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MA ARTS CULTURE AND HERITAGE MANAGEMENT:

RESEARCH REPORT

THE INTERNET AND SOUTH AFRICAN MUSIC

The impact of the Internet on the protection of South African recording artists' copyrights and consumers' fair use rights.

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1. ABSTRACT

The impact of the Internet on the protection of South African recording artists' copyrights and consumers' fair use rights can be defined by two opposing theories, the 'value commons' and the 'creative commons'. The 'value commons' supported primarily by record labels in the music industry, advocates for stronger policy enforcement, Digital Rights Management (DRM) and a universal pay-per-view, pay-per-use and pay-per-listen system. From an artist and consumer perspective, this 'value commons' approach is not the best system as it works to benefit record labels that, due to the way recording contracts are constructed, own the music created by signed or commissioned artists, and require that all costs for making the album be returned to the company, meaning that 85% of artists are actually in debt to their record label after the records are released. The 'creative commons', or the 'information commons', supported by recording artists and consumers using Internet, advocates for the Internet to be treated as a platform for promotion and knowledge sharing. This research report argues for a balance between the 'value commons' and the 'creative commons' theories, promoting a balance between policy and technology systems to protect artists' copyrights, but also considers consumers' fair use rights.

Technology and new media has a large role to play in the dissemination of information worldwide. In this 'global village', as termed by Marshall McLuhan (1992), where the speed of exchange of goods and knowledge has increased and transcends geographical borders, artists and consumers can share and trade information immediately and at almost no cost. Although South Africa may be perceived as being unprepared for the shift from the traditional music industry to the digital online music industry, resulting issues of digital piracy, online copyrights and fair use rights are a growing concern for the music industry and national government.

National policy is relevant in this digital realm in its ability to legislate the protection of artists' copyrights, so long as it does not impede on market liberalisation and consumer fair use rights. International authorities, national government, artists and consumers are all responsible for ensuring the protection of artist and consumer rights. In South Africa, however, ineffective policy and enforcement and management systems, national and industry politics, limited finances and underdeveloped technology all negatively impact the development of online policy.

It is apparent that placing monetary values on intangible online goods is difficult. Action needs to be taken to develop the 'value commons' and protect the 'creative commons'. Economics, politics and the 'digital divide' are a few of the factors preventing action and the move toward fair global information sharing and trading. This research report will review online problems such as piracy, pricing and rights protection and attempt to define new models, systems and policies to protect South African recording artists' copyrights and consumers' fair use rights.

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3. INTRODUCTION

The music industry is significantly affected by developments in new media in the ways in which music is recorded, distributed, archived and policed. Before the rise of new media, and the Internet in particular, the music industry prescribed that artists signed to record labels to manage and administer the production and sale of their music through specific channels. This music product was tangible in the form of a cassette or compact disk and meant that record labels had the power to the control the sale and use thereof. As the growth and nature of the Internet shifted traditional notions of production, ownership, rights, policy and usage, concepts of power and control over the intangible music product were redefined.

The growth of new media has allowed for the rise of the independent artist who operates independently of a record label, taking full advantage of the opportunities afforded by the Internet. Majority of the independent artists interviewed for this paper advocate for the Internet to be treated as a 'creative commons' where music can be produced, promoted, distributed and used by consumers worldwide and at no or minimal costs. Record labels, favouring the theory of the 'value commons', are supporting the drive for stronger copyright enforcement, licensing agreements, Digital Rights Management (DRM) and a pay-per-view, pay-per-use and pay-per-listen system. It is important to consider, however, that Internet users and online music consumers also include recording artists, who by their creative nature, often sample and reference other artists' music in their creative process. Updated fair use rights need not only promote 'information commons' for the public, but also 'creative commons' for artists. This research report argues for a balance between the 'creative commons', 'value commons' and 'information commons' theories to address the issue of digital copyright protection, promoting a balance

between policy and technology systems to protect artists' copyrights, but also considering consumers' fair use rights to protect and promote innovation, creativity and education in the music sector.

As noted in the Cultural Industries Growth Strategy's (CIGS) final report on The South African Music Industry (1998), the relationship between the Internet and the music industry is noteworthy for two reasons: "its promotional possibilities; and its implications for the protection of copyright". Considering that many South African artists rely primarily on the sale of their music to sustain themselves, viewing the Internet solely from the perspective of the 'creative commons' as a means for global exposure and information sharing is insufficient. On the other hand, policy and technology developed in support of the 'value commons' to protect copyrights that arguably impede on market liberalisation and consumer fair use rights, are also inadequate. A balance between the development of policy and technology to prevent digital piracy and protect artists' copyrights online, while also promoting the fair use rights of Internet users is, therefore, necessary.

The stance of the ten recording artists interviewed on the question of fair use rights and downloading music for free on the Internet was split fairly evenly between artists who supported the 'creative commons' model, and on the other hand artists that promoted the 'value commons' model. What was common in all responses, however, was that the choice to upload music to be downloaded for free on the Internet lies with the artist, and should only be effected with the approval of the artist, and not with the online music service provider or Internet user. It may be argued, however, that tighter regulation and governance of the Internet will increasingly urge consumers to resort to alternative, and possibly illegal, ways of accessing music, as was seen similarly in history in the ways bootleggers fought the Prohibition.

According to an article on the Prohibition sourced online from Digital History (2012), Prohibition in the United States was a national ban on the sale, manufacture, and transportation of alcohol, in place from 1920 to 1933. Advocates argued that banning alcohol would eradicate corruption, reduce labour politics, and help 'Americanize' immigrants. Similarly, record labels support a ban on the provision of free downloads as they are concerned about the repercussions that this will have on the productivity, sustainability and success of the music industry, which relies strongly on the sale of music to operate. Record labels argue that focusing on the 'value commons' and banning free downloads would curb piracy, reduce industry politics, and create a prosperous online industry as consumers, artists and Internet service providers' needs would be met by legitimate and relevant means, licenses and policies.

Prohibition not only fostered corruption and contempt for law and law enforcement among large segments of the population, but also created a huge consumer market unmet by legitimate means. Organized crime filled that vacuum left by the closure of the legal alcohol industry and devastated the nation's brewing industry. Resembling the Prohibition's quick production of bootleggers, speakeasies, moonshine, bathtub gin, and rum runners illegally smuggling supplies of alcohol across state lines, stringently prohibiting fair use rights on the Internet has produced many illegal online music services and boosted music piracy.

Considering the reasons for the repeal of the Prohibition in 1933, it may be argued that the Internet, like all other communication mediums and platforms should, to some extent, be regulated, governed and monitored as prescribed by local and international policies, at the same time keeping in mind consumer and public rights. The extent to which the Internet and online interactions are governed, should be

determined considering the 'creative commons' theory, the 'value commons' theory and the 'information commons' theories to ensure that Internet users' needs and rights to access information are met and protected, whilst making provisions for the music industry to survive and thrive. This research report will assess these theories to shed light on the current South African music industry and international policy solutions to similar issues.

As asserted by Adam Haupt (2008) the values encoded within new media are radically different from those inherent in the 'one-to-many' monologue that characterises the dated technologies of broadcasting and associated 20th century mass media and now allows communication that is 'many-to-many', multidirectional, unrestricted and self-organising. The music industry cannot be viewed in isolation from the consumers that support and engage with it; therefore, linked with policy and technology developments to protect copyrights, needs to be the development of licensing agreements and fair use policy to provide Internet users access to increased information, legitimate online service providers and music catalogues, and encourage consumers to pay for the music that they stream and download.

Primarily this research aims to assess the 'creative commons', 'value commons' and 'information commons' theories to better understand the impact of the Internet on the protection of South African recording artist copyrights and consumer fair use rights. To contextualise this research, an assessment will be done on globalisation, the role of the Internet in globalisation and digitisation and the South African landscape. Current local policy will be examined in relation to issues of digital piracy and intellectual property. International policy and technology then be assessed to determine solutions to that South Africa can adopt in developing national policy to prevent piracy and protect artist and consumer rights. The relevance of national policy in relation to its possible impact on market

liberalisation and fair use rights will be measured. International, national, artist and consumer responsibilities in ensuring that all policy and technology developed are fair and effective in protecting copyrights and fair use rights will be considered. Finally, factors preventing government, artists and consumers from taking action to develop online piracy prevention and rights protection will be discussed.

This research is of interest and importance because it highlights the recent global and local shifts in music industry practice, since the advent of the Internet and digitization. It is also of interest and importance as it notes the changes in arts policy as a result of technological and sociological developments. This topic is significant as it highlights ways in which developing countries can adopt relevant international policy components and adapt their local policy to solve existing policy problems. The open, anonymous and accessible nature of the Internet means that policy, copyright and intellectual property issues of protection, ownership and revenue need regulation, enforcement and monitoring, to prevent digital piracy and allow for artists to sustain their work and themselves. Internet users, including artists, consumers and Internet service providers, need to be encouraged and protected as they create, share, sell and buy cultural information and products globally online. There are numerous theories and works by industry experts and academics that define and assess the impact of the Internet on the rights of copyrights holders and consumers of music online. The literature review that follows makes note of the theories, academic resources and materials that were assessed for this research report.

Literature Review

There has been comprehensive and continuous research, such as Nancy Baym and Annette Markham (2009) regarding the plight of the music industry in relation to rapidly changing new media. According to Baym and Markham (2009), in the past decade the music industry has maximised on music's potential to transcend geographic, linguistic, political and cultural borders and barriers, and has taken full financial advantage of increasingly growing common global interests and tastes. Globalisation and the advent of the Internet increased South African record labels' means to promote and sell music globally to a mass market at a portion of the cost of producing, printing, duplicating and distributing albums.

Globalisation, the role of the Internet in the music industry and the South African ICT Landscape will be assessed in Chapter 4. For this analysis, the World Bank's report entitled Understanding Globalisation (2004) will provide insight into economic, literacy and communication disparities between first and third world countries. The Global Village: Transformations in World Life and Media in the 21st Century (Communication and Society), by Marshall McLuhan (1992), will also be reviewed with respect to the definition and perception of a 'global village' and globally connected communication. In relation to McLuhan's assertion of globalisation creating a 'global village', Stealing Empire: P2P, Intellectual Property and Hip Hop Subversion, by Adam Haupt (2008: 36), will also be reviewed to gain insight into his understanding of the potential global shifts in traditionally defined and established territories defined "not necessarily by the operation of capital or the circulation of capital itself, but by shifts in technology and the will of subjects who see the possibilities for seizing agency in their attempts to own the means of production and representation".

