

DEVELOPING GUIDELINES FOR SOUTH AFRICAN MUSIC LIBRARIANS

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ABSTRACT

Music librarians must have knowledge of the copyright laws which govern the transferring of music from the old analogue form to the new digital formats. These laws were a particular concern of the South African Music Archive Project (SAMAP) which aimed to create an online resource for indigenous South African music particularly that of musicians suppressed during the apartheid years. Polak's (2009) study was an offshoot of SAMAP. This article draws on her study and identifies the specific problems encountered by music librarians with regard to digital copyright law pertaining to music. The guiding theoretical framework is based on the Berne Convention (2014) and the World Intellectual Property Organization (WIPO) Copyright Treaty (1996) which provide the overarching international framework for guiding copyright. The literature review focuses on the international and national legislation; copyright in original recordings; duration of copyright; fair use, the public domain and information commons; copyright and fair dealing; and the South African Copyright Act (No. 98 of 1978). A survey conducted by e-mail identified problem areas experienced by the music librarians regarding the digital music copyright laws in South Africa. Two sets of guidelines for South African music librarians were formulated using their responses and the literature reviewed, and recommendations are made.

KEYWORDS

analogue, Berne Convention, copyright, digital, musical work, sound recording, World Intellectual Property Organization Copyright Treaty

1 INTRODUCTION

Although copyright has existed for many centuries, the emergence of electronic information has created a dilemma regarding copyright in the contemporary globalised world. This is the case with the music industry in particular where technology is evolving at such a rapid pace that music librarians constantly have to upgrade their audio visual material. Polak (2009) established that South African music librarians felt that they needed guidelines on digital copyright laws as they apply to sound recordings. This article draws on the larger study by Polak (2009) but seeks in particular to focus on the areas of greatest need for music librarians. It then puts forward relevant guidelines for music librarians with regard to copyright and sound recordings. In doing so it draws on the literature reviewed, the legislation on copyright, both national and international, and a survey of music librarians regarding the problem areas in terms of their knowledge of digital music copyright laws in South Africa.

The scholars of ancient Greece and the Roman Empire were probably the first people to be concerned about being recognised as the authors of their works according to the United Kingdom (UK) Intellectual Property Office for Creativity and Innovation (2008). It was not until the invention of the printing press in 1440, however, and the subsequent higher rate of public literacy and mass production of books, that an early form of copyright protection developed. Since those early days, many statutes and Acts have been passed in various countries to protect copyright, ranging from the Statute of Anne in 1710 in the UK to the United States of America (US) Digital Millennium Copyright Act (DMCA) of 1998. South Africa is governed by the Copyright Act (No. 98 of 1978, hereafter the SA Copyright Act), with special sections regarding the duration of sound recordings and reciprocal rights; impacts on the digitisation of old sound recordings; and the complex issue of public domain and fair use in South Africa.

Polak's (2009) study, from which the current article is drawn, was an offshoot of the South African Music Archive Project (SAMAP 2009), previously the Hidden Years Music Archive Project (HYMAP), which aimed to create an online resource for indigenous South African music and associated cultural heritage. South African musicians and their music were often either banned or suppressed during the apartheid years and much of it remains difficult to access. There was, therefore, an urgent need to catalogue, digitise and restore this music, especially as a resource for future use. There was increasing concern about the new techniques for recording sound and visual images which had proliferated at such a rapid rate that access and copyright had become critical issues which needed to be addressed and clarified before the old analogue records could be converted into the new digital format. Polak's (2009) study undertook this task and the article reports on a specific aspect of the larger study.

2 PROBLEM STATEMENT

It is necessary for music librarians to know the copyright laws as they pertain to each country and to each type of material, particularly the highly specialised area of sound recordings. With the rapid changes in technology it is often necessary for librarians to migrate sound recordings to newer technologies. However, it is illegal to merely copy from, for instance, vinyl records to compact discs (CDs). The finer points regarding this knowledge can be difficult to obtain and it appeared to the researchers that music librarians needed guidance on the areas affected by the modern technologies in particular, for example, the transferral of music from analogue to digital formats. The guides that existed, such as that of Musiker (1989) which predated the World Intellectual Property Organization (WIPO) Copyright Treaty (1996), required updating.

The purpose of the current study was to develop a set of guidelines relating to copyright and music collections for music librarians on what the digital copyright laws are, and how they can be clearly interpreted and put into practice when material is copied from analogue to digital formats. This necessitated first identifying the specific problems encountered by music librarians with regard to digital music copyright law.

3 RESEARCH QUESTIONS

The purpose gave rise to the following research questions for the study:

- What problems do South African music librarians encounter with regard to digital music copyright laws?
- Are the librarians able to interpret digital copyright law?
- Are the librarians able to abide by the law when the material is copied from analogue to digital format?
- What guidelines can be developed or updated for South African music librarians?

4 METHODOLOGY

The study drew on two types of research. It employed an in-depth literature search of the relevant international and local literature to identify the key issues and principles of the field, and the empirical component comprised a survey, followed by informal telephone interviews. The focus of the survey was on identifying any problems which the music librarians encountered in implementing the digital music copyright laws. The data would be used together with the literature reviewed to synthesise guidelines.

