Challenges for Copyright Protection in the Digital Era

*Perspectives with a focus on music copyright*

Adv. J. Joel Baloyi
Senior Lecturer, University of South Africa
The Role of Copyright in protecting Rights holders

- The copyright system remains the most effective method of protecting the rights of authors and composers at present.
- Copyright is both a negative and positive right – negative because it prevents others from using works in which copyright subsists, without authorisation (which may involve payment of remuneration), and positive because it gives exclusive rights to the rights holder in respect of his or her works.
- Copyright imposes civil and criminal sanctions for the infringement of copyright.
The “Convergence Problem”

- To converge means “to come from different directions and meet at the same point to become one thing” (Longman Dictionary of Contemporary English)
- In the entertainment business this relates to the emergence of new content carriers, platforms and technologies that bring together media that were traditionally separate.
- For example, the mobile phone today serves as a communication device, a camera, a music player, a radio, a recording device (both audio and video), etc.
The “Convergence Problem” (2)

- Historically the advent of new technologies or new ways of content exploitation has often presented licensing challenges.
- Gutenberg’s invention of the printing press made it easy for literature and music to be copied. The authors’ quest for protection of their rights in this regard led to the recognition of the reproduction right (the right to copy, from which the term copy-right was derived), after the enactment of the Statute of Anne in 1710.
The “Convergence Problem” (3)

- The reproduction right naturally birthed the publishing right, as authors engaged publishers regarding the publication of their works.
- Until the English decision of *Bach v Longman* of 1777, the reproduction right was seen as relating only to literary works (i.e. books).
- In *Bach v Longman* the court held that the definition of ‘books’ should be extended to include musical scores, songs and sheets, and that by extension, the term ‘authors’ should include music composers.
The “Convergence Problem” (4)

- The affording of copyright protection to musical works in a sense constituted a “convergence problem” in relation to copyright licensing, in that whereas in the past users only had to pay owners of copyright in literary works (books and other writings), they were now required to pay additional fees to publishers and composers of musical works (sheet music, lyrics).

- The convergence problem became more clearly visible in cases where one piece of writing contained both a literary work and a musical notation, yet the user was required to pay (for) two rights-holders or rights.
The “Convergence Problem” (5)

- When the right of public performance was recognised in France in the 19th century (1848) another convergence problem arose: users were now expected to pay not only in respect of the reproduction and publishing rights, but also in respect of the performing right, even though the performance arose from the same musical work.

- The convergence problem here was caused by a new mode of exploitation.
The “Convergence Problem” (6)

- Thomas Edison’s invention of the phonogram and gramophone paved way for the recognition of another form of copyright relating to music – copyright in sound recordings.
- This led to the gradual phasing out of the use of sheet music and other forms of written notation, as musical works were now invariably embodied in sound recordings.
- This convergence meant that when exploiting a sound recording, users would be required to pay for the use of musical and literary works also.
The “Convergence Problem” (7)

- What’s more, users found that they now had to pay separate fees not only in respect of each of the different ways in which literary and musical works could be exploited through both the written form and in sound recordings (i.e. the bundle of rights), but also in respect of each of the different ways in which the sound recording itself could be exploited, since a different copyright subsists in respect of the sound recording.
The “Convergence Problem” (8)

- The convergence problem created by the invention of sound recordings was compounded by the fact that around the same time (towards the end of the 19th century), cinematography, or film technology was invented by the likes of William Friese-Green, Louis Le Prince and Thomas Edison.

- The discovery of film led to further convergence, as the film, besides being protected by copyright in its own right, now embodied within itself other copyright works such as literary works, musical works and sound recordings.
The “Convergence Problem” (9)

- New, forms of the reproduction right, such as the *synchronisation right* and the *master use right*, which became major sources of income, were introduced.
- The licensing of copyright was now becoming a minefield and more expensive to users, as multiple rights were now involved.
- Just as users were reeling from the effect of these technological discoveries the 1920s saw the advent of radio, and with it the introduction of another bundle of right in respect of the performing right, namely the *broadcast right*. 
The “Convergence Problem” (10)

- Meanwhile the discovery of the telephone earlier (Bell) also led to the recognition of the diffusion transmission right, which, unlike radio broadcasts which are applicable in respect of wireless technology, is applicable in respect of wired transmissions. ‘Broadcast mechanicals’ also became a new source of income for rights-holders. The terrain of music licensing had become very complex and specialist lawyers had become inevitable.
The “Convergence Problem” (11)

- The advent of television in the second part of the 20th century brought the convergence problem to a new, complicated level, as television created an environment of multi-layered exploitation of rights. The use of music in films, as theme music, background music and signature tunes in programmes, and in commercial adverts, brought about new sources of performing rights and synchronisation rights – and increased licensing obligations for users.
Enter the Digital Era

• Beyond any doubt, it was the advent of digital technology in the 1990’s, in particular internet technology (and the resultant technology of social media, blogs etc), that has compounded the convergence problem and took the attention of everyone.

• New media and technology has always challenged the adequacy of existing laws, but not to the extent that the digital revolution has now done.
The Digital Era (2)

• Digital convergence has caught the attention of everyone because of its impact in blurring the lines with regard to the *neat description* of the various works involved (e.g. literary works, musical works, sound recordings, films), as well as the delineation of rights (mechanical rights, performing rights etc).