With the Internet becoming one of the primary tools for recording artists' to penetrate the local and global music market, traditional notions of ownership, rights, policy and Internet usage appear to be outdated and need to be updated to prevent digital piracy, protect copyright and promote the fair use of information. Chapter 5 of this research report focuses on the impact of the Internet on piracy, copyrights and policy. The issues that will be engaged with are those pertaining to the policy implications of both the 'value commons' and 'creative commons' theories in promoting the protection and development of copyrights for South African recording artists' music online and the protection of fair use rights for Internet users.

The *Copyright Act no 98 of 1978* and the *1996 White Paper on Arts, culture and Heritage* will be reviewed in Chapter 5 to establish the current extent of protection for South African recording artists and consumers online, before providing solutions of development or other possible models. Brad DeLong and Dan Froomkin's book entitled Speculative Microeconomics for Tomorrow's Economy (2000) will be reviewed to gain an understanding of the ways in which economists define and determine the pricing of online products. The extent to which South African based online music stores can be successful conduits for companies and artists to profitably promote and distribute music will be examined by assessing *Musica's* download services. Additionally, licensing, pricing and digital piracy will be examined to understand how the agendas of Internet users affect and are affected by Internet governance, content licensing and pricing regulations. This assessment will also shed light on the balance of technology and policy needed to protect artists' copyright and the public's consumer and human rights.

Possible solutions to the online challenges faced by the music industry will be examined in Chapter 6. International technology and policy developments will be assessed to determine the necessary balance

needed to best prevent piracy and protect intellectual property. International policies and practices will also be reviewed to determine possible lessons and solutions that can be learnt and implemented in South Africa. Sections and aspects of international arts policy from countries that are both similar and different to South Africa in terms of their economic, social and technological status will be examined to determine policy developments and ideas that South Africa can assimilate and implement. In their book The Global Music Industry: Three Perspectives (2007), Bernstein, Sekine and Wiessman describe and discuss the music industry from a global perspective, providing an examination of the operations of the music businesses in the United States, Canada, Latin America and the Caribbean, Africa, Europe and Asia. An assessment will not be done on entire policies, but on specific practices that will provide possible solutions to underdeveloped South African recorded music policy problems and issues around digitization and piracy.

An analysis of current South African online music policy and practice will be conducted to assist in validating or challenging the argument that a balance policy and technology developments is needed to protect Internet users. An assessment will be done, in Chapter 7, on the relevance of government policy in the music industry, in particular online music, and look at the extent to which policy may impede market liberalisation as encouraged by fair use practices legislation. If national policy is able to deal adequately with infringement and piracy, this will open the landscape for legitimate online businesses to operate on the Internet, providing a viable distribution system for artists and a larger library of content for consumers. If national policy is enforced too stringently, however, it does have the potential to impede on market liberalisation and consumers rights.

Gregory Barnes' Inquiry on Copyright Policy, creativity and Innovation in the Internet Economy (2008) will be assessed to better understand the benefits of national policy in online music practices. Changes

in consumer and artist behaviour since the availability of music online will be affirmed by an assessment of Tim Lester's blog titled Is the Local Music industry a Sink or Swim Market? (2010). In Chapter 7, an article entitled Music Industries Need Copyright Law Update to Defeat Piracy in the Marketplace (1998) by the Digital Media Association (DiMA) will be reviewed to determine the problems with current copyright law as it applies to digital music services. Glyn Moody's article How Do We Know That Piracy Isn't Really A Big Issue? Because Media Companies Still Haven't Needed To Change As A Result Of It (2012) will be assessed for its aversion to view piracy as the invincible threat that the music industry portray it as. Moody (2012) asserts that the media industries, rather than promoting the prevention of piracy should redefine their distribution models. As argued by Moody (2012) if the media industries redefine models to provide incentives for consumers to legitimately purchase products online, there is no need for government intervention or strengthening of national policy.

Chapter 8 will review the responsibilities of people and organisations tasked by national legislation to take action to prevent piracy, protect copyright and promote payment. In this section the role of international authorities, national government, artists and consumers will be reviewed through the responsibilities as prescribed by international and national policies such as *Berne Convention on Copyright, the Rome Convention, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)*and *the 1996 White Paper on Arts, Culture and Heritage*. It is apparent with the globalisation of the Internet that international authorities have taken the position to standardise policies and regulations. Although, considering that the Internet is global, it can be argued that globally standardised policies are necessary, this impacts negatively on the freedom of national government to create independent national policies specific to the needs and practices of its citizens. These international and national policies in turn, impact the amount of freedom and agency seen in artists and consumers to preserve their rights online.

In Chapter 9, an assessment of David Bunn's End of the Rainbow: South African Arts funding in the Post-Mbeki Years (2009) along with related national documents and reports, will be conducted to determine the factors preventing South African government and citizens from taking action to fight for fair and just policies and technology to circumvent piracy, protect intellectual property, promote creativity, innovation and fair use, and allow artists their necessary and deserved remuneration for the use of their work online. The major problems, such as inefficient rights management and piracy, faced by the South African music industry seem to be amplified by online interactions as they are much harder to regulate and monitor in a realm that is as decentralized, anonymous and open as the Internet. Ethél Teljeur's research conducted for the Edge Institute titled Intellectual Property Rights in South Africa: an Economic Review of Policy and Impact (2003) will be reviewed for its reintroduction of economics into the intellectual property debate. Teljeur's stance is that although legislation may be accurate on paper, it does not always allow for easy enforcement. As much as industries and individuals need to work with, and adapt to, new media and related technological developments, there need to be structures in place to protect, support and encourage them.

Methodology

The nature of this research is quantitative, in relation to the impact the Internet on artist and consumer rights and qualitative, with respect to personal opinions of respondents interviewed. For this report, documentary analysis, interviews and informal sources such as social networks and blogs were conducted and assessed to determine the problems and possibilities for South African recorded music online.

Yvonne Lincoln (1980), in a book titled Naturalistic Inquiry, defines three forms of documentary analysis. The first is 'simple tracking' which involves documenting both the overt and tacit behaviours, practices and operations of people and industries. The second is 'content analysis', which involves the development of categories and analysis of the relationship among the categories. The third form of documentary analysis that was used primarily in this research is what Lincoln defines as 'aggregational analysis', which involves the collection and analysis of information from dissimilar documents under new conceptual models, which in turn yields insights not intended or anticipated in the original source materials.

This method of 'aggregational analysis' was conducted to assess existing arts policy and to determine whether or not it is necessary and relevant to adapt existing policy or create any new policies to take into account the impact of the Internet, globalisation and digitization. Document analysis was an appropriate approach as the source materials were comprehensive and thorough. The World Intellectual Property Organization's (WIPO) report on Best Practices in the Music Industry and their Relevance for Government Policies in Developing Countries (2001) and the Independent Communications Authority of South Africa's (ICASA) Discussion Paper on the Review of Local Content Quotas (2000), will be reviewed to determine the need and relevance for the development of national policies, especially in this era of 'immaterial rights'. Considering that government commissioned and issued documents, and industry statistics sources were required, it was difficult to find the most updated and current information as much of this research, although conducted recently, are only released after considerable time frames. Interviewing respondents was, therefore, necessary to attain a more current view on the subject matter.

Semi-structured in-depth interviews were conducted as outlined by Natasha Mack, Cynthia Woodsong, Kathleen MacQueen, Greg Guest and Emily Namey (2005) in Qualitative Research Methods: A Data Collector's Field Guide. In-depth interviews were a viable approach as they are very effective in giving a human face to research problems. Conducting interviews was useful as a research tool as they provided insight into how people interpret and order their immediate surroundings and subsidiary global effectors. Qualitative interviews were also a feasible approach as their flexible, exploratory, unstructured and conversational nature, allowed the space to adjust later questions depending on respondent's answers to earlier questions in order to clarify responses, to follow promising new lines of inquiry, and to probe for more detail. Interviews were conducted to understand the perception of recording artists and management agencies about the impact of the Internet and digitization on the music industry.

Respondents were selected through 'typical case' and 'snowball approach/networking' selection methods. 'Typical case' selection determines what characterizes 'typical' and selects particular people. The 'snowball approach/networking' selection method selects the next respondent on a recommendation basis from the previous respondent. This 'snowball approach/networking' selection method was useful as it provided insight into industry connections and links. Record labels were approached through their online websites to complete interviews and provide contact details for recording artists signed to their companies. These recording artists were asked to provide contact details for other signed and independent artists. Respondents were also selected by searching artist biographies on online networks such as facebook and twitter for respondents who fit the criteria of recording artists. The request was also made to these artists to recommend other recording artists that would be interested in being interviewed for this research.

Ten qualitative interviews were conducted with recording artists operating within the music industry in Johannesburg; ten with people working in Johannesburg based record labels and five with employees of national organisations and councils. Findings from the interviews were used throughout this research to understand why South African recording artists use, or do not use, the Internet to conduct business, and the degree to which recording artists' believe that South African arts policy still needs to be developed to protect and support artists and their work online. Analysis was also conducted on findings from interviews to provide insight into the perceptions and opinions of artists, management and organisations on digital piracy, Internet governance and national policy.

The primary advantage of qualitative interviews is that they allow participants the opportunity to respond in their own words, and allows the researcher the flexibility to probe initial responses and, to a certain degree control the line of questioning. There were two limitations experienced in conducting these interviews. The first was that objective and truthful responses free of external pressures including company loyalty were difficult to encourage as interviews took place during working hours. Respondents were allowed to remain anonymous or respond via email to overcome this limitation. The second limitation was that interviews with record labels and national organisations were fairly difficult to obtain due to time and relevant information restraints. Many record labels and national organisations have only recently begun developing departments, structures and polices to contend with issues of the Internet on artist and consumer rights, therefore, relevant documents and information were limited and not always readily available.

The third method of research used was informal online sources. Examples of these types of materials are blogs, podcasts, image databases, tagged databases of resources and a wide variety of web pages that use technology to present information in new and varied ways. This method of research selects on

individuals or groups as identified by online kinship groups, organizations, neighbourhoods, or social classes. These groups are generally selected by probability methods. “Because network methods focus on relations among actors, actors cannot be sampled independently to be included as observations” (Hanneman, R: 2001, 10). If an individual part of a discussion thread or group is selected, then all other people tied to the blog or discussion through comments and threads were also included in analysis. As a result, this network research approach used studied groups by means of common opinion and common interest, rather than by sample. With informal online sources, however, as asserted by Hanneman (2001) the elements of the population to be studied are defined by falling within some boundary.

The main boundary existing in social network research methodologies is the boundary imposed or created by the actors themselves around a population that is known or invited to be part of a group or network. For example, on facebook and twitter, conversations may be limited to ‘friends’ and ‘followers’, respectively. This means that differing opinions and debate may be excluded and a prejudiced perspective may be presented. As a result, the extent of comprehensive representation of a group or community via a social network may be questionable.