A semi-structured self-administered questionnaire¹ was developed using the literature reviewed. It was then pretested on staff members of the Information Studies Programme of the University of KwaZulu-Natal (UKZN) and on a legal librarian at the Department of Justice.

Together with a covering letter and informed consent document the questionnaire was sent via email to 22 South African music librarians and law librarians between 12 and 16 March 2009. Email was used as it is inexpensive and time efficient. The respondents were reminded to return the completed questionnaires as soon as possible via email, and further reminders were sent. Eighteen responses were received. The researchers later followed up with informal telephonic interviews in which the respondents were able to discuss relevant issues that they found difficult. Notes were made from these interviews.

The 18 respondents were professional librarians from eight South African university music libraries, one philharmonic music library, and three South African Broadcasting Corporation (SABC) libraries. In addition, two law librarians contributed a legal perspective. The music librarians represented the main music libraries in South Africa. The two law libraries were selected purposively by the researchers because one was of local significance in the province of KwaZulu-Natal and the other of national significance in South Africa.

Given the relatively small number of respondents the quantitative data was analysed manually and frequencies and percentages were calculated. The data from the informal interviews was analysed using thematic analysis whereby trends and patterns were identified. The findings from the data are presented in Section 7, together with verbatim quotes from the respondents.

5 THEORETICAL FRAMEWORK

This section presents the theoretical framework for the study which is the Berne Convention for the Protection of Literary and Artistic Works, known as the Berne Convention (2014), and the WIPO Copyright Treaty (1996). First accepted in 1886, in Berne, Switzerland, the Berne Convention is an international agreement governing copyright. It is grounded in the French concept of the 'right of the author' (*droit d'auteur*), rather than the Anglo-Saxon concept of 'copyright' which was limited to economic concerns (Berne Convention 2014). Its core provision is that 'each of the contracting countries shall provide automatic protection for works first published in other countries of the Berne union and for unpublished works whose authors are citizens of or resident in such other countries' (Berne Convention 2014). In other words it requires its signatories to recognise the copyright of works of authors from other signatory countries in the same way as it recognises the copyright of its own nationals. The Berne Convention (2014) thus establishes a system of equal treatment among internationalised copyright signatories, and also requires member states to provide strong minimum standards for copyright law (WIPO 1996).

Before the Berne Convention, national copyright laws usually only applied to works created within each country. The Berne Convention was developed at the instigation of

Victor Hugo of the Association Littéraire et Artistique Internationale. It has undergone five revisions with the latest amendment being in 1979.

The WIPO Copyright Treaty was adopted in 1996 to address various issues raised by information technology and the Internet which were not addressed adequately by the Berne Convention (2014). WIPO administers the Berne Convention (UK Copyright Service 2007).

The Berne Convention and WIPO provide the overarching international framework for guiding copyright. Approximately 140 countries are signatories (Rao 2003) and it 'assists the nationals of its member states with international protection for such works as novels, poems and plays, *songs and musicals*, paintings, sculpture and architectural works' (WIPO 1996).

In providing for minimum standards of copyright protection, the Berne Convention stipulates that the works, whether published or not, of authors from the signatory countries are protected during the author's lifetime and for 50 years thereafter. Included in this protection are those works of authors from non-signatory countries that were first published in one of the signatory countries (Clausen 2004:418).

What is significant is that 'while specific details of copyright law vary from nation to nation, the Berne Convention provides a common framework with regard to intellectual property rights between nations' (Release the music n.d.). Rao (2003:265) points out that it has 'provided the basis for mutual recognition of copyright between sovereign nations and protected the development of international norms in copyright protection'.

6 LITERATURE REVIEW

This literature review describes the Berne Convention's relationship to national legislation. It then focuses on the SA Copyright Act; copyright in original recordings; duration of copyright; fair use, the public domain and information commons, and copyright and fair dealing.

6.1 THE BERNE CONVENTION AND NATIONAL LEGISLATION

As the Dramatic, Artistic and Literary Rights Organization (DALRO 2008) explains, each country is bound to frame its national copyright legislation within the parameters of the Berne Convention and to abide by the provisions of article 9(1). Each country is also governed by its own national copyright laws.

Copyright is thus governed by Acts which vary from country to country. South Africa is governed by the Copyright Act (No. 98 of 1978); the UK by the Copyright Designs and Patents Act (CDPA) of 1988; Australia by the Australian Copyright Act of 1968 and the US by the US Copyright Act of 1976. South Africa is served by DALRO, an

organisation which monitors issues of copyright in all the arts (Addleson 2005), on behalf of South African artists, musicians, writers, and performers.

6.2 THE SA COPYRIGHT ACT

According to the SA Copyright Act, copyright is conferred on original works in the following categories: literary (this should include the composition of songs), musical, artistic, sound recordings, cinematograph films and photographs, broadcasts, programme-carrying signals and published editions (Smit & Van Wyk 2007). The work in question needs only to be in writing or some other material form, and it is immaterial whether or not the work is offered for sale.