• For example, the acts of and streaming of music can give rise to both mechanical and performing rights.

• In the digital environment it is not always easy to pinpoint to any one work, as all works may be exploited at the same time.
The Digital Era (3)

- Peer-to-Peer (P2P) file sharing (beginning with Napster in the early 2000’s) introduced new set of problems in respect of copyright protection
- 1996 WIPO ‘Internet Treaties’ sought to resolve some of the issues (Provisions in relation to TPMs and DRMs)
- Several countries introduced legislation compliant with the WIPO Internet Treaties (SA did not)
- This has not stopped the digital piracy avalanche and the unique licensing issues arising from digital exploitation.
The Digital Era (4)

- It is no longer possible to avoid dealing with the problems posed by the digital exploitation of copyright works.
- The music industry has gone almost full circle into the digital environment now, with income from physical sales now constituting to a large extent, supplementary income.
- Digital exploitation has invariably become the first mode of exploitation for an increasing number of artists.
The Digital Era (5)

- The IFPI Digital Music Report 2015 has shown that revenues from digital music services now match those from physical format sales for the first time.
- The report shows that consumers have now embraced the music access models of streaming and subscription. Furthermore the steep increase in subscription revenues (+39.0%) has offset declining download sales (-8.0%).
- The digital revolution has brought back the age of the single, where success is first tested through digital performance before the release of an album.
Enforcement Difficulties in the Digital Environment

- The difficulty in enforcing protecting against individual infringer is a central problem in digital music exploitation: It may be difficult to locate infringers; individual infringers may not be capable of paying damages; also there may be jurisdictional and choice-of-law problems

- In South Africa the lack of adequate legislation dealing with the digital music environment is a great deficiency. The Copyright Act 98 of 1978 is outdated and needs to be reviewed. The proposed Copyright Amendment Bill 2015 is a welcome development.
Enforcement Difficulties in the Digital Environment (2)

- Digital exploitation has also imposed burdens on internet service providers (ISPs), who are now required to ‘clear’ rights in respect of multitudes of rights-holders, making it difficult to do business.

- ISPs are generally held liable on the basis of contributory infringement, i.e. ‘causing another’ to infringe copyright as contemplated in Section 23(1) of the Copyright Act.
In South Africa the principles of contributory infringement were applied in *Atari Inc & Another v JB Radio Parts (Pty) Ltd* (unreported), where an interim interdict was issued against the seller of a device capable of reproducing the computer games of the applicant, on the basis that such device instigated or facilitated the making of unauthorised copies of the computer games by third parties, despite no evidence of actual reproduction.
Enforcement Difficulties in the Digital Environment (4)

- The Electronic Communications and Transactions Act (ECT Act, No 25 of 2002) makes provision for ‘take-down notices’ in respect of content hosted on an internet service provider’s network (ss 75 & 77). The Internet Service Provider’s Association (ISPA) receives these notices on behalf of its members.

- This, together with the ‘contributory infringement’ provisions of the Copyright Act (Section 23(1); Atari case) provides some remedies for rights holders.
Enforcement Difficulties in the Digital Environment (5)

- Generally, and internationally, the contributory liability of ISPs has not been an easy to deal with and there have been heated debates on the parameters applicable.

- Different jurisdictions are grappling with viable solutions in this regard, e.g. the *graduated response regime* used in France (HADOPI) and discussed in Australia after the 2010 *Roadshow Films v iiNet* case.
Possible solutions to the problem

- A number of as-yet-untested solutions have been presented to the problem
- Some have proposed a **Global Licence (GL)** or some form of for rights holders, based on a **compulsory/statutory remuneration** system of mandatory collective licensing
- In this model ISPs will collect licensing fees (e.g. as part of their subscription fees) and pass these on to rights holders (probably through their representative CMOs)
- The ISPs would charge a commission fee in this regard
Possible solutions to the problem (2)

- Others have recommended the so-called Value Recognition Right, which has been also given other names such as ‘Voluntary Collective Licensing of Music File Sharing’, ‘Music Like Water Flat Rate’ and ‘Access to Music Charge’.

- The rationale is that the VRR would enable the music industry to create a new commercial relationship with any company that derives value from either the sharing or the storage of music, and to compensate rights holders based on the value of music in the supply chain.
Possible solutions to the problem (3)

- The private copying levy system (and the recommendation about charging a levy on ISPs) has been given as an example of how the VRR would work.
- Those supporting traditional forms of licensing believe the solution lies in making licensing easier for rights holders – thus the propose the use of a *single music rights licence*.
- The *single music rights licence* will result in the licensing of the whole bundle of music copyright (performing, mechanical and synchronisation rights).
Possible solutions to the problem (4)

- The single music licence will undoubtedly depend on the co-operation of all relevant rights holders in the music value chain, some of whom may not be in the same ‘camp’.
Conclusion

- There is no doubt that the digital environment has changed the face of the music and broader copyright industries.
- It is important to have laws that are up-to-date and that are capable of dealing with the rapidly-changing scenarios.
- The digital revolution must however not only be looked at in terms of its negative effects (enforcement problems) but also in terms of the opportunities that it has created for many more artists to participate in the value chain (e.g. reduced costs of distribution).