This type of social network research methodology does not have an equivalent print format and with the rise of new media and the consequent change in means of communication, including informal sources in research is becoming increasingly important.“In strict and traditional sense these types of materials would not be regarded as formal scholarly publications, although it is quite clear that they can be used for scholarly communication and as a means of disseminating results. It is therefore important to evaluate them and to conduct further research into the creation and use of these electronic resources...” (Russell, I: 2009, 18). Selected blogs and networks with topics focusing on the

accessibility and use of online music were accessed through Google, Facebook and twitter searches were read, analysed and referenced for this paper.

4. GLOBALISATION, THE INTERNET AND THE SOUTH AFRICAN LANDSCAPE

Globalisation

There has always been a sharing of cultural goods, services and knowledge between people and countries, according to Baym and Markham (2009), but in recent years improved technologies and a transcendence of geographical borders has increased the speed of exchange. Globalisation is not a new phenomenon and it cannot be seen as black and white. As affirmed by Philippe Legrain (2003) it is a controversial, complex, continual process allowing many different definitions and opinions. It can generally be referred to as the process of technological, political, and economic change and integration driven by increased trade and investment worldwide (World Bank, 2004).These changes include the emergence of global corporations and development of global communication. Improved technology has evidently reduced costs and prices with regard to communication and the exchange of cultural goods. "Such cultural [ex]change – as well as the growing economic ties of trade and investment and the political links between countries grappling with global problems – is of the essence of 21st century globalization" (Legrain, 2003: 2).As global interaction increases, copyrights and fair use rights need to be developed, nationally and internationally, to protect the rights of citizens involved in the exchange of cultural goods and knowledge.

Globalisation has not only developed global communication, but it has also encouraged and promoted migration and the spread an awareness of the cultural differences between countries. This has led to

greater recognition of diversity and respect for cultural identities, which is consequently improving democracy and access to human rights. Globally connected communication has also created what Marshall McLuhan (1992) referred to as the 'global village'. McLuhan (1992: 254) described how the globe "has been contracted into a village by electric technology and the instantaneous movement of information from every quarter to every point at the same time".

Today, the term "Global Village" is mostly used as a metaphor to describe the Internet and World Wide Web. On the Internet, physical distance is even less of a hindrance to the real-time communicative activities of people, and therefore social spheres are greatly expanded by the openness of the web and the ease at which people can search for online communities and interact with others that share the same interests and concerns. This technology, therefore, fosters the idea of a conglomerate yet unified global community. Due to the enhanced speed of communication online and the ability of people to read about, spread, and react to global news very rapidly, McLuhan (1992) says this forces us to become more involved with one another from countries around the world and be more aware of our global responsibilities. This increased rate of exchange of culture globally infers that International and national authorities, along with artists and consumers, need to take responsibility for protecting and promoting national culture worldwide to allow free and fair distribution, sale and use of national cultural products in global markets.

As inferred by the 'global village' perception, global markets means bigger profits which lead to greater economic wealth, but on the other hand, threaten the extinction of local cultures and markets. It can be argued that globalisation breeds the perfect environment for the 'rich to get richer and the poor to get poorer' as developing countries have been unable to take advantage of the global exchange and trade

of cultural goods due to structural adjustment policies imposed by the International Monetary Fund and the World Bank, as later discussed. The unique cultures of developing countries, in a 'global village', arguably face extinction due to the flood of 'Western' influences and cultures, and the need to appropriate 'Western' practices in order to compete in, and gain from, the global exchange and trade of cultural goods.

In a 'global village' richer countries have the power to influence the institutions of globalisation, like the World Trade Organisation, the United Nations, the Commonwealth, the European Union, the International Labour Organisation, the World Bank and the International Monetary Fund, which are all international bodies that influence the policies and choices that national governments can make. This has a direct impact on the interests of the developing world, as it determines the ways in which governments create national policy and run their countries. According to the World Bank report on globalisation, "throughout the 1990s, countries in Africa, Central South Africa, Latin America and Asia were forced to impose structural adjustment policies designed by the International Monetary Fund and the World Bank in order to secure loans to support their weak economies" (2004). The effect of this imposition has been that these countries with weak domestic policies, institutions, infrastructure and trade barriers have a reduced ability to take advantage of the global changes. South Africa, as a signatory to International treaties, needs to comply with these regulations, but also adopt attitudes and practices of other countries that have successfully created and developed national policy, within international policy confines, to provide citizens the freedom and opportunity to empower themselves and consequently the national economy.

As affirmed in Stealing Empire: P2P, Intellectual Property and Hip Hop Subversion, by Adam Haupt (2008: 36), with globalisation,

> "Traditionally defined and established territories are being deterritorialised, not necessarily by the operation of capital or the circulation of capital itself, but by shifts in technology and the will of subjects who see the possibilities for seizing agency in their attempts to own the means of production and representation".

'Empire' is defined by Haupt (2008: 36) as a descriptive term for "a mode of cooperation between former colonial powers; working on the basis of cultural and economic hegemony, through its control over technology and the means of representation, consolidates and legitimates its cultural, political, legal and economic operation". Technology, however, makes it possible for subjects to engage directly with one another without having their interaction mediated, censored or controlled by corporate media. This benefit of technology needs to be considered as it relates to consumer fair use rights and the 'creative commons' theory. Inflexible copyright and digital rights management systems, as promoted by the corporate music industry and record labels, need to be carefully considered as these systems have the tendency to infringe on consumer rights. Policy and technology developed to manage online interactions need to be balanced in promoting fair use and protecting copyright to allow consumers to, within right and license terms, use cultural information and goods and allow artists a fair opportunity to be remunerated for their work and increasingly compete in the industry.

The 10 South African recording artists interviewed had differing opinions when asked what they perceived as the main issue preventing independent South African recording artists from being financially successful and competing comparatively online with successful local and international counterparts. All responses were, however, related to financial factors. This question was posed to gain an understanding of whether issues raised by the artists could be corrected and improved by

national policy and technology developments. The responses can be framed in the following categories in no specific order:

- Lack of music business knowledge and skills;
- Information and economic gap;
- Play it safe – Do not take enough financial risks.

An interesting common opinion between artists, record label employees and rights protection organisations, is the perceived lack of music business acumen among local artists. Most respondents support the growth knowledge and skills of South African recording artists needed to close the information and economic gap between South African artists and their international counterparts. These respondents believe that increased knowledge and skills will allow artists to take financial risks and compete on an even playing field. It is clear from these responses that there needs to be a stronger focus on promoting and growing education in this area of business and access to the technology, tools and resources needed to effectively make use of the Internet to conduct music business.

So far, globalisation has been praised for opening up the space for diversity, and challenged for its potential to homogenize culture and language and disregard indigenous and national culture and languages. Although Haupt's (2008) assertion that globalisation is promoting appropriation, and therefore, producing homogenous cultural products is valid, the UNESCO Universal Declaration on Cultural Diversity adopted in 2001 to promote intercultural dialogues and preserve cultural diversity. According to Koïchiro Matsuura (2001), UNESCO's Director-General in the introduction to the Declaration, "The Universal Declaration makes it clear that each individual must acknowledge not only

otherness in all its forms but also the plurality of his or her own identity, within societies that are themselves plural. Only in this way can cultural diversity be preserved as an adaptive process and as a capacity for expression, creation and innovation".

The cause & effect of globalisation means more competition inside national borders; but more importantly the need for musicians, labels, and professionals to push global boundaries and stand out in the crowd of global competitors. The problem most musicians and industry professionals are challenged with, however, is finding the balance between domestic growth while confronting illegal downloading, a depleted economy, and a dwindling fan base against the necessity of global expansion. To combat this, national policy and legislation, such as quota regulations, needs to be developed to promote national artists, which will encourage consumer support of the local music industry, and result in global expansion of the South African music industry to mass markets.

The role of the Internet in globalisation and the music industry

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As the Internet becomes more accessible by more people globally, it is increasingly taking on the characteristics of a mass medium rather than an interpersonal one. According to Haupt (2008), the decentralized, 'many-to-many' nature of the Internet does, however, make it very different from more traditional 'one-to-many' mass media. As asserted by Robert McChesney (2001), prior to the 1990s, media systems were primarily national systems, but during the 1990s a global commercial media market emerged. McChesney (2001), in an online article on Global Media, Neoliberalism, and Imperialism, states that, "the rise of a global media market is encouraged by new digital and satellite technologies that make global markets both cost-effective and lucrative". In addition to financial interests, global media have an impact on media content, politics, and culture.

The impact of Internet on globalisation has both positive and negative effects. The positive impacts of Internet technology on globalisation include the modernization and improvement of the business sector on a worldwide basis. Businesses improved their global competitiveness, productivity and communication with more efficient electronic transaction processing and instant access to information. The market is now more competitive with consumers having greater choices. With this boom of productivity, communication and competition, the balance of 'value commons' and 'creative commons' is now more necessary than ever. Artists' copyrights need to be protected through policy and technology means to ensure continued productivity, growth and opportunities to compete. These protective measures should not, however, infringe on artists and consumers' rights to sample and share the increasingly diverse catalogue of cultural information and goods.

The line between 'sampling' and pirating music online is, however, a fine one that is almost impossible to define. Record labels are becoming increasingly concerned with online piracy, where people illegally swapped music over peer-to-peer networks like Napster and LimeWire, which was founded as a free peer-to-peer file sharing Internet service that emphasized sharing music files encoded in MP3 format. Partly in response to the piracy threat and partly due to sliding CD sales, music companies began to experiment with licensing their records to new online services to allow consumers to listen to music online, while collecting small fees and advertising revenue that the services would share with labels and artists. The music industry's perception of these new licences was that consumers would be discouraged from stealing music, and record labels might even get a sales boost as listeners discovered new kinds of music. Researchers and industry experts, such as Douglas MacMillan in an article detailing The Music Industry's New Internet Problem(2009), however, assert that online music sites are being used by a growing number of listeners as a substitute for purchasing music, rather than serving as a catalyst for more purchases. Due to the fact that the efficient and effective licenses and

policies are fairly difficult to enforce and monitor online, technology managing digital rights is a necessary addition to legislation to prevent piracy and protect copyrights. These digital systems must not, however, be inflexible to the point of preventing the fair use of a product once purchased.

It is apparent that a viable system combining policy and technology has not yet been developed, and probably will not for some time should record labels remain on the two extreme ends rigidly supporting the 'value commons' theory or the 'creative commons' theory respectively. With current licensing models, however, revenues from digital download services are exhibiting strong growth trends, but costs of anti-piracy enforcement continue to increase. Statistics released by the Recording Industry of South Africa (RiSA) (2007) state that the costs of deploying RiSA's national anti-piracy enforcement unit continue to increase; however, no figures were made available in the release. In addition to the benefits of flexible digital rights management systems, as mentioned above, the music industry and supporting organizations will also benefit as the costs spent to deploy RiSA's national anti-piracy enforcement unit should decrease as digital rights management systems will reduce the rate of piracy.

