessary copyright authorization whenever it is impracticable for right holders to act individually.

On behalf of its members, licenses are issued by RROs whereby permission is granted to make reprographic or scanned copies of a portion of a published work (including books, journals, periodicals, etc.), in limited numbers of copies, for use by employees of institutions and organizations (including libraries, public administrations, copy shop, educational institutions, and a wide variety of businesses in trade and industry). Some RROs are also permitted to license other copyright uses, such as those related to electronic distribution via networks.

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



6. USING WORKS OWNED BY OTHERS

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

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

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

Remember that you may need specific permission for using other people's content **outside your business premises** (investor "road show," company website, annual report, company newsletter, etc.), and **inside your business premises** (distribution to employees, product research, in-house meetings and training, etc.). And, even if you use **just a part of a copyright-protected work**, you will generally need prior permission.

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



Do you also need permission to make electronic or digital use of the works of others?

Copyright protection applies to digital use and storage in the same way as it does to any other uses. Therefore, you may need prior permission from the copyright owners to scan their works; post their works on an electronic bulletin board or a website; save their digital content on your enterprise's database; or publish their works on your website. Most websites list the e-mail address of a contact person, making it relatively easy to request permission to reproduce images or text.

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

As explained above, copyright is separate from the right of possession of the work (see page 61). Buying a copy of a book, CD, video or computer program by itself does not give the buyer the right to make further copies or play or show them in public. The right to do these things remain with the copyright

owner, whose permission you would need to do those acts. You should note that, as with photocopying a work, scanning a work to produce an electronic copy and downloading a copy of a work which is in an electronic form, all involve copying the work. Prior permission is needed before doing any of those acts.

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

Authorization from the copyright owner is not needed:

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

When is a work in the public domain?

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

- A work for which the copyright protection period has expired;

Example:

South African music artist Lucky Dube died in 2007. His music is still protected by copyright and will remain protected for the next 45 years. Frédéric Chopin died in 1849. Music and lyrics written by him are now in the public domain. Anyone can, therefore, play the music of Chopin.

LICENSING SOFTWARE

Standardized packaged software is often licensed to you upon purchase. You purchase the physical package but only receive a license for certain uses of the software contained in it. The terms and conditions of the license (called “**shrink-wrap license**”) are often contained on the package, which may be returned if you do not agree with the stated terms and conditions. By opening the package you are deemed to have accepted the terms and conditions of the agreement. Otherwise, the **licensing agreement** may be included inside the packaged software.

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

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

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

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

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

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

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

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

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

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

All national copyright laws include a number of limitations and exceptions, which limit the scope of copyright protection, and which allow either free use of works under certain



circumstances, or use without permission but against a payment. The exact provisions vary from one country to another, but generally exceptions and limitations include the use of a **quotation** from a published work (that is, to use short excerpts in an independently created work), some copying for **private and personal use** (e.g., for research and study purposes), some reproduction in **libraries and archives** (e.g., of works out of print, where the copies are too fragile to be lent to the general public), reproduction of excerpts of works by **teachers** for use by the students in a class, or the making of special copies for use by **visually handicapped** persons.

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

In “common law” countries, such as Australia, Canada, India, the United Kingdom, the United States of America and South Africa, works are subject to “fair use” or “fair dealing”. Here, the description in the copyright law is less specific. “Fair use” recognizes that certain types of use of other people’s copyright-protected works do not require the copyright holder’s authorization. It is presumed that the use is sufficiently minimal that it will not unreasonably interfere with the copyright holder’s exclusive rights to reproduce and otherwise use the work. It is difficult to describe any general rules about “fair use” because it is always very fact specific. However, private individuals who copy works for their own **personal use** generally have much greater “fair use” rights than those who copy for commercial uses. Examples of activities that may be permitted as “fair use” include distributing copies of a picture

from a newspaper in class for educational purposes, imitating a work for the purpose of parody or social commentary, making quotations from a published work, and reverse engineering software to achieve compatibility. The scope of “fair use” varies from one country to another. Note that, even if you use other people’s work under these provisions, you still need, in most countries, to cite the name of the author.

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

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

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

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

What is a levy system for private copying?