DALRO (2008) explains that ‘South Africa, as a signatory to the Berne Convention, is bound to frame its national copyright legislation within certain parameters and to abide by the provisions of Article 9(1) according to which authors have the exclusive right to authorise reproduction of their works in any manner or form’.

However, because of the need for special provisions to take account of educational needs, Article 9(2) of the Berne Convention allows member states to permit ‘the reproduction of copyright-protected works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the author’ (DALRO 2008).

Therefore, while copyright law ‘reserves to the copyright owner the exclusive right to undertake certain acts in regard to that work, it recognises that some uses of copyright-protected works do lie outside the owner’s control, and it consequently provides for exceptions to the exclusive right’ (DALRO 2008). DALRO (2008) explains further that: ‘While many users regard these exceptions as their rights, they are technically exempted from liability or, in other words, defences to what would otherwise be infringing acts.’

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

6.3 COPYRIGHT IN ORIGINAL RECORDINGS

Copyright in South Africa comes into existence automatically on creation of the original work in a material form and does not depend for its existence on any registration or any copyright marking or warning (Smit & Van Wyk 2007).

Music librarians must take cognisance of the fact that (whether in the US, UK or South Africa) ‘copies cannot be made of sound recordings, films and videos, even for preservation purposes, although permission can be sought’ (Hannabuss 1998:186).

The librarian should also be familiar with works which are out of copyright and in the public domain. The laws which apply to sound recordings in the public domain in the US are particularly difficult to comprehend. There is prolific literature on the US copyright situation which is highly complex, especially regarding the public domain.

While there are basically two main copyrights in sound recordings, namely, copyright in the composition and copyright in the actual sound recording, it is crucial to note that many copyrights can in fact exist simultaneously in a sound recording. UK Music (2008) explains that copyright can exist in: (i) the music (‘musical works’); (ii) the lyrics of the song (‘literary works’); and (iii) the sound recording itself. Only the initial (prototype) recording will be protected by copyright. There might be additional copyright protection accompanying a CD, for example,

if the CD cover has a photo or design on it that might be protected by copyright as an artistic work, ... any written commentary about the music or song might be protected by copyright as a literary work, ... there might even be copyright in the typographical arrangement or the way in which the printed words of the commentary are arranged (UK Music 2008).

As noted above, librarians, and especially archivists, need to constantly upgrade their audio visual material. However, Kent (n.d.) warns that: ‘Any musical or literary work reproduced in a sound recording may be subject to separate copyright protection, irrespective of the copyright status of the actual recording’, and further elaborates:

The right of a composer or author to control the making of any recording of a musical or literary work is known as the mechanical right, and a licence from the relevant rights owner (usually the publisher) in respect of a copyright work is mandatory before any re-issued recording is published. A royalty may be due and payable on each copy manufactured and sold.

In the European Union (EU), Kent (n.d.) explains that ‘the term of copyright in a musical or literary work, whether published or not, lasts for the lifetime of the composer/author and expires after a period of 70 years from the end of the calendar year in which the composer/author dies. The work then passes into the public domain’.

A further complication is that ‘even where a musical (or literary) work can be shown to be in the public domain in one country, it does not necessarily follow that it is in the public domain universally’. For example, there are many well-known works in the public domain in the US which are protected in the UK and other countries (Kent n.d.).

The University of Melbourne (2006) states that if the copyright owner is unknown, it can be indicated as follows: ‘Copyright owner unknown. All reasonable attempts made to identify. If you are the owner or know who they are please advise us’.

As noted there are several copyrights in a sound recording. Details of copyright law vary from nation to nation and this has to be taken into consideration concerning public domain works, as the UK examples below will highlight.

6.4 DURATION OF COPYRIGHT

The duration of copyright varies from country to country and is governed by its national laws. The duration of copyright for literary, dramatic, musical or artistic works in South Africa differs from the UK, Europe, the US and Australia (UK Intellectual Property Office 2008).

In the US the duration of copyright protection differs depending on when the work was created and published. Besek (2009:6–7) explains: ‘For works first created on or after January 1, 1978 (the effective date of the 1976 Copyright Act), copyright lasts for the life of the author and 70 years thereafter.’ For anonymous and pseudonymous works, and works made for hire, however, the term is ‘95 years from publication or 120 years from creation (whichever expires first)’ (Besek 2009:6–7). For works first published prior to 1 January 1978, the rules are more complicated but ample guidance is provided in Besek (2009:7).

Sound recordings in Australia last from 70 years from the end of the year the recording was first published (University of Melbourne 2006). In South Africa and the UK it remains 50 years (Release the music n.d.). This is a controversial topic and at present there is lobbying on both sides. Some lobbyists wish to extend the copyright duration and others want to curtail the duration. The *Release the Music Campaign in the UK*, for example, strongly opposes the proposed extension of copyright from 50 years to 90 years (Release the music n.d.).