It is apparent that the Internet and globalisation has had a significant impact on music business models and strategies, in particular in the way music and copyrights are licensed and protected online. Many record labels have been looking at other ways to gain value from the growth in streaming and downloading music online. As expressed in the interviews conducted for this research report, artists and record labels are, for example, using interactive dashboards, such as South African based 'ReverbNation', to monitor where on the Web their music is being played, and even the demographic group and geographic location of the people playing it. They can then use this information to review, revise and develop business and advertising strategies. Most industry experts, such as MacMillan

(2009), agree that there is no simple way to make money from online music. As asserted in a quote by Dalton Caldwell, CEO of Imeem[1],

> "The way we [the music industry] monetize music and other goods on the Internet is to take the excitement and experience around them, and monetize them through several different business models...For instance, Imeem is primarily advertising, but we also make a great deal of money from driving digital purchases of downloads, ringtones, ticket sales as well as merchandising sales".
>
> (Imeem, 2012)

It goes without saying that for the music industry to make money from online music, consumers need to have access to the Internet and necessary resources to make online purchases of music. Similar to Imeem's expansion of its business to include digital downloads, many local record labels have recognized the barriers to operating successfully online, and have for some time already, been looking for ways to maximise on online sales of music and mobile sales of ringtones. The South African landscape is fairly unique in comparison to International counterparts with regard to its dual focus of developing online and mobile markets.

The South African ICT Landscape

South Africa may be the powerhouse economy of the continent, yet despite having the largest Gross Domestic Product (GDP) of any African country, South Africa ranks fourth in terms of the total number of Internet connections, behind Egypt, Nigeria and Morocco. Statistics sourced show that in 2011, South Africa, with a population of 49,004,031, only 6,800,000 people had access to the Internet (Interne World Stats, 2011). Majority of South African Internet users access the Internet via mobile phones,

[1]Imeem was a social media web site where users interacted with each other by streaming, uploading and sharing music and music videos. With more than 100 million unique users, Imeem was drawing a crowd, but was not turning a profit and in 2009, after 'MySpace' acquired the service, it was shut down.

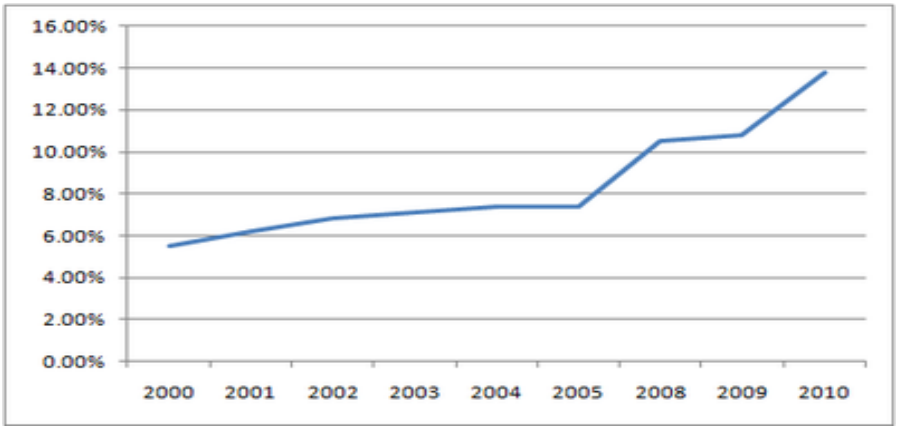
although multiple-SIM-card ownership has exaggerated the population penetration rate of mobile Internet usage, and a large number of poorer South Africans are still excluded from mobile ownership (Music and Copyright, 2011). To combat this exclusion, most South African mobile operators have introduced very-low-denomination top-ups and a range of cheap handsets. Making mobile phones more affordable means well for the music industry as the online market will increase as more people gain access to the Internet.

According to the record label employees interviewed, however, although consumers downloading music for free on the Internet are causing profit losses in many companies, in South Africa, the music industry is far more affected by consumers sharing music via Bluetooth or similar mobile phone-based technologies. They attribute this to local demographics and the socio-economic status of majority of the local population. Considering the increase in access to the Internet via mobile phones, copyright and digital rights management and enforcement systems need to make provision for mobile phone users. For example, technology protecting digital rights should charge consumers for the initial download or purchase of a song, but should not infringe on their ability to play the song multiple times on their mobile phone. The problem comes in, as in the case of illegal peer-to-peer file sharing, when users swap music via mobile phone-based technologies such as Bluetooth or Blackberry's bbm service. Similar conversations to those currently underway between the music industry, Internet service providers and computer manufacturers with regard to possible technology measures that can be taken to prevent piracy and the illegal sharing of music online, need to happen with the music industry and mobile phone manufacturers.

In contrast to mobile, broadband penetration is low. An article entitled Will the South African music industry benefit from the optimism of the World Cup? on the Music and Copyright (2011) website, affirms that at the end of March 2010 in South Africa,

"10% of households had a broadband connection, and the figure is only expected to reach just over 20% by end-2014. High prices and poor bandwidth have limited the growth of Internet connectivity. Digital music sales online (excluding ad-supported and subscription services) accounted for around 10% of the digital total in 2009".

Although digital sales are low, South Africa has the digital communications infrastructure needed to raise sales. The number of Internet users is steadily increasing annually, due to the growth in broadband and 3G Internet connections and the licensing of greater numbers of service providers, which have started to result in cheaper, faster Internet. The graph below, sourced from World Wide Worx (2012), shows Internet users in South Africa by penetration as a percentage of Internet users in the population.

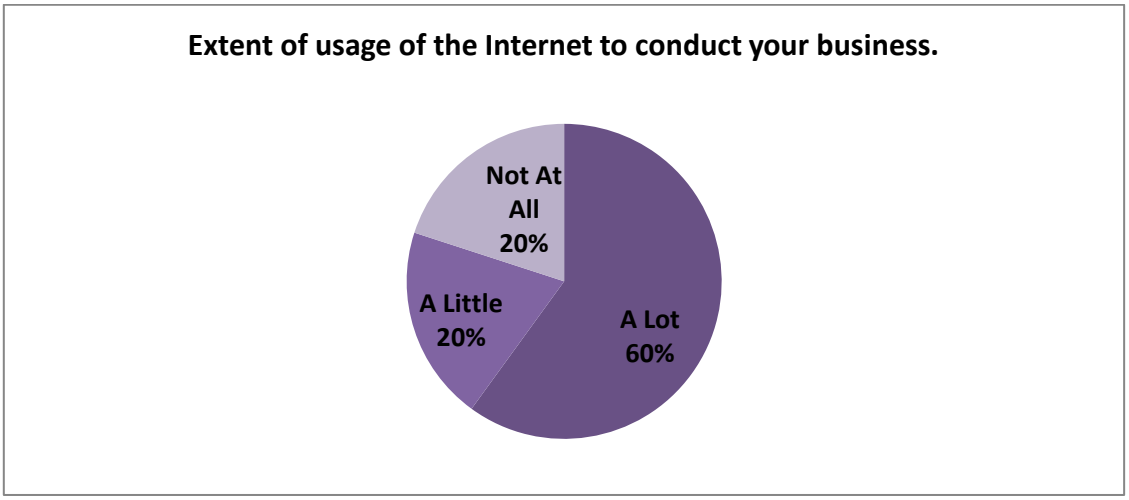


Source: World Wide Worx (2012)

Most of the growth in broadband Internet came from small- and medium-sized businesses upgrading to ADSL, which in turn provided Internet access to more than half a million South Africans working in offices who were not previously online (Conway-Smith, 2010). The resulting sudden increase in bandwidth should cause online retail prices to fall and demand to rise as digital music services become less restricted to mobile or broadband platforms and become more appealing to consumers. As

affirmed by Conway-Smith (2010), a study conducted by World Wide Worx also found that larger companies are increasingly giving 3G cards to their employees so that they can work outside the office, driving growth in wireless Internet. The number of wireless Internet subscribers jumped by 88% in the past year, and high speed Internet connections by 21% (World Wide Worx, 2012). Considering the fact that South Africans are increasingly able to access the Internet and use the Internet to conduct business, as shown in the graph below, this increased activity online means that artist' copyrights and consumer fair use rights, now more than ever, need to be protected online to encourage usage and consequently growth in the music industry.

Of the 10 independent South African recording artists interviewed, currently, 60% extensively use the Internet to conduct their business online. For the purpose of this research report, using the Internet to conduct business as a recording artist refers to the processes of production, promotion and distribution of the artist's brand, music and live performances. The pie chart that follows illustrates the extent to which the 10 South African recording artists interviewed use the Internet to conduct business as a recording artist.



Source: Artist Interviews (2011)

Considering the growth in Internet access and usage, new relationships between music businesses and online music service providers and music downloading statistics; it is clear that there is room for South Africa to develop and grow its strength and position in the global music industry. As South Africa continues to strengthen its presence online, it is becoming more pertinent that policy and technology be developed to prevent piracy, protect artists' copyrights while simultaneously protecting consumers' fair use rights. This will encourage further development of local artists' repertoires, Internet service providers' catalogues and consumers' options to legitimately purchase music online. The following chapters discuss this growth detailing challenges, responsibilities and solutions.

5. PIRACY, PROPERTY AND POLICY:

THE 'VALUE COMMONS' AND THE 'CREATIVE COMMONS'

The meaning and value of property is increasingly being defined by the laws and policies regulating copyright and intellectual property. Where property used to be generally defined as physical matter possessed by a person or group, in this digital information age, it has come to mean something more elusive, intangible and intellectual. Defining and creating policies and licenses that address the questions of how to deal with changing forms of property, ownership and fair use is, at this time, of the utmost importance.

Raj Patel's book "*The Value of Nothing: How to Reshape Market Society and Redefine Democracy"* (2010), is an account of how modern society came to create the 'free market' ideology that now dominates digital communication and exchange. Patel affirms that the shift from this 'free market' ideology where the value and pricing of products is determined by the perceptions of modern society

will only happen when these perceptions and ideologies are acknowledged and products are better protected. Considering the fact that Patel's perspective is based on the problem of contemporary markets' need to equate price with value, the solution to define the value of intangible and intellectual property such as music is made more difficult. Many of the record labels interviewed for this research provided the 'value commons' as a viable solution where there is a move away from the 'free market' ideology to value, licensing and pricing systems where consumers are charged on a pay-per-view, pay-per-listen, pay-per-use model through copyrights and licenses.