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

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

Levies are usually collected by a collective management organization from manufacturers, importers, operators or users, and then distributed to the relevant right owners. No blank media levies have to date been implemented in South Africa.

Can you use works protected by technological protection measures (TPMs)?

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

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

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

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

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

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

As there might be several "layers" of rights, there may be several different right owners from each of whom licenses are

You need authorization from the copyright owner whose works you want to use. Authors often transfer their rights to a publisher or a CMO to manage the economic exploitation of their works.

required. For example, there may be a music publisher for the composition, a recording company for the recording of music, and often also the performers.

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

How can your business reduce the risk of infringement?

Litigation for copyright infringement can be an expensive affair. Therefore, it would be wise to implement policies that help avoid infringement. The following are recommended:

- Educate the staff employed by your company so that they are made aware of possible copyright implications of their work and actions;
- Obtain written licenses or assignments, where needed, and ensure that staff are familiar with the scope of such licenses or assignments;
- Mark any apparatus that could be used to infringe copyright (such as photocopiers, computers, CD and DVD burners) with a clear notice that the apparatus must not be used to infringe copyright;
- Prohibit your staff explicitly from downloading any copyright-protected material from the Internet on office computers without authorization; and
- If your business makes frequent use of products protected by technological protection measures (TPMs), develop

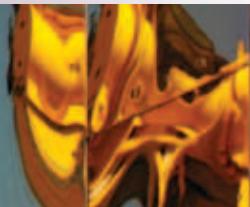


policies to ensure that employees do not circumvent TPMs without authorization from the copyright owner, or do not exceed the scope of the authorization.

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

SUMMARY CHECKLIST

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



7. ENFORCING COPYRIGHT

When is your copyright infringed?

Anyone who engages without the prior permission of the copyright owner in an activity, which the copyright owner alone is authorized to do or prohibit, is said to have violated the owner's copyright, and is said to have "infringed" copyright.

The **economic rights** may be infringed if someone, without authorization:

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

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

- by any person who, without the authority of the copyright owner, imports, sells, lets, by way of trade offers or exposes



- for sale or hire, or distributes for purposes of trade, an article in the Republic if he/she knew that the making of the article constituted an infringement of copyright or would have constituted an infringement if made in the Republic; or
- by any person who permits a place of entertainment to be used for a public performance of a literary or musical work, where the performance constitutes an infringement of copyright, unless the person was not aware and had no reasonable grounds to suspect that the performance was an infringement.

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

The **moral rights** may be infringed:

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

There may also be a (copyright or independent) infringement if someone makes, imports, or commercially deals in devices that **circumvent technological protection measures** that you have put in place to protect your copyright content against

unauthorized uses. Moreover, there may be infringement if someone **removes or alters rights management information** that you have attached to a copyright work.

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

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

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

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

If your copyright is infringed, then you may begin by **sending a letter** (called a “letter of demand”) to the alleged infringer informing him/her of the possible existence of a conflict. It is advisable to seek the help of a lawyer to write this letter. In some countries, including South Africa, if someone has infringed your copyright on the Internet, you may have the option:

- To send a special letter of demand to an Internet Service Provider (ISP) requesting that the infringing content be removed from the website or that access to it be blocked (“notice and take-down”); or
- To notify the ISP, which in turn notifies its clients of the alleged infringement and thereby facilitates resolution of the issue (“notice and notice” approach).

Sometimes surprise is the best tactic.

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

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

Bringing **legal proceedings** against an infringer is advisable only if:

- you can prove that you own the copyright in the work;
- you can prove infringement of your rights; and

- the value of succeeding in the legal action outweighs the costs of the proceedings.

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

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

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

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

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

- making for sale or hire;
- selling or letting for hire by way of trade;
- exhibiting in public or distributing by way of trade;
- importing into South Africa otherwise than for private or domestic use articles which the person knows to be infringing copies of the work; and

- distributing for purposes of trade or for any other purpose to such an extent that the owner of the copyright is prejudicially affected, articles which is known to be infringing copies of the work.