6.5 FAIR USE, THE PUBLIC DOMAIN AND INFORMATION COMMONS

Each country has its own demarcated period for the duration of copyright prior to the work becoming available in the public domain. After the copyright expires, the work will be in the public domain and is then no longer bound by copyright. Librarians need to take cognisance of the period for the duration of copyright as it relates to the public domain. They also have to keep pace with new approaches, which are aimed at reversing the trend of copyright and are collectively referred to as the ‘information commons’. These Braman (2006:19) regards as a response to ‘the aggressive assertion of intellectual property rights in the digital environment’. The practice of ‘fair use’ and the ‘public domain’, however, are ‘commons-type’ practices which have been in use

for some time, even before the commons movement began (Braman 2006). Braman (2006:19) describes fair use and the public domain as follows:

- Fair use: The use of copyrighted material without permission or licence, if the criteria of serving the public good and not damaging the market are met.
- Public domain: Material is in the public domain when it has never been copyrighted, the copyright has expired, the material is voluntarily contributed to the public domain, or the government has produced the information.

Kent (n.d.) outlines the public domain situation in the UK concerning sound recordings and cites useful and explicit examples which are used here to illustrate critical points.

It is fair to say that only those sound recordings *first published* in the UK before 31st December 1957 can safely be considered to be in the UK public domain. That is, the recording copyright term (50 years from the end of the year of actual *making*, or publication in the case of recordings released between 1st June and 31st December 1957) has expired, and any corresponding Performers'/Recording Rights no longer subsist. A recording made before that date *but not published until later* may still be subject to these rights, despite the recording being in the public domain.

Kent (n.d.) illustrates his point with two examples:

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

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

Other examples of works that might well be in the public domain, but might nevertheless be subject to Performers'/Recording Rights, are 'unpublished recordings such as alternative masters, studio out-takes, or those made for private or demonstration purposes' (Kent n.d.). Kent (n.d.) points out further that even foreign-source recordings may be in the public domain in the UK and he cites an example:

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

Kent (n.d.) states that some foreign sound recordings which were made or first published before 31 December 1957 but were never released in the UK may also be in the public

domain in the UK, as he explains: ‘Under the CDPA such recordings would have enjoyed reciprocal protection, and the duration of copyright in works afforded such protection cannot exceed the period laid down in the Act (ie, 50 years in the case of sound recordings)’.

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

Sound recordings will have an individual copyright separate to the underlying composition. If the underlying composition is in the public domain, it does not follow that a sound recording is. You cannot reproduce a more recent sound recording of a public domain work, though you may create your own sound recording from the public domain composition.

An interesting exception in terms of a work falling into the public domain is the case of J.M. Barrie’s *Peter Pan*. The copyright for *Peter Pan* was due to expire in 1987 in the UK, but an amendment to the 1988 Copyright Designs and Patents Act was passed to allow the copyright to run indefinitely in the UK. Any royalties from this work are paid to the trustees of the Hospital for Sick Children, Great Ormond Street, London for as long as the hospital exists (UK Copyright Service n.d.).

6.6 COPYRIGHT AND FAIR DEALING

Fair dealing relates to fair use and refers to what constitutes a reasonable portion of the protected material. The focus here is on the composition, such as musical scores and lyrics, as opposed to the sound recordings themselves. General consensus on the quantity of copies that will qualify for fair dealing as well as what constitutes ‘reasonable portions’ when copying is a problematic issue.

Musiker (1989) explains that the

Copyright Act, and reproduction regulations published in Government Gazette 6252 of 22 December 1978, make provision for exceptions when acts which would otherwise infringe copyright, are permitted. It must be remembered, however, that a reproduction of less than a substantial part of a work is in the first instance not an infringement. [However], ‘substantial’ in this context is both a qualitative measure and a quantitative measure.

For example, according to Musiker (1989), a single line of a song, or even the first few notes of a song may be judged to be substantial. Musiker (1989) adds that:

Section (12)1 of the Copyright Act provides ... that it is not an infringement of copyright if a literary work is used solely, and then only to the extent reasonably necessary for the purposes of research or private study by, or the personal and private use of, the person using the work. The term ‘use’ here does not include the making of copies of the whole

or substantial part of a work unless such copies are authorized by the reproduction regulations.

Masango (2005:129), commenting on fair use, identifies a lack of clarity on what a reasonable portion to be copied should be in the SA Copyright Act: ‘The South African Copyright Act 98 of 1978 section 12(1) says that there shall be no infringement of copyright by any fair dealing with a literary or musical work’; but he then points out, citing Copeling (1978:48), that Section 13 stipulates that in addition to the fair dealing allowances under section 12, ‘reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interest of the author’.

Masango (2005:19) argues that although these sections allow copying of copyrighted works, the SA Copyright Act ‘does not state what should be considered as a reasonable portion of copied works nor does it state how frequently copying of a document is permitted under fair dealing exemption’. He further contends, citing DALRO (n.d.), that this omission lays the way open for considerable uncertainty: ‘it is possible that a whole chapter from a long book may be considered reasonable, while in the case of a sonnet even a few lines may be held to exceed the limits of reasonability’.