Considering advances in technology as tools for producing, distributing and promoting content in various forms, many independent artists interviewed believe that the traditional approach to copyright protection and licensing is obsolete and argue that there is a need for an alternative to traditional copyright where value is expressed in ways other than simply financial returns. The 'creative commons' perspective, supported by independent artists, promotes open, equitable and fair use practice, putting unprecedented power into the hands of recording artists and Internet users, "creating an environment in which restrictions take a back seat to permissions and the creative talents of individuals benefit the common good" (Educause Learning Initiative, 2007: 2).As asserted by an article on Creative Commons by the Educause Learning Initiative (2007):

> The 'value commons' ideology supported by record labels advocates for the traditional understanding of copyright as an all-or-nothing proposition: a work is either in the public domain, or its owner asserts "all rights reserved". Whereas, the 'creative commons' theory, supported by artists, consumers and Internet users allows copyright owners to release some of those rights while retaining others, with the goal of increasing access to and sharing of intellectual property.

For recording artists copyrights are probably the intellectual property right most threatened by the Internet. The protection of publishing and copyright is an important part of managing a recording artist's music career. The royalties earned through these protections are the primary source of remuneration for artists. However, the right and ability for artists and consumers to access and sample music is of equal importance to the protection of their copyrights. Therefore, there needs to be a balance between the 'value commons' protecting artists' copyrights and securing deserved revenue and the 'creative commons' protecting fair use rights and promoting creation, innovation and education.

The primary national policy affecting South African music online is the *Copyright Act no 98 of 1978*(Copyright Act), which adheres to the guidelines if the 'value commons' theory. According to the Copyright Act, copyright gives the owner of the work exclusive rights to control, use and exploit the copyrighted work or parts of it for personal gain, profit or otherwise. Copyright consists of various aspects, each of which may be owned by a different person or licensed by way of an exclusive or non-exclusive licence to people other than the copyright owner. As stated in the Copyright Act (1978: 6),

> "A licensee does not obtain copyright in the work, but only the right to use it in a manner as described in the licence and only for the duration of the licence. As soon as the licence is terminated such exploitation rights revert to the copyright owner".

It is important that these licenses not only protect artists' copyrights, but also consumers' fair use rights. Keeping in mind that artists' themselves, are music consumers that require access to music to sample and create their own music, it is pertinent that these licenses do not restrict fair use rights of information. It can, therefore, be argued that a balance is needed in these licenses to simultaneously protect 'value commons' and 'creative commons'.

It is apparent that the digitisation of music has made the copying and distribution of work virtually effortless, instantaneous and perfect, and it can be done at a minimal cost. MP3 digital file compression technology, for example, has made the exchange of music online fast and cheap, even with limited bandwidth. The battle between the recording industry and those illegally sharing music over the Internet has been laborious and ongoing. According to Bach (2004), at its core, it is a battle about the meaning and value of intangible property and thus a battle over the heart of the emerging information economy. This battle is fought on one side by record labels who promote the implementation of the 'value commons' through legal and electronic measures to protect digital content, and artists and consumers who fight on the side of the 'creative commons' promoting online privacy, freedom and consumer fair use rights, which would arguably circumvent piracy. Later in this paper possible policy and technology solutions will be explored to balance the scale between record labels and Internet users to ensure the protection of copyrights and the protection of fair use rights.

In national legislation, infringement of copyright is dealt with in section 23 of the Copyright Act (1978), which provides that copyright is infringed when any person, not being the owner of the copyright, "does or causes any other to do any act that the owner has the exclusive right to do or authorise" including:

a) making, directly or indirectly, a record embodying the sound recording;
b) letting, or offering or exposing for hire by way of trade, directly or indirectly, a reproduction of the sound recording;
c) broadcasting the sound recording;
d) 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;
e) communicating the sound recording to the public.

Piracy may be argued as one of the main offenders of copyright. Although in countries, such as South Africa, where Internet access and availability is scarce and the prevalence of commercial piracy of CDs is still thriving; online piracy poses far greater challenges to the music industry. The first challenge of online piracy for the music industry is that there is no longer a centralized point of transgression. Where the blame could once be placed on limited and detectable manufacturers and dealers of sub-standard pirated CDs, perpetrators now include Internet Services Providers along with teenagers, students and all individuals participating in peer-to-peer file sharing in the privacy of their own homes all over the world. The second challenge is the fact that whereas commercial CD pirates challenge the record industry's monopoly over the distribution and related profits of music, online music pirates challenge the nature of the distribution model in itself. Due to the fact that music is stored and distributed over the Internet in a form that separates it from traditional disks or tangible hardware, it lends itself to the perception of being cost and consequence free. The third challenge is that creating technology and policy to enforce copyright laws is expensive, lengthy and easily challenged by the rapidly increasing and developing technology that this technology and policy is trying to regulate.

The fact that digital technology makes it easy to copy and distribute information at zero marginal cost and consequence, does not mean that copyright holders should forfeit their copyright by placing work on a website or by someone else placing their work on a website. It is important to remember that according to the Copyright Act, copyright gives its owner exclusive rights to control and authorize the use of the published work for personal gain, profit or otherwise. Subject to section 1(5)(e) of the Copyright Act, "publication is deemed to have occurred when copies of a work have been issued to the public...". This means that the issuing of copies of sound recordings by making the work available on a web site, for streaming or downloading, could amount to its publication. Although publication of works applies traditionally and without contest to tangible media such as books and computer disks, there is no apparent reason why this regulation should not also apply to the Internet and more specifically to the

placement of a work on a web site for users to make transient copies of it by viewing it or more permanent copies by downloading it.

Due to the intangible nature of music online, a central issue that the music industry is plagued with is pricing of online products. Brad DeLong and Dan Froomkin (2000) define this distribution, consumption and pricing of music online as what economists would refer to as non-rivalry and non-excludability where one person's consumption does not diminish another person's ability to consume, and one cannot control by whom it is consumed. They go on to argue that it is easier to put a price on a product that is tangible, definable, standard and controllable to ensure payment is received in advance or at the point of sale. As discussed later, there are policy options with regard to licensing that may provide solutions to this challenge. It will also be considered whether perhaps the issue is not creating policy and technology to solely circumvent piracy, but create policy to enforce education to wane the online consumers' mentality of the Internet as free and anonymous. As is apparent from the thread below, many consumers are finding the scarcity of legitimate online music service providers, and unrealistic pricing structures, a driving force to consider downloading music illegally. Updated and current licensing and pricing models need to be created to ensure the protection of copyrights and also provide consumers with legitimate Internet service providers where music can be bought at a fair price.

Trying to find the opinions of consumers about online services is not difficult in this age of blogs, interactive and social networks and threads. One thread in particular with the subject line No decent music download sites for South Africans (2005) provides an interesting look at the changes in consumer behaviour and communication with the advent of the Internet. Threads, like many other interactive systems on the Internet allow users to anonymously state their opinions, queries and complaints and have other users respond instantly.

In the thread, one user states that as much as he opposes illegal mp3 downloads, access to online music for South Africans is limited as most online services are only available to America and Britain. He goes on to declare that if South African music companies do not start providing the same services then he will have no problem to download music illegally. This comment is followed by a range of users that advise him on the few sites that cater to South Africans, the legal aspects related to downloading music and the reasons for limited South African online music sites. Considering that this interaction is taking place online, users are able to adopt suggestions and reply to comments immediately.

Another issue that is brought up in the thread is the fact that South African based providers are expensive and only support certain technology unlike international counterparts that are able to charge almost nothing for downloads. An example from the thread that will be assessed further is *Musica's* online service. A few of the users commenting on the thread had tried the *Musica* online service and found it to be overpriced and inaccessible as it only supports Internet Explorer.

Mapara Syed (2010) details *Musica's* download service. According to the article, *Musica's* download service was "the first legal and local online service that lets users download tracks and pay in rands" (Syed, 2010: Issue no 240). At the time the article was written, the only other legal download site in the country was www.samp3.co.za, which is run by enthusiasts trying to promote local artists not yet part of the established music industry. In June of 2006, the Music Industry Online website (MIO) published an article detailing ten of the top mp3 download sites at the time. Most of the sites were global as opposed to local, but since then a number of new South African based mp3 download sites have emerged. Due to the fact that the changes in downloading and consuming music are changing so rapidly, MIO focused the search on only 5 local sites that are providing legitimate and remarkable online services.

Musica's online music service ranked at number 3, behind www.samp3.co.za and www.rhythmrecords.co.za. Unlike the first two ranking websites, MIO confirmed that the price of downloads on www.musica.co.za are similar to that of the normal retail price. *Musica's* site allows registered users to download single tracks for R9.99 and entire albums for R129.99, which is more or less the same price of buying an album at a *Musica* store. Users are also able to stream a particular song for 10c. Although it is encouraging that South African companies are being innovative and legally utilising the Internet as a distribution channel where royalty fees are still paid to artists, the *Musica* price point is relatively expensive compared to international download services. According to an online article by Claire Bates (2009), consumers can pay a minimum of 29p (R3.60)[2] for singles and £7.68 (R92.30) for albums.

According to Syed (2010), not only is the pricing of *Musica's* content a concern for the site and consumers, but the catalogue of content is also limited. Karey Evett, the PR spokesperson for *Musica's* download site attributes this lack of local content to the fact that some local record labels do not have their music available in a digitized format and consequently, electronic transmission of their recordings is impossible for sites like *Musica's* online service. "Only about 20% of local record labels have gone digital, although *Musica* is trying to encourage local labels to convert their tracks" (Syed, 2010: Issue no 240).

Another problem of the *Musica* online service, as raised in the thread discussed above, is that "the service is currently limited to Windows users running Internet Explorer and Windows Media Player, and currently excluding those using other systems such as Apple Mac, Mozilla, Netscape, WinAmp and Linux" (2005: 2). Yahya Patel, e-commerce manager at *Musica*, states that they have no immediate

[2]Exchange rate was calculated at an exchange rate of R12.27to the British Pound on www.xe.com/ucc/on 16 February 2012.

plans to incorporate support for systems that are not compatible with the service. He adds that the OD2 software, which is the infrastructure supplier for the service, uses Media Player's digital rights management to curb piracy by preventing users from copying downloaded music to multiple and separate computers, without necessary licenses (Syed, 2010: Issue no 240).

It is apparent that one of the main challenges for artists, labels and Internet Service Providers is the financial factor incurred in digitizing and licensing music. Syed (2010), however, asserts that the main and current constraint for South African consumers trying to download music is bandwidth, and in fact, access to computers and the Internet. The statistics, as illustrated by Syed (2010), show that of South Africa's population of over 40 million, only 40,000 have access to a broadband connection, and of these 40,000, only 7,500 have it in their homes, while the remaining 80% or so are connected at work. The problem, as agreed by Rutger van Spaandonk, Executive Director of the Core Group, and Apple Independent Marketing Company and official representative for Apple SA, is that South Africans are heavily affected by the 'digital divide' and many music buyers do not have Internet access at home and are not permitted to download music in a personal capacity at the office (Syed, 2010: Issue no 240). In addition to this, even if people are able to download music at work the next concern is access to digital music players and licenses that allow them to play this music on multiple devices.

