# Needletime royalties

SADULLA KARJIKER

You wait ages for a reported judgement concerning "needletime" royalties pursuant to s9A of the Copyright Act, and then two reported decisions come along at approximately the same time. The one was an enquiry by the Copyright Tribunal, and the other a judgement by the Supreme Court of Appeal, following an appeal from the Copyright Tribunal.

Needletime royalties are the amounts charged for copyright licences for playing 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 findings concerning the powers of SAMPRA and the Copyright Tribunal.

SAMPRA is the only collecting society accredited in terms of s9A of the Collecting Society Regulations (promulgated on 1 June 2006 under GN

517 in GG 28894), and in terms of s56(1)(b) of the Performers' Protection Act (11 of 1967), for the Recording Industry of South Africa (RISA).

In *Foschini Retail Group (Pty) Ltd & Others v South African Music Performance Rights Association* [2013] ZAGPPHC 304 (the *Foschini* case) a group of 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 playing 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 SAMPRA is obliged to negotiate and agree the royalty with relevant users in terms of s9A(1)(b) of the Copyright Act, and regulation 7(3) of the Collecting Society Regulations. In the absence of an agreement between SAMPRA and a relevant user, it 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 s29(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 in terms of s9A of the Copyright Act. In the absence of an agreement between SAMPRA and a user concerning the amount of the royalty pursuant to s9As, 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 as from when the relevant royalties 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. The Supreme Court of Appeal reduced the royalty rate determined by the Copyright Tribunal that broadcasters had to pay because of its negative financial implications for the country as a whole; the majority of the copyright owners tended to be foreigners and the greater portion of the royalty payments were remitted abroad. Consequently, it would be inappropriate simply to set the royalty with reference to international practice or in comparison with that used in another jurisdiction, without considering its domestic effects. Furthermore, it appears to be recognised it is not only the users of sound recordings who benefit from the use, but that copyright owners benefit too from the consequential sales. Given the emphasis on balancing the various interests, and the mutual benefit from the use of the sound recordings, a market-based approach is considered inappropriate to determine the royalty; a royalty on the basis of some sort of benchmarking should rather be used.

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 local copyright owners may be 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 than those paid to its own copyright owners, South Africa could similarly discriminate and allow for lower royalty rates for copyright owners from that territory. 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 monopoly, was abus-

ing its dominant position.

There appears to be a distinct preference for calculating the royalty using simple criteria. In the *Foschini* case, the Copyright Tribunal agreed with SAMPRA that the royalty should simply be determined on 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 royalty. Similarly, the Supreme Court of Appeal in the *NAB* case 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 on a flat rate based on a broadcaster's actual revenue and its fraction of editorial content, rather than on notional revenue.

*Karjiker*

In both cases, the royalty initially determined by SAMPRA was 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 significantly, the Copyright Tribunal capped the royalty for retail stores with an area greater than 1500m$^2$. 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 amounts to R1 220 *per annum*. In the NAB case, SAMPRA had initially stipulated a maximum royalty rate of 10% of revenue, this was reduced to 7% by the Copyright Tribunal, then further reduced to 3% of revenue by the Supreme Court of Appeal.

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

***Karjiker is associate professor, Department of Mercantile Law and a member of the Anton Mostert chair of Intellectual Property Law, Stellenbosch University.***