Nicholson (2009) also alludes to the fact that South Africa does not have fair use provisions in its copyright laws (as is the case in the US) and states that all use of copyright material is governed by the principle of fair dealing in section 12(1) of the SA Copyright Act. Section 12(1) permits reproduction of a literary or musical work, without permission:

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

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

The above examples demonstrate the complexity of the public domain and fair dealing. Librarians cannot simply copy old analogue recordings onto a digital format without making sure that the recording itself and other copyrights inherent in/associated with the recording are definitely in the public domain.

7 RESULTS: PROBLEMS EXPERIENCED BY THE LIBRARIANS

This section presents the findings on copyright problems which were reported by music librarians in the survey and follow-up interviews. Many of the respondents appeared to have found the questionnaire rather daunting and had tried to look up the answers before being reassured by telephone that this was unnecessary.

Of the respondents, 11 (61%) were familiar with sound recording copyright legislation in South Africa, while seven (39%) were not. Nine of the respondents who stated that they were familiar with copyright elaborated as follows, verbatim:

Just the basic guidelines ...

Information gleaned from a master's thesis ...

Fair use policy: individual or educational institution may make one copy of a recording they own i.e. have purchased so as to ensure the quality and life of the original.

I have a copy of the Act on hand should I get confronted with any copyright issues regarding sound recordings.

No, not enough. I know more about the US law and sort of follow some of it whilst realising we do not have the equivalent of fair use.

We are not experts, but we do have a basic understanding of the law.

In response to a question regarding how long the term of protection for copyrights related to music in South Africa, that is, the composition and the sound recording is, ten (56%) of the respondents were able to give the correct answer, while eight (44%) did not know how long copyright exists for a musical composition. The music librarians felt that they had limited knowledge on digital copyright issues regarding sound recordings, and they cited the following problems verbatim:

[There are] no definite guidelines.

Places restrictions on accessibility, due to timely and often costly administrative processes.

I know of no copyright laws that are specific to digital material.

Government needs to make known the laws i.e. alert individuals in the music industry and in institutions that have music departments.

Lack of direction ...

All 18 respondents (100%) made it clear that they felt that their knowledge of this field was very limited. The two legal librarians also had very limited knowledge concerning digital music copyright laws. One respondent stated that she travelled regularly to the US and was more familiar with US copyright laws than with South African copyright laws.

In short, the respondents felt that they needed guidance on what the situation regarding digital music copyright laws in other countries is; what lessons can be learnt which are applicable to the South African situation; which copyright laws in South Africa

have a bearing on copyright and digital music collections in South Africa; and what the implications of these laws are. The following four areas were identified from the overall responses as particularly problematic.

7.1 COPING WITH THE RESULTS OF TECHNOLOGICAL CHANGE

The problem of coping with technological change which was identified by the librarians, also emerged in the literature. Technology has the ability to be a key factor in enabling copyright infringements in the electronic age when it is so easy to reproduce work by photocopying, scanning and reproducing music. This development has resulted in the many Acts and statutes being passed so as to protect copyright holders. Thus, it is most important for librarians to be able to interpret legal and professional guidelines pertaining to copyright law and to draw on the SA Copyright Act as a legal framework.

7.2 IDENTIFYING THE RELEVANT COPYRIGHT LAW

The librarians' responses focussed on the issue of copyright law as it pertains to music collections. The survey revealed that in most instances the South African music librarians surveyed felt they had limited knowledge of the law.

7.3 UNDERSTANDING THE BASIC PRINCIPLES OF SOUTH AFRICAN COPYRIGHT

The respondents in the study needed guidance on basic South African copyright principles. The copyright principles are contained in the SA Copyright Act and deal with the duration of copyright, the formalities required to obtain copyright and how to determine who owns copyright. It is to the librarians' advantage to have an understanding of basic copyright principles (such as those pertaining to how long copyright lasts); the formalities (such as licences) which are required for a library to loan out copyrighted material, especially sound recordings; and to be able to determine who owns the copyright.

Oddie (1999:239) confirms the need for copyright management, stating that 'copyright management has become a problem for which few countries are prepared'. Besides knowing the principles, librarians need to establish, for example, what a 'reasonable portion' for copying constitutes. They also need to find out what users intend doing with the copyrighted material.

7.4 KEEPING PACE WITH AMENDMENTS TO THE LAW

The librarians recognised that they need to keep pace with changes. The librarian has to be fully conversant with changes and/or amendments to these laws, especially

in this electronic age where ‘frequent updates to the law will probably become the norm’ (Samuels 2000:54). These laws are often changed and/or amended especially as technology evolves at a rapid pace. Hannabuss (1998:190) confirms that ‘the law is there and should be known. The law keeps changing and we must keep up with it’.

Having established by means of a survey that music librarians are (perhaps understandably given the complexity of copyright law) insufficiently familiar with South African digital copyright laws pertaining to sound recordings and are therefore handicapped in their ability to interpret and implement these laws, it can be concluded that a set of guidelines concerning the transferral of music from analogue to digital format would be a useful resource for the music librarians.