Keeping in mind South Africa's 'digital divide' and the fact that many consumers do not have access to personal computers or Internet connections, and use company or public computers to access and download online music, problems arise when illegal copies are found stored on company or public computers that do not belong to the person making the copies and infringing on copyrights. The infringing copies may even be stored on a device belonging to a relatively innocent party, such as an intermediary or end-user. Copyright is, however, infringed not only by a person who reproduces a work

without permission, but also by a person who causes or authorises such reproduction. This type of infringement can be applicable in cases where the infringing copies are not found on the system of the person making such copies, but on the system of an innocent intermediary or end-user.

The Copyright Act prohibits "unauthorised broadcasting or transmission in a diffusion service of literary and musical works...by granting exclusivity to the owner of the copyright in them". Both the actions of broadcasting and transmission via a diffusion service are directed at the transmission end of a telecommunication service rather than the receiving end. In fact the display on the receiving apparatus is expressly excluded from the definition of a diffusion service. The distinction between a broadcast and a diffusion service based on the means of transmission is therefore already inadequate, due to the fact that the Internet no longer consists primarily of wires, cables and other tangible means of transmission and that satellite already forms part of the Internet telecommunications network. The technological construction of the Internet also makes it impossible for a web site proprietor to know by which route or means the content will be conveyed to a user. This has a significant impact on licensing models and copyright enforcement.

The proprietor of a web site may argue that it does not actually transmit any information by merely making content available on its web site. As stated in the Copyright Act (1978), however, infringement can also occur when a person causes or authorises an infringing act. The proprietor clearly facilitates the transmission of the works available on the web site by placing them there. A proprietor can therefore infringe a third party's copyright by making a work available on its web site without permission, because this action will eventually cause the work to be transmitted as part of a diffusion service.

Until now, the discussion has focussed primarily on the digital challenges faced by the music industry and the benefits of creating policy and preventing piracy for the protection of the rights of artists, the music industry and consumers. Digital technologies are, however, a double-edged sword that not only make copying easier, but also provide copyright holders with ways to measure and control their work online and related revenues. According to the 'creative commons' theory, digital technologies stifle competition and innovation in what should be one of the most dynamic areas of the emerging information economy.

There are benefits to free downloading that must be mentioned. Due to the way recording contracts are constructed, music is not necessarily owned by the artist but by the record label commissioning it. "When artists change labels, due to publishing and licenses, their new label is not allowed to produce the albums the artist made on the old label, and if the old label decides not to print anymore albums or release the songs, the music is effectively lost" (Bach, 2004: 24). Considering the way music is stored, archived and shared on the Internet, music downloading is one of the best alternatives for most people to access these songs no longer in print.

According to Nielsen's Netratings (www.nielsen.com/us/en/industries/media/music.html, 2009) research profiling South Africa's Internet usage, shows 31% are aged between 18 and 29 years. Considering that most music downloaders are youth that both have the time it takes to download mass amounts of music, and who also do not have the money needed to buy albums. However, it may be argued that music downloading creates a love and appreciation of music that will develop in teens as they become adults. As research shows, although adults may not have the time to download the same amount of

music, they have more expendable income to buy albums, thereby increasing album sales in the long term.

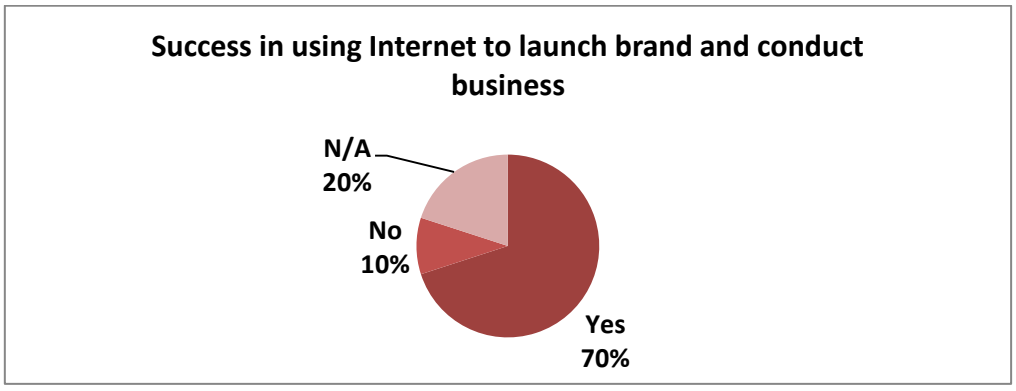
According to Neilson SoundScan, in 2005, 81.87% of the entire music industry was controlled by 4 major record companies, Universal Music Group (UMG), Sony BMG Music Entertainment, EMI Group, and Warner Music Group. On November 11, 2011, however, according to an online news release Vivendi and its subsidiary, UMG, announced that they signed with Citigroup Inc. a definitive agreement to purchase EMI's recorded music division for a total consideration of £1.2 billion (Vivendi, 2011).In 2012, these 3 major record companies account for almost 75% of the International music industry (Musicians, 2012). These labels have the money to promote their artists through advertising, radio, and music videos. Most artists are not, however, signed to these labels, but smaller independent labels that do not have as much money as the major labels. As a result, most artists get limited to zero radio play, ineffective promotion and advertising strategies, and their videos are of low quality and are usually not shown on television.

Online music downloading is beneficial for upcoming and independent artists to get the exposure they normally would not have, and make their music available and accessible to current and new markets. Music Piracy allows downloaders to experiment with unknown artists. Smaller, independent artists have been on the rise the past several years, and are starting to take some market share away from the major labels. The 'creative commons' theory asserts that experimentation with new pricing and licensing models cannot hurt the industry. Advocates of this theory argue that downloaders would not buy the music of an unknown artist, if free downloads were not available, but by downloading and having the music, they may either realize they like the music, and buy the actual album or other albums

by the same artist, or spread the music to their friends, who then in turn might also buy the music, or attend live performances.

It is clear from the responses from interviews conducted with the 10 South African recording artists, based in Johannesburg, that South African artists see the necessity and advantages of conducting business online. Majority of the respondents are currently taking advantage of the Internet as an alternative avenue and platform to conduct music business and feel that they successfully utilize the Internet to launch and promote their brands and music. Although all of the South African recording artists interviewed measure their success online by interaction and brand awareness. The extent to which these levels of interaction and brand awareness online are converted into ticket and music sales, as a result of online advertising, would be an indication of the success of their online interactions and brand awareness.

The pie chart that follows illustrates the perceived success of the 10 South African recording artists interviewed in utilizing the Internet to launch their brand and conduct their business. The 20% not applicable relates to respondents who had previously answered that they do not use the Internet to conduct business as a recording artist.



Source: Recording Artist Interviews (2011)

According to the Recording Industry Association of America (RIAA) (2005), only 15% of albums are financially profitable worldwide. As shown by the 2005 RIAA Consumer Profile, CD sales at concerts have risen, implying that there are more people attending concerts and/or more people attending these concerts who do not already own these CD's. According to RIAA (2005), this increase in attendance and CD sales at performances may be attributed to the publicity gained due to online music downloading.

Using social network sites such as *Facebook* and *Twitter*, with the core objective being to make 'friends' and increase 'followers' respectively, to promote their brands and music globally is a strong indication that South African recording artists primarily use the Internet as a tool to build and grow brand awareness and promote and advertise their music and live shows rather than as a financial avenue to sell their music. Currently South African recording artists rely primarily on ticket sales for live shows, royalties from air play, and ringtones for mobile phones as main sources of income. However, the benefits of these artist-consumer relationship building networks cannot be overlooked. Artists are able to build and maintain an active and proactive audience and provide more value and incentives for consumers to pay for their music and attend their live shows.

Many artists, including well established artists from Madonna to U2, offer free streams and/or downloads of their new albums before they are released. These artists are the ones that realize the positive potential of free music. Respondents interviewed from record labels name global exposure as the leading advantage of the Internet, affirming that the Internet has become a core focus when it comes to releases. Most albums are released digitally first with the physical release thereafter.

Although these benefits for free downloading and streaming of music are notable, the fact that many artists rely on royalties for sustainability, means that their intellectual property rights need to be protected. It is apparent that the recording industry, arguably controlled by the major record labels, is mixing the fight against piracy with aggressive efforts to cement the industry status quo, and majority of the local recording artists are unable to participate in the emerging information economy. Consumers are also being forced into a new relationship with music access and acquisition due to music industry defence strategies to fight piracy. It can be argued, in accordance with David Bach (2004), that these stringent enforcements of anti-piracy technology and policy raises the possibility that information technologies, rather than creating an avenue for information to be accessible to all, are actually shrinking "information commons" resting on universal pay-per-view, pay-per-use and pay-per-listen. This barrier to access can be argued to be going against of South African consumers' fair use rights as defined by the *White Paper*. The challenge for policy makers is to balance the legitimate interests of deserving grassroots copyright holders to control their property, with a public interest in broad availability and diffusion of information.

6. BALANCING THE 'VALUE COMMONS' AND 'CREATIVE COMMONS' THEORIES

As previously discussed in this report, there is a need for a balance in technology and policy developments to protect not only artists and the music industry, but consumers and Internet service providers furthermore. The challenge for policymakers is to balance the legitimate interests of copyright holders to control their property with a public interest in broad availability and diffusion of information. It is important too that these policies are created with the intention to fight music piracy and not to stifle competition and undermine consumers.

Reinhardt Buys and Francis Cronje et al, in their book, Cyberlaw@sa: The Law of the Internet in South Africa (2003), concur that technology itself would not be the best way to protect copyright on the Internet as digital locks are easily broken. Technological developments, such as Digital Rights Management (DRM), are underway to control copying and downloading, but until such developments are complete the law is the copyright holder's only recourse. In South Africa copyright protection is afforded solely under the Copyright Act. No protection of copyright exists in terms of the common law, as can be seen from the Copyright Act, which expressly states that "no copyright or right in the nature of copyright shall subsist other than by virtue of the Act or some other enactment" (Buys and Cronje, 2003: 38).

