Needletime royalties: At last, some case law

You wait ages for a reported judgment concerning “needletime” royalties pursuant to section 9A of the Copyright Act, and then two come along at approximately the same time. There were two reported decisions, one, an enquiry by the Copyright Tribunal, and, the other, a judgment by the Supreme Court of Appeal following an appeal from the Copyright Tribunal. Needletime royalties are the amounts charged for copyright licences for the playing of sound recordings which are audible to the members of the public. Besides the courts’ consideration of the methods used for calculating the royalties in the respective matters, issues concerning the procedure to be followed by the South African Music Performance Rights Association (“SAMPRA”), and the Copyright Tribunal, in determining the needletime royalties were also clarified. Furthermore, there were also findings concerning the powers of SAMPRA and the Copyright Tribunal.

SAMPRA is the only accredited collecting society pursuant to the Collecting Society Regulations (promulgated on 1 June 2006 under GN 517 in GG 28894), in terms of section 9A of the Act and in terms of section 56(1)(b) of the Performers' Protection Act 11 of 1967, for the Recording Industry of South Africa (RISA).

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In *Foschini Retail Group (Pty) (Ltd) & Others v South African Music Performance Rights Association* [2013] ZAGPPHC 304 (the *Foschini* case) a group of retailers (the "retailers") who played background music in their stores referred their dispute concerning the royalty charged by SAMPRA to the Copyright Tribunal. The case of *National Association of Broadcasters v South African Music Performance Rights Association* [2014] ZASCA 10 (the *NAB* case), on the other hand, was an appeal from a determination of the Copyright Tribunal to the Supreme of Appeal (the SCA) concerning the royalty charged by SAMPRA to broadcasters for the playing of sound recordings administered by it on behalf of their copyright owners.

Power of SAMPRA to determine needletime royalties

In the *Foschini* case, the court held that pursuant to section 9A(1)(b) of the Copyright Act, and regulation 7(3) of the Collecting Society Regulations, SAMPRA is obliged to negotiate, and agree, the royalty with relevant users. In the absence of an agreement between SAMPRA and a relevant user, SAMPRA does not have the power to unilaterally determine the applicable royalty. If the parties fail to reach agreement, the royalty must be determined by the Copyright Tribunal established in terms of s 29(1) of the Copyright Act or by way arbitration in terms of the Arbitration Act. A royalty unilaterally determined by SAMPRA is invalid.

Power of the Copyright Tribunal and procedure to determine needletime royalties

As the Collecting Society Regulations do not prescribe the procedure for the adjudication of a royalty rate, the licensing scheme provisions in Chapter 3 of the Copyright Act, subject to any necessary changes required by the context, should apply to disputes concerning the determination of the applicable royalty by the Copyright Tribunal pursuant to section 9A of the Copyright Act. Thus, in the absence of an agreement between SAMPRA, as the collecting society, and a user concerning the amount of the royalty pursuant to section 9A, section 31(5) not only gives the Copyright Tribunal the authority to determine the royalty payable but it also goes further and imposes an **obligation** on the Copyright Tribunal to determine the relevant royalty rate.

The Supreme Court of Appeal held that the Copyright Tribunal is competent to determine its own jurisdiction, that is, whether it has the statutory power to deal with a particular issue. If the Copyright Tribunal makes a mistake in determining its jurisdiction, its decision could be challenged on appeal. Having said that, the Copyright Tribunal's powers are narrowly defined, and, for example, it does not have the power to make a determination concerning the date from when the relevant royalties as determined by it would be due. The court also held that if the Copyright Tribunal's royalty determination was based on incorrect facts, and, if it ignored relevant factors, its determination could be overturned and substituted.

Method for determining needletime royalties

The correct basis for determining needletime royalties appears to be to set them at a level which appropriately remunerates the copyright owners, while considering the interests of the users of their works, so as to maximise public welfare. Public welfare appears to be an express policy consideration as the Supreme Court of Appeal reduced the royalty rate to be paid by broadcasters determined by the Copyright Tribunal because of its negative financial implications for the country as a whole: as the majority of the copyright owners tended to be foreigners, the greater portion of the royalty payments were remitted abroad. Thus, it would be inappropriate to simply set the royalty with reference to international practice, or by comparison with that used in another jurisdiction, without considering its domestic effects. Furthermore, there appears to be a recognition of the fact that the public playing of sound recordings for which needletime royalties would be payable benefit the copyright owners of such recordings as they serve to promote the sales of such works, and, that it is not simply the users of such records who seek to derive a benefit from such use. Given the emphasis on the balancing of the various interests, and the mutual benefit from the use of the sound recordings, a market-based approach is considered to be inappropriate to determine the royalty; a royalty on the basis of some sort of benchmarking should rather be used.

The consideration of factors such as the country's balance of payments seems to be questionable. A collecting society such SAMPRA will also license a significant amount of local content, which means that these local copyright owners are maybe

receiving lower royalties than would be the case if such a factor was not included in the determination of royalties. Interestingly, from an international perspective, sound recordings are expressly excluded from the principle of national treatment (a country which is a member of a multilateral treaty embracing copyright is required to grant to foreign works the same measure of protection bestowed on domestic works), instead, the principle of reciprocity applies. Accordingly, if a particular jurisdiction discriminates against South African copyright owners of sound recordings by stipulating lower royalty rates on such works than those paid to its own copyright owners, we could similarly discriminate and allow for lower royalty rates for copyright owners from such territory than that paid to local owners. However, in the absence of such a situation, it appears that our local copyright owners of sound recordings would continue receiving lower royalties. There was, however, no suggestion that SAMPRA, which is, effectively, a monopolist was abusing its dominant position.

There appears to be a distinct preference for calculating the royalty with reference to simple criteria, rather than with reference to a factor which may be difficult to quantify. Thus, in the *Foschini* case, the Copyright Tribunal agreed with SAMPRA that the royalty should simply be determined with reference to the total area of a retail store (and not simply the area to which customers had access). It rejected factors such as the economic value which the background music added to retailers' businesses when played in their stores, or the number of consumers attending the retailers' stores, for calculating the royalty. The Supreme Court of Appeal in the *NAB* case, in a similar vein, rejected the notion that, in the context of radio broadcasting, audience-reach should be used to determine the royalty, or that royalty rates should differ for the different times of the day, because of the difficulties of valuation. It held that the royalty should be determined at a flat rate, based on a broadcaster's actual revenue and its fraction of editorial content, rather than on notional revenue.

In both cases, the royalty initially determined by SAMPRA was, arguably, significantly reduced. In the *Foschini* case, the royalty was reduced to about a third of what had been initially stipulated for the various sizes of premises. Even more significant, the Copyright Tribunal capped the royalty for retail stores with an area greater than 1500m^2. Thus, while SAMPRA's royalty for a store with an area of 10,000m^2 would have been an amount of R11,000 per annum, the substituted

royalty would only be R1,220 per annum. In the *NAB* case, SAMPRA had initially stipulated a maximum royalty rate of ten percent of revenue, which was reduced to seven percent by the Copyright Tribunal, then further reduced to three percent of revenue by the Supreme Court of Appeal.

It is possible that we may not have wait too long for some further case law in relation to needletime royalties as the retailers are apparently appealing the determination by the Copyright Tribunal in the *Foschini* case.

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