8 GUIDELINES

Two sets of guidelines were developed from the data obtained from the survey together with the literature review. The first set applies to print and the second set applies to the actual sound recordings. They are preceded by some general principles. In some instances updating of existing source material was required, in others the compilation was more original. A short checklist is provided after the main guidelines.

8.1 GENERAL PRINCIPLES

Four general principles apply to the copyright of sound recordings, namely:

8.1.1 There are two main copyrights in sound recordings

There are basically two main copyrights in sound recordings, firstly the copyright in the composition, musical score and lyrics, which exists for the life of the author plus 50 years from the end of the year in which the author dies; and secondly, in the actual sound recording itself copyright exists for 50 years from the end of the year in which the recording was first published or made. Thereafter the composition and recording fall into the public domain (UK Music 2008; University of Melbourne 2006).

8.1.2 Other potential copyrights

The librarian needs to be aware of further potential copyrights as artwork and cover designs are also subject to copyright (UK Music 2008; University of Melbourne 2006).

8.1.3 Copyright in analogue and digital formats

According to Allington (2009), there is no difference between copyright in the analogue and digital formats. If copyright exists in the analogue format, it then certainly continues

in the new digital format if the sound is transferred from analogue to digital format. It is a false notion that copyright ceases if the recording is transferred to digital format. The digital format thus does not affect the legal principles and tenets of the SA Copyright Act which includes CDs and downloading (Allington 2009). Copyright permission has to be obtained from the copyright holder for sound recordings to be transferred from analogue to digital formats (Nair 2009).

8.1.4 Copyright and the lending of material

Musiker (1989) addresses the issue of whether copyright legislation in South Africa covers the lending of material. Libraries may in their normal capacity, lend works. However, the prescribed ‘copyright warning’² must be displayed prominently and in its entirety at all libraries and should be incorporated in order forms in the same size type as that used predominantly throughout the form.

8.2 COPYING PRINT

This section deals with the making of copies from print in the form of compositions, lyrics and musical scores. Nicholson (2009) points out specific but limited exceptions for educational purposes:

A librarian may make one (1) copy of a work or obtain an interlibrary loan copy for a user (within the permitted amounts), as long as it is for research or private study, or for personal or private use. A librarian may not make multiple copies for users. A library or archive has certain restricted rights to make copies for archive/reference purposes only.

Thus, a library or archive depot, in terms of these rights, may

- duplicate a published work in its entirety for the purpose of replacement of a work that is lost, stolen, damaged or deteriorating if the library or archives, after reasonable effort, determined that an unused replacement cannot be obtained at a fair price.
- make copies for patrons.
- make copies for other libraries’ patrons for the purposes of interlibrary loan (Tanya Pretorius’ Bookmarks 2004).

Musiker’s (1989) guidelines were based on Section 13 of the SA Copyright Act and reproduction regulations published in Government Gazette 6252 of 22 December 1978. These regulations made provision for exceptions, when Acts which would otherwise infringe copyright, are permitted and Musiker (1989) outlined the exceptions as follows:

- **Making of copies for interlibrary loan:** The reproduction of **one** copy (not multiple) for an interlibrary loan is allowed. The reproduction must not

constitute a substitution for buying the work and it must be for one of the following: research, private study, personal or private use.

- **Copying to replace damaged copies:** In a case where the copy held by the library has deteriorated physically or been damaged it may make a copy to replace it, provided the library shows that reasonable efforts were made to obtain an unused replacement at a fair price. (This permission therefore does not apply to a work that was not previously in the library.)
- Section 13 of Act/Regulation 3 states that a library or archive has certain restricted rights to make copies for archive/reference purposes only.
- **Copying of an unpublished work for preservation purposes:** In the case of unpublished works the library may make a copy for preservation, security, for research use, for the collection of their own or another library, but not for an individual.
- **Copying of a published work for preservation purposes:** A library may duplicate the whole of a published work to replace a work that is lost, stolen, damaged or deteriorating if the library, after reasonable effort, has determined that an unused replacement cannot be obtained at a fair price.
- **Copying of a published work which is now out of print:** In a case where the library is unable to obtain the work elsewhere at a fair price after reasonable attempts, it may make a copy of a substantial part or the whole work for a user. The copy then becomes the property of the user for his/her private study or research purposes.
- **Copying for private study:** Making a single copy of a reasonable portion of a work (see above) is permitted for private study or research by a user, as long as the legitimate interest of the copyright owner is not prejudiced.
- **Reserve and short-loan collections:** Libraries may not make multiple copies and place these items on academic reserve or in short-loan collections. The permission of the copyright owner must be obtained before reproduction. The copying exclusions do not protect a library where it is aware or has substantial reason to believe that it is engaging in the related or concerted multiple copying of the same material. Compatible with fair practice, multiple copies for teachers for teaching purposes (one per pupil) may be made, providing the source and author are mentioned.

There is, however, a lack of clarity regarding short-loan and reserve collections since the Act does not address this issue directly.

The second set of guidelines relate to the actual sound recordings. The guidelines are synthesised from responses to the questionnaire sent to the participants in the study. Content has been supported with reference to the literature.