Technology: DRM

So far, the discussion suggests that digital technologies are a one-way threat to copyright. Digital technologies are, however, a double-edged sword. The very same technologies that can undermine intellectual property can also grant a measure of control far greater than anything familiar from previous eras (Lessig, 1999). DRM technologies, tools used to control and promote the 'value commons' theory, are a set of electronic locks for digital content such as music, video, and text enforcing the concepts of pay-per-listen, pay-per-view and pay-per-use. With DRM content is not distributed as raw data but rather inside a secure container. Accessing the content requires a key and control over key distribution grants de-facto control over content distribution. The obvious problem with DRM is the need for uniform standards. Some industry representatives have therefore called on policymakers to mandate all devices capable of playing digital music to be equipped with DRM. In the meantime, multiple corporate solutions are competing in the market place. Microsoft's technology, for example, embedded in its Windows Media Player, is an industry leader.

DRM as such of course does not restrict copying. According to Jeroen van Wijk in Bach (2004) all it does is return a measure of control to content producers providing record companies almost limitless latitude and close control over what users actually do with the industry's products. What the music industry does with this measure of control is a matter of corporate strategy. It can, for example, be used to prevent any copying, to permit only a single copy, to prevent burning of songs onto CDs, or to only permit playback during the first 48 hours after purchase (Bach, 2004).

The impact of DRM can be argued in at least three ways. The first is the officially stated position of copyright industries, which view DRM simply as tools to combat piracy and counterfeiting. Viewing DRM through this perspective faults anybody who downloads music from the web without paying royalties of committing theft. This view describes DRM as a way for owners of intellectual property to defend their rights.

The second is a microeconomic point of view regarding the character and value of information goods. If the problem is indeed that information goods are non-excludable and non-rivalrous as observed by DeLong and Froomkin (2000), then DRM may just be the saviour of markets, enabling information goods to function more or less like conventional goods, re-establishing excludability and thus allowing online distribution to be controlled. DRM would then provide the enforcement and monitoring systems to enforce licenses, pricing and copyright models.

The third stems from sceptics who are concerned about consumer rights in the emerging information society. DRM gives the music industry a set of tools to initiate a paradigm shift in the entertainment and information industries. Rather than selling physical music carriers and leaving it up to consumers what to do with them, the industry would exert much greater "after sales" control over consumers and their consumption. According to Pamela Samuelson "the main goal of DRM mandates is not, as the

industry often claims, to stop 'piracy' but to change consumer expectations. In the content industry's view, consumers don't have rights; they have expectations" (Samuelson, 2003:44). These expectations are about what consumers may and may not do with digital content. If content providers do not give consumers permission to burn legitimately downloaded songs onto a CD, consumers may just have to accept it. "If listening to a song five times during a 48-hour period were a lot cheaper than purchasing a right to unlimited listening, consumers better adjust their listening patterns (Samuelson, 2003: 44).

Digital network technologies have indeed made copyright infringement vastly easier and undermined legitimate music sales. DRM is certainly one way to turn the tables on pirates. It is also true that DRM – by re-establishing excludability and rivalry – could resolve the underlying tension between digital information goods and copyright. It might thereby enable established business models, policies, and law enforcement strategies to continue to work, or at least to minimize adjustment costs.

SAMRO asserts that DRM is increasing in significance as South Africa enters the digital era. According to Yavi Madurai (2009), marketing general manager at SAMRO, however, DRM is currently not a key issue for local artists as consumers still prefer mobile music marketing and ringtone purchases to online streaming and downloading. Madurai places the responsibility on local artists to ensure that the company providing services online is licensed. Although it can be agreed that artists need to be active in the protection of their rights, it can also be argued that government, more importantly, needs to take responsibility in this matter by ensuring water-tight policies of protection and implementing a strategy that prevents unlicensed providers from operating. Madurai goes on to say that "we [South African recording artists] are a lot more Internet-averse than international artists. We have more issues around online risks. There are also bandwidth issues and really the most exposed is the cellphone – because we are a mobile country" (Madurai, 2009). Madurai (2009) asserts that anti-circumvention provisions,

which restrict the consumer's use of digital media, even while acting within legal boundaries, will become a key problem in the future.

The goal for policy and technology creators is market segmentation and differential pricing, not only preventing unlawful copying. Online music services operated by or on behalf of the major record companies are using DRM to diversify their product offerings. MusicNet, for example, offers AOL users three different subscription levels. Only with DRM do service providers have the ability to control which songs users may listen to while being online, which songs they can download to their own computers, and which songs they can burn. It is, however, evident that the music industry is beginning to deploy DRM for much more than just preventing piracy.

From a public policy and public interest perspective, the near-universal digital lock-up of information goods that is necessary for some of these strategies to work is a substantial concern. Most importantly, it tilts the balance of producer and consumer rights that is the core of intellectual property regulation considerably toward the former. In addition to the implications for consumer rights and the threat such tight controls may pose to creativity, possible effects on market competition are an additional concern. High switching costs may lock in consumers, stifling competition. Control over digital licensing is likely to give the music industry an edge, keeping out new entrants.

It is already clear that DRM could be a universal remedy for copyright holders. Not only does it help them prevent piracy; it also provides the capability for a set of product and marketing strategic options that are truly unprecedented. The only problem is that electronic locks, like all locks, can be broken. Copyright holders thus know that reliance on technology alone is insufficient.

International Policy

Sections of music policy from International countries that are faced with similar problems as the South African music industry will be reviewed. The review and assessment of these International policies will hopefully provide solutions to the problems that South Africa is currently faced with. These local problems include formalizing digital copyright protection while promoting fair use rights to circumvent piracy. Essentially, International policies will be examined to assist in understanding the necessary balance between the 'value commons' and the 'creative commons' and the best practice methods to correct this balance.

The article 7 Ways to Support Artists by Canadian journalist, Bruce DeMara (2009), is evidence of the scope that examining global arts and culture policies can have on correcting and improving the environment of national artists. It is clear from the article the similarities between Canadian operations and South African operations. Much like the argument for South Africa, DeMara highlights the fact that the main thing that Canada needs to address is ways to support artists more completely. The predominant issues he raises are Canada's lack of artist support and development, and government's underestimation of the role of International competition. The argument here emphasises the need to balance the 'value commons' to support and develop artists financially and the 'creative commons' to promote creativity, innovation and healthy competition.

Arthur Bernstein, Naoki Sekine and Dick Wiessman's book titled The Global Music Industry: Three Perspectives (2007) describes Canada's response to the cultural domination of the American-recorded product, which is also faced by the South African music industry. Similar to ICASA's quota regulations for South African broadcasters, in 1982 the Canadian government reacted to the cultural domination of American-recorded product by establishing the Canadian Content Laws. These rules established that a

certain percentage of music broadcast in Canada to be one-half Canadian, in terms of the artist, producer, and lyricist of the song. Cultural domination of the American-recorded product is a significantly more difficult to combat on the Internet as website 'broadcasters' or owners are not necessarily country-bound.

Many content quota regulatory instruments will be simply unworkable as broadcasting becomes Internet-based. According to Lawson Hunter, Edward Iacobucci and Michael Trebilcock (2010: 24) "there may be intellectual property issues, and geo-blocking as a consequence, but there is no regulatory or technological obstacle tithe penetration in Canada of video content from foreign sources". As asserted by Hunter, Iacobucci and Trebilcock (2010) consideration needs to be given to mechanisms to provide prominence to Canadian programming and to help consumers find such programming in the unlimited space of the Internet. Hunter, Iacobucci and Trebilcock (2010) affirm that current Canadian content quota regulations may be ineffective in dealing with new media.

> "Fundamental regulatory change is required to reflect the inevitable impact of technological change on consumer viewing behaviour. Canadian content and most likely other regulatory policies as well need to be updated accordingly. New funding programs and sources of revenue are needed to replace the current quota system to support the creation and promotion of Canadian cultural content. In this technological stage, net neutrality would ensure non-discriminatory access to the Internet and hence easy access to viewers by content providers...If net neutrality does not exist, and if competition concerns arise, only then might regulation be necessary. Such regulation would ensure that broadcasting content providers are not discriminated against and that access to Canadian content is maintained".
>
> (Hunter, Iacobucci and Terbilcock, 2010: 27).

South Africa's implementation of these regulations, later discussed as the responsibility of ICASA, would be beneficial for South African recording artists as it means that they would be able to make their music available to international consumers, via these websites, by uploading their music in their own home country. The complication here is ensuring that collection agencies, such as SAMRO, are working to ensure that they receive their deserved financial rewards for any of their music downloaded. Government needs to assist in the development of new funding models to support the creation and promotion of national cultural content.

In terms of artist development, as mentioned by DeMara, what the South African government can learn from Canada is their investment in the growth of the music industry via their establishment of the Foundation to Assist Canadian Talent on Records (FACTOR). The purpose of FACTOR is to assist the development of an independent Canadian recording industry. Grants are given to enable artists and songwriters to have their work produced, to create videos, and even to support domestic and international tours. Other money is given to Canadian record labels, producers, engineers, and directors, in an attempt to establish and reinforce a domestic recording infrastructure to support the music industry. In order for South African recording artists to compete in the global music industry, they need to be afforded the necessary infrastructure and resources. With the knowledge of the growth of the Internet in the recording music industry, programmes and policies need to be created and implemented to provide South African recording artists with the knowledge and skills to develop and promote their music business online and effectively sustain themselves financially through this. These online mediums need to include not only access via a computer, but also a mobile cellular phone.

In the *2010 Cape MIC Mission Statement*, Greta Wilson claims that technology necessary for paying for digital downloads is not compatible with the practices of South African society, and argues that more structures suitable to our society need to be created to allow easier transactions online. Developments

in mobile technology, such as the ability to access the Internet, purchase ringtones, and exchange music via Bluetooth, are good examples of the creation of avenues made to suit South African youth, and society at large. The facility for consumers to purchase music online using airtime that they can buy cash or with debit cards, makes legally purchasing or downloading music from one's cell phone easier than on a computer. The problem is not so much the inefficient technology, however, but the perception of the Internet as open, free and anonymous; the impression of online interactions as untraceable and without reproof; and the volume of music available to be downloaded for free.

In Japan the recent growth of music publishing revenue lies not in mechanical royalty but in performing royalty. In South Africa with the predominance of mobile phone access and usage, the royalty model may be useful. Japanese youth, similarly to South African youth, have accepted the ring tone, which is a service available through mobile phone companies that allows user to choose their favourite hit songs at a fixed fee. This new model adopted by Japan focusing on performing royalty revenue has rapidly grown the music business profiting not only publishers but also to independent artists and labels. Although Japan's strategy benefits the youth with regard to access to catalogues of music, they also have strong anti-piracy regulations. The punishment for illegal-product selling in Japan is currently "confiscation of illegal sales income and fines up to 5 to 10 times of the income" (Bernstein, et al, 2007: 231).