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

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

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

In South Africa, copyright owners can under the Counterfeit Goods Act apply to the Commissioner for Customs and Excise to seize and detain goods that are alleged to be counterfeit. When such an application has been granted, all stipulated goods that are counterfeit or suspected on reasonable grounds to be counterfeit, may be seized and detained by the customs authorities upon entering the Republic.

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

In many instances, an effective way of dealing with infringement is through **arbitration or mediation**.

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

ANNEX I

Useful Internet Links

- World Intellectual Property Organization: www.wipo.int
- WIPO's Section of Small and Medium-sized Enterprises: www.wipo.int/sme/en/
- WIPO's Website on Copyright and Related Rights: www.wipo.int/copyright/en/index.html
- WIPO's Website on Enforcement: www.wipo.int/enforcement/en/index.html

To buy publications from the WIPO electronic bookshop: www.wipo.int/ebookshop. These include:

- Guide on the Licensing of Copyright and Related Rights, publication no. 897
- Collective Management of Copyright and Related Rights, publication no. 855

To download free publications: www.wipo.int/publications. These include:

- Understanding Copyright and Related Rights, publication no. 909
- From Artist to Audience: How creators and consumers benefit from copyright and related rights and the system of collective management of copyright, publication no. 922
- Collective Management in Reprography, publication no. 924

Directory of National Copyright Administrations: www.wipo.int/directory/en/urls.jsp

International Non-Governmental Organizations

- International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM; acronym derived from the original French name): www.biem.org
- Business Software Alliance (BSA): www.bsa.org
- International Confederation of Societies of Authors and Composers (CISAC; acronym from French name): www.cisac.org
- International Federation of Film Producers Associations (FIAPF; acronym from French name): www.fiapf.org
- International Federation of Reproduction Rights Organizations (IFRRO): www.ifrro.org
- International Federation of the Phonographic Industry (IFPI): www.ifpi.org
- Independent Music Companies Association (IMPALA): www.impalasite.org
- International Publishers Association (IPA): www.ipa-uie.org
- Software & Information Industry Association (SIIA): www.siia.net

ANNEX II

Website Addresses of National Copyright Administrations

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

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

Note: For up-to-date information visit website at the following url:
www.wipo.int/directory

ANNEX III

Summary of the Main International Treaties Dealing with Copyright and Related Rights

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

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

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (The Rome Convention) (1961)

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

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (The Phonograms Convention) (1971)

The Phonograms Convention provides for the obligation of each contracting State to protect a producer of phonograms

who is a national of another contracting State against the making of duplicates without the consent of the producer, against the importation of such duplicates, where the making or importation is for the purposes of distribution to the public, and against the distribution of such duplicates to the public. “Phonogram” means an exclusively aural fixation (that is, it does not comprise, for example, the sound tracks of films or videocassettes), whatever be its form (disc, tape or other). The Convention is currently in force in 78 countries. A list of the contracting parties and full text of the Convention are available at www.wipo.int/treaties/en/ip/phonograms/index.html.

Agreement on Trade Related Aspects of Intellectual Property Rights (The TRIPS Agreement) (1994)

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

WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (1996)

The WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) were concluded in 1996 in order to adapt the protection of the

rights of authors, performers and phonogram producers to the challenges posed by the advent of the digital world. The WCT supplements the Berne Convention for the Protection of Literary and Artistic Works, adapting its provisions to the new requirements of the Information Society. This means firstly that all regulations in the Berne Convention are applicable mutatis mutandis to the digital environment. It also means that all WCT Contracting Parties must meet the substantive provisions of the Berne Convention, irrespective of whether they are parties to the Berne Convention itself. The WCT extends authors' rights in respect of their works by granting them three exclusive rights, i.e. the right to:

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

The WCT entered into force on March 6 2002 and there are currently 90 members (see: www.wipo.int/treaties/en/ip/wct/index.html).