8.2 COPYING SOUND RECORDINGS

Musiker (1989) addresses the issue of how copyright in sound recordings in South Africa relates to copyright of print. He points out that it is not different from print because, according to the SA Copyright Act, the precise nature of the material form is unimportant, whether it is a literary work embodied in a sound recording, tape or disc, they are all fully protected by copyright. Copyright cannot differ between old sound recordings and digital formats because, according to the SA Copyright Act, the precise nature of the material form is unimportant, for example, a literary work embodied in a sound recording, computer tape or floppy disc is fully protected by copyright. Copyright applies independently to the categories of works of film (cinematographic and video) sound recordings (disc and cassette) and broadcasts (sound and television), that is, in addition to the copyright in the basic literary or musical work which forms the basis of or features in the film, sound recordings or broadcast. It must be noted that even if a work is out of copyright a new edition may not be reproduced without permission (Dean 1987). For example, Allington (2009) states that even if recordings are in the public domain, if they are bundled together into a new compilation [or edition] it is violating copyright law to, for example, publish the same album with the same sleeve design and title without permission.

8.2.1 What is meant by the term reproduction?

The transference or reproduction of sound recordings in libraries from one format to another is not permissible without the consent of the copyright holder. Section 12(1–5 & 12) of the SA Copyright Act relates to musical works and section 14 to exceptions for musical works.

Copyright generally prohibits, in relation to a work or any substantial part of it (substantial being rather difficult to quantify) unauthorised reproduction in any manner or form, publication or making an adaptation. The term ‘reproduction’ has a wider meaning than ‘copy’ and includes recording or filming of a literary work and an adaptation includes a translation and a serialisation (Dean 1987).

8.2.2 Ownership of copyright

The person who first makes or creates the work (the author of an original work or his/her assignee) owns the copyright in the old analogue sound recordings which preceded digital formats. However, as publishers often act on the author’s behalf, it is advisable to address requests to the publisher (Dean 1987).

Music librarians must take cognisance of the fact that (whether in the US, UK or South Africa) ‘copies cannot be made of sound recordings, films and videos even for preservation, although permission can be sought’ (Hannabus 1988:186) from the owner/s of the material.

If copyright is held by a record label and is in analogue format and then transferred to a digital format, copyright remains as above, that is, the person who first created the work (or the publisher acting on the author's behalf) remains the owner of the copyright (Dean 1987).

8.2.3 Duration of copyright

In South Africa, for literary, musical or artistic works the copyright exists for the life of the author plus 50 years from the end of the year in which the author dies in or 50 years from the date of first publication, performance in public, offering for sale of records thereof or the broadcasting thereof, whichever is earlier. In sound recordings copyright exists for 50 years from the end of the year in which the recording is first published or made available to the public (Smit & van Wyk 2007).

8.3 SHORT CHECKLIST OF COPYRIGHT RULES FOR LENDING SOUND RECORDINGS AND COPYING FROM ONE MEDIUM TO ANOTHER IN LIBRARIES

8.3.1 Lending

- a. Libraries may lend sound recordings provided they hold a licence or an agreement with the producer/copyright holder.
- b. The prescribed 'copyright warning' (see Note 2) must be displayed prominently and in its entirety to discourage copying of material at home.

8.3.2 Copying

- a. Making copies for interlibrary loan is not permitted without the permission of the copyright holder.
- b. Copying to replace damaged copies is not permitted without the permission of the copyright holder. The provisions for copying in libraries and archives are for literary, dramatic and musical works only. The musical work is the score as written or printed, not a sound recording of it.
- c. Copying an unpublished sound recording for preservation purposes is not permitted without the permission of the copyright holder.
- d. Copying a published sound recording is not permitted without the permission of the copyright holder.
- e. Copying a published sound recording which is now out of print is not permitted without the permission of the copyright holder.
- f. Copying for private study is not allowed.

9 DISCUSSION

In terms of problems experienced the librarians surveyed felt that they had limited knowledge of digital copyright issues regarding sound recordings. They were especially concerned about the situation regarding digital music copyright laws in other countries and what lessons could be applied in South Africa. The issue of balancing the interests of private rights versus the public good is a contentious one especially because of the necessity for libraries and archives to constantly upgrade their audio visual material from obsolete technology. McDonald (2005:11) states that, 'as old playback technologies become increasingly inoperable, as analogue recordings wear out, we stand to lose an entire modern art form if some sort of agreement [with copyright holders copyright duration] is not reached in the near future'.

However, as Hannabuss (1998:186) clearly stipulates, 'copies cannot be made of sound recordings, films and videos, even for preservation purposes, although permission can be sought'.

Sound recording copyright issues are legal in nature and can be most complex, especially if they are not properly understood. It is wise to take heed of the following suggestion from Bieleford and Cheeseman (1997:107) who advise 'that safe course of action is to buy the number of sound recordings that are needed ... or to obtain permission to use the material'. A particularly difficult area relates to library users seeking to make copies of borrowed sound recordings at home.

Another complex area is where copyright is held by the musician or a family member, and a digital version is created for an archive library. The library or archive has the right to loan this version only if it owns the digital version with permission from the copyright holder. It may then provide users with this version providing the copyright warnings are prominently displayed.

It is essential to remember that sound recordings constitute copyright in the written works, such as the composition, musical score and lyrics, as well as the actual recording itself and both are subject to separate copyrights. McRobert (2001) illustrates this point with reference to Australian copyright law when he points out that a typical pop song would attract a separate copyright in the literary work (in the lyrics), the musical work (the musical composition) and copyright in the sound recording.

The librarians had difficulty knowing which copyright laws in South Africa have a bearing on copyright and digital music collections and what their implications are. Hence, it was difficult for them to interpret the digital copyright laws. This problem raised further difficulties for them in ensuring that they abided by the law, particularly when material was copied from analogue to digital formats. As a result the generation of up-to-date guidelines was an important task for the researchers.

As librarians are not usually legal authorities on copyright issues they are advised when in doubt to seek guidance from the legal advisers of their institutions as suggested by the International Association of Music Libraries (2004).

10 CONCLUSION

The article has focused on the problems South African music librarians encounter with regard to digital music copyright laws; whether the librarians are able to interpret the digital copyright law; whether the librarians are able to abide by the law when the material is copied from analogue to digital format; and what guidelines can be developed or updated for South African music librarians. It sought to establish whether digital copyright laws were clearly interpreted and put into practice when the material is copied from analogue to digital format.

The literature review provided definitions of sound recordings, general copyright principles, international copyright laws, concentrating on the US, the UK and Australia to shed light on critical issues and, most importantly as pertaining to the study, South African digital music copyright laws for sound recordings.

The article has addressed the areas of greatest need for the music librarians and the findings indicated that the librarians felt that they had limited knowledge of digital copyright issues regarding sound recordings. Issues of particular importance on which the librarians needed guidance were: what the situation regarding digital music copyright laws in other countries is; what lessons can be learnt which are applicable to the South African situation; which copyright laws in South Africa have a bearing on copyright and digital music collections in South Africa; and what the implications of these laws are.

The article has provided guidelines regarding copyright and sound recordings. In doing so it drew on the legislation regarding copyright, both national and international. In addition to developing a synthesis of other more recent material, the guidelines update and refresh the earlier guidelines of Musiker which dated from 1989. The updating was especially needed because of the development in copying from analogue records to digital formats.

11 RECOMMENDATIONS

Librarians, and in particular music librarians, need to take note of the copyright laws when reproducing sound recordings. Thus, when librarians need to upgrade their audio visual material they need to be cognisant of all the copyrights contained in a sound recording as it is of utmost importance to include both the print and sound recording guidelines.

Users need to be advised that, with regard to digital sound recordings, they are not allowed to copy at home. They need to be warned about the SA Copyright Act regulations by the libraries which should prominently display copyright warnings (see Note 2). Copyright infringements apply to any format of sound recordings as mentioned above. In cases that are not covered in the guidelines or are not clear cut, institutional legal advisers should be called on for expert advice.

It is recommended that:

- a. Music librarians set up an online Community of Practice (CoP) to share knowledge and also seek a way forward on complex areas. The study has provided a set of guidelines for such a CoP.
- b. The guidelines as a whole should be regarded as a draft document for comment and feedback by music librarians.
- c. Music librarians should set up a seminar linked to the Library and Information Association of South Africa (LIASA) Annual Conference to address the issue of copying sound recordings for preservation purposes and a fair way to take this forward.

The article has outlined the problems encountered by music librarians, and suggested guidelines drawn from a review of the literature and tailored to the content in their responses to the survey. The draft guidelines and recommendations are put forward for comment and development.

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NOTES

- 1 The research instrument is available in Polak (2009) at: http://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/1253/Polak_F_2009.pdf?sequence=1
- 2 In South Africa, in addition to a 'Copyright Warning', Musiker (1989) advises that the following notice be displayed:

COPYRIGHT

IN TERMS OF THE REGULATIONS PROMULGATED UNDER THE COPYRIGHT ACT, NO 98 OF 1978 (AS AMENDED), MATERIAL REQUIRED FOR STUDY OR RESEARCH PURPOSES MAY BE REPRODUCED, SUBJECT TO THE FOLLOWING CONDITIONS:

1. NOT MORE THAN ONE COPY MAY BE MADE OF NOT MORE THAN ONE ARTICLE OR OTHER CONTRIBUTION APPEARING IN A PERIODICAL ISSUE OR OTHER COLLECTION

2. FROM OTHER WORKS, ONLY A REASONABLE PORTION MAY BE REPRODUCED (IT IS ACCEPTED THAT A “REASONABLE PORTION” MEANS: NOT MORE THAN 10 PER CENT OF THE WHOLE WORK, HAVING REGARD FOR THE TOTALITY AND MEANING OF THE WORK).

NOTE: NO WORK MAY BE REPRODUCED IN ITS ENTIRETY WITHOUT PRIOR AUTHORIZATION BY THE COPYRIGHT OWNER.

USERS DISREGARDING THE ABOVEMENTIONED CONDITIONS ARE LIABLE TO PROSECUTION.

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