In contrast to the WCT, the WPPT deals with holders of related rights, its purpose being the international

harmonisation of protection for performers and phonogram producers in the information society. However, it does not apply to audiovisual performances. The WPPT mainly protects the economic interests and personality rights of performers (actors, singers, musicians, etc) in respect of their performances, whether or not they are recorded on phonograms. It also helps persons who, or legal entities which, take the initiative and have the responsibility for the fixation of the sounds. WPPT grants rights holders the exclusive right to:

- authorise or prohibit direct or indirect reproduction of a phonogram (right of reproduction);
- authorise or prohibit the making available to the public of the original or copies of a phonogram by sale or other transfer of ownership (right of distribution);
- authorise or prohibit the commercial rental to the public of the original or copies of a phonogram (right of rental); and
- authorise or prohibit the making available to the public, by wire or wireless means, of any performance fixed on a phonogram in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them, e.g., on-demand services (right of making available). With regard to live performances, i.e., those not fixed on a phonogram, the WPPT also grants performers the exclusive right to authorise:
 - broadcasting to the public;
 - communication to the public; and
 - fixation (of sound only).

The WPPT came into force on May 20, 2002. 91 states are currently member of the WPPT (see www.wipo.int/treaties/en/ip/wppt/index.html).

Convention on Cybercrime (2001)

Drafted by the Council of Europe, the convention on cybercrime sets out a common criminal policy aimed at the protection of society against cybercrime. It is the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security. It also contains a series of powers and procedures such as the search of computer networks and interception. The full text can be read at conventions.coe.int/Treaty/en/Treaties/Html/185.htm.

Copyright Directive (2001)

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

ANNEX IV

List of countries party to the Berne Convention for the Protection of Literary and Artistic Works (Status as of August 2013)

Albania	Cape Verde
Algeria	Central African Republic
Andorra	Chad
Antigua and Barbuda	Chile
Argentina	China
Armenia	Colombia
Australia	Comoros
Austria	Congo
Azerbaijan	Costa Rica
Bahamas	Côte d'Ivoire
Bahrain	Croatia
Bangladesh	Cuba
Barbados	Cyprus
Belarus	Czech Republic
Belgium	Democratic People's Republic of Korea
Belize	Democratic Republic of the Congo
Benin	Denmark
Bhutan	Djibouti
Bolivia	Dominica
Bosnia and Herzegovina	Dominican Republic
Botswana	Ecuador
Brazil	Egypt
Brunei Darussalem	El Salvador
Bulgaria	Equatorial Guinea
Burkina Faso	Estonia
Cameroon	
Canada	

Fiji	Lebanon
Finland	Lesotho
France	Liberia
Gabon	Libya
Gambia	Liechtenstein
Georgia	Lithuania
Germany	Luxembourg
Ghana	Madagascar
Greece	Malawi
Grenada	Malaysia
Guatemala	Mali
Guinea	Malta
Guinea-Bissau	Mauritania
Guyana	Mauritius
Haiti	Mexico
Holy See	Micronesia (Federated States of)
Honduras	Monaco
Hungary	Mongolia
Iceland	Morocco
India	Namibia
Indonesia	Nepal
Ireland	Netherlands
Israel	New Zealand
Italy	Nicaragua
Jamaica	Niger
Japan	Nigeria
Jordan	Norway
Kazakhstan	Oman
Kenya	Pakistan
Kyrgyzstan	Panama
Lao People's Democratic Republic	Paraguay
Latvia	Peru

Philippines	Sweden
Poland	Switzerland
Portugal	Syrian Arab Republic
Qatar	Tajikistan
Republic of Korea	Thailand
Republic of Moldova	The former Yugoslav Republic of Macedonia
Romania	Togo
Russian Federation	Tonga
Rwanda	Trinidad and Tobago
Saint Kitts and Nevis	Tunisia
Saint Lucia	Turkey
Saint Vincent and the Grenadines	Ukraine
Saudi Arabia	United Arab Emirates
Samoa	United Kingdom
Senegal	United Republic of Tanzania
Serbia and Montenegro	United States of America
Singapore	Uruguay
Slovakia	Uzbekistan
Slovenia	Vanuatu
South Africa	Venezuela
Spain	Vietnam
Sri Lanka	Yemen
Sudan	Zambia
Suriname	Zimbabwe
Swaziland	

(Total: 166 States)

Note: For up-to-date information visit website at the following url:
www.wipo.int/treaties/en/ip/berne