A lesson that South African can learn from China to combat piracy is their low-price strategy that saw digital music sales boom and exceed physical sales. This low-price strategy required record labels to lower the price of online music to compete with cheap, pirated physical CDs. One reason that this marketing strategy is successful, according to Bernstein et al, is because the digital market is "steady and safe thanks to secured digital rights management, so it's comparatively difficult to lose master royalties, whereas physical CDs can be duplicated easily from an original master, and pirated CDs can

be copied in mass production as a result of it" (Bernstein et al, 2007: 244). South Africa needs to develop its copyright management and pricing policies to ensure that artists' work is protected from piracy and they receive their financial benefits for each download.

The emergence and expansion of music piracy in Europe has come about as a result of a variety of factors, including the increased penetration of broadband Internet services, the increasing involvement of organized crime, the relaxation of border controls between countries, and the higher capacity for downloading and storing music. It can be agreed, as asserted by Bernstein et al (2007) that digitisation has lead to wide-spread, cross-border and virtually uncontrollable copyright infringement because of the simplicity of digital reproduction, the ease and speed of digital transmission and the ease of digital manipulation. This problem of piracy, which is undeniably amplified by the nature of the Internet, faced by Europe is similarly faced in the South African music industry. Similar to China's low-price strategy, according to Bates (2009), the European music industry is dealing with this through developed licensing and pricing agreements with online service providers. Internet music service providers are now charging minimum costs for downloads of larger catalogues of music, to encourage and incentivise consumers to legally download music.

In the fight against online piracy, South Africa would benefit from 'copyright alerts' system, as prescribed by Europe's 2010 Digital Economy Act, and 'Protect IP Act of 2011' adopted by many International countries. The 'copyright alerts' system is a good indication of how communication and negotiation between ISPs and rights holders can work to the benefit of all parties. According to Paul McGuinness for the Telegraph, "these 'copyright alerts' are warnings that, with escalating urgency, aim to nudge broadband users away from piracy towards downloading and streaming music from legitimate services. There will be the prospect of deterrent sanctions for those who repeatedly ignore the

warnings" (McGuinness, 2010). The 'Protect IP Act of 2011' is legislature concerned with regulating controls to cease ISPs that illegally sell products.

The harmonisation of intellectual property and copyright legislation across the EU member countries is a prime example of a broad issue that affects the European music industry that is shared by the South African music industry online. As asserted by Bernstein et al (2007), until the early 1990s individual European countries set the legal duration of copyrights according to minimum levels established in *Berne* and *Rome Convention*s. With the growth of the Internet and global trade, copyright holders were faced with a situation in Europe, where the recognized term, or duration of their rights, varied from country to country. This raised some serious legal and commercial questions regarding cross-border exploitation of works whose copyright protection had expired in one EU country but were still protected in another.

As mentioned in Bernstein et al (2007), in the interest of diffusing a potentially complicated transnational issue and with a view to facilitating a level playing field in commerce and free trade, the European Economic Community (EEC) passed, on October 29, 1993, Council Directive 93/98/EEC, which provided for the harmonization of the terms of copyright protection. Under this directive all member states of the European Union were required to guarantee copyright owners the same level of protection. Although, globally there needs to be a harmonization of the terms of copyright protection as per the *Berne* and *Rome Convention*s, South African policy-makers who decide on which conventions to be signatories of, need to ensure that all policies affecting recording artists and consumers, work to protect their rights in the global music market.

There are many rights related to copyright, but according to Bernstein et al (2007) the rights most affected by the Internet are associated with the public performance and communication of a

copyrighted work. The public performance of a work includes live performances, broadcasts, and other commercial uses involving the public communication of such work. The neighbouring right associated with the public communication of a performance, production, or broadcast of an individual creation, on the other hand "provides for a royalty that is paid to performers, session musicians, producers, and broadcasters in recognition of their contribution to the creation of a piece of work" (Bernstein et al, 2007: 121). It is apparent that a fourth area needs to be created that is associated specifically with digital rights, which provides for a mechanical royalty that is paid to creators every time their music is shared, streamed or downloaded from the Internet.

As previously mentioned, the rapidly moving digital age, with its capacity to distribute music across borders, does not sit easily within a royalty distribution system premised on national boundaries and localized collection of license fees. According to Bernstein et al (2007), this has presented a real problem for the music industry interested in the global sale of digital music services. Bernstein et al (2007) confirm that there is simply no satisfactory system for this. The fact that this issue remains unresolved is seriously hampering the global development of online music services and infrastructure. This is a fundamental issue for the South African music industry in that it is widely agreed that the future of the music industry globally is inextricably linked to digital distribution systems and networks and South Africa lags behind many other countries in the development of this sector.

As a result of an appraisal carried out by the European Commission in 2005, three options for dealing with this issue were put forth, which can be used to improve South African music policy. "The first option is to continue with the status quo (i.e. do nothing), second option is to investigate ways in which the collaboration between the collection societies of the twenty-seven member states can be improved, and the third option is to give rights holders the choice to authorize one single collection society to

license and monitor all the different online uses of their work across the EU" (Bernstein et al, 2007: 129).

As done by the European Commission, South Africa needs to support the third option, which represents a long-term model of good practice in cross-border licensing and distribution of royalties in the online environment. "Under this scenario rights holders would be able to separate and withdraw their online rights from the general rights administered by their national collection agencies and assign them to any agency of their choosing. In the case of European Commission, this agency would then issue a single EU-wide license covering online distribution and provide incentives to EU collection societies to improve the quality of their service to rights holders and enhance the volume of cross-border royalty payments" (Bernstein et al, 2007). South Africa should consider strengthening relationships across the continent and the globe with regard to licensing models and royalty collection to promote legitimate Internet services and cross-border royalty payments.

National Policy

An article on the RISA website titled, A dynamic South African music industry (2007) highlights issues affecting the South African recording industry that are topics of focus in this research, such as piracy. As stated in the article, the loss of revenue from this increase in piracy is hinting toward the music industry's increasing dependence on opening up new revenue streams to sustain the business. These new revenue streams include "leveraging digital incomes across the South African, African and international markets, especially in the mobile sector – and ensuring that broadcasters and other users of music pay the producers and performers of music as outlined in the Needletime legislation" (RiSA, 2007).

It is apparent that although, with new media, consumers are exposed to more media, more writers, more video artists, and more creativity in more ways than ever before, the challenge for media companies is finding a way to stand out and make money from all that exposure. Employees of record labels were posed with the question of the significance of record labels in a business significantly affected by changes in technology and the growth in possibilities for independent artists to operate successfully on the Internet. All 10 of the record label employees interviewed, responded that although the traditional record label business model may have become obsolete due to the growth and possibilities of the Internet and the decrease in physical CD sales, record labels will not completely deteriorate or become insignificant if they adapt to the changes in the music industry. They attribute their fortitude to the fact that artists generally do not have adequate business acumen to operate independently and require the assistance of a record label to fuel their success. Another reason mentioned by employees of record labels to illustrate the continued existence of record labels is that digital sales are not their only revenue stream.

The article A dynamic South African music industry (2010) on the RISA website, makes it apparent that there is a need to create policy, structures and infrastructure to support and protect musicians and their work online. It is important to consider the perspective of the music industry that the digital realm has become a standard platform for all recording artists wanting to penetrate the local and global music markets. As a result of the Internet becoming the primary market for recording artists, revenues need to be attained for artists to maintain themselves and their work. Similar to how radio and television broadcasting pay for their use of music recordings, and consumers pay for recorded CDs, it has been argued by record labels that online transactions also need to be financially beneficial for recording artists. These financial benefits will be attained through the protection and management of recording artists' intellectual property and copyright implemented by supporting policy as consistent with the

'value commons' principle. As previously mentioned, however, this supporting policy should not infringe on the rights of Internet users to have fair use of online information as prescribed by the 'creative commons' principle.

The *2010 Cape MIC Mission Statement* supports the notion that companies are increasingly making use of the Internet to penetrate the music industry. The volume of online interactions has resulted in the need to develop policy that protects South African recording artists' work on the Internet more comprehensively. Unlike Wilson's (2010) contention that digital media has become more regulated, this research goes further to argue that more regulation is needed to ensure that artists' are provided financial advantages of their work being downloaded or streamed. It is apparent that there needs to be more developed policy, structures and infrastructure created to manage online transactions and ensure that recording artists maintain their copyright on their intellectual property and receive their legally deserved royalties.

Wilson (2010) does, however, maintain that "the market opportunities have not yet been cornered by any particular groups and even the big music companies are still trying to catch-up. This new business model thus creates huge business opportunity to be opened". Taking a more local perspective, Wilson (2010) affirms that, "in South Africa, the numbers of CD sales are still on the increase, unlike the international trends. This is predominantly due, among other things, to the fact that technology necessary for digital downloads has not yet fully taken off in South African society. Wilson claims that "while consumers with access to digital technology download international music online, South African music has a very small footprint on the Internet, and is not readily available" (Wilson, 2010).

The availability of South African music on the Internet, or lack thereof according to Wilson (2010), is a problem coupled with the fact that American-recorded product is still dominating the market. As previously mentioned, Canada's established quota regulating policies to combat cultural domination of American music as described by Arthur Bernstein et al, need to be reviewed and considered in the development of South African music policy. As later discussed, ICASA should review and update current local broadcasting quotas to make provision for Internet broadcasters.

In line with artists' requirements for access and exchange, consumers have similar needs of access to, education in, and exchange with, new technology and global cultures to ensure implementation of the *White Paper's* value that "access to, participation in, and enjoyment of the arts, cultural expression, and the preservation of one's heritage are basic rights; they are not luxuries, nor are they privileges as we have generally been lead to believe" (1996). Government needs to create policies that the 'creative commons' principle and encourage conversations within the music industry to provide optimum conditions for all actively participating online.

A good example of such a conversation is the recent agreement between ExactMobile and NORM on payment of music royalties, granting ExactMobile a license "to make the copies it needs to sell digital music, amongst other rights granted" (musicexchange.co.za/archive2009/detailedtopics.html, 2009). This dispute between ExactMobile and NORM was, according to Gillian Ezra (2009) based on ambivalent rates of mechanical royalties, paid by music sellers to the composers of the works, as administered by NORM. As stated by Ezra (2009), this rate has been "hotly debated over the past three years within South Africa between NORM and a large number of Service Providers". Government needs to get involved in setting national standards for the sale of digital music online that will ensure that artists are being fairly compensated, music sellers are offered business models which allows for an

increase of sales, and consumers are provided access to legitimate and affordable music services. IP regimes protecting South African recording artists' work online needs to be developed to allow artists to operate and compete nationally and internationally via the Internet, and ensure that the receive their deserved financial benefits.

7. RELEVANCE OF NATIONAL POLICY AND IMPLICATION ON MARKET LIBERALISATION AND FAIR USE RIGHTS

The relevance of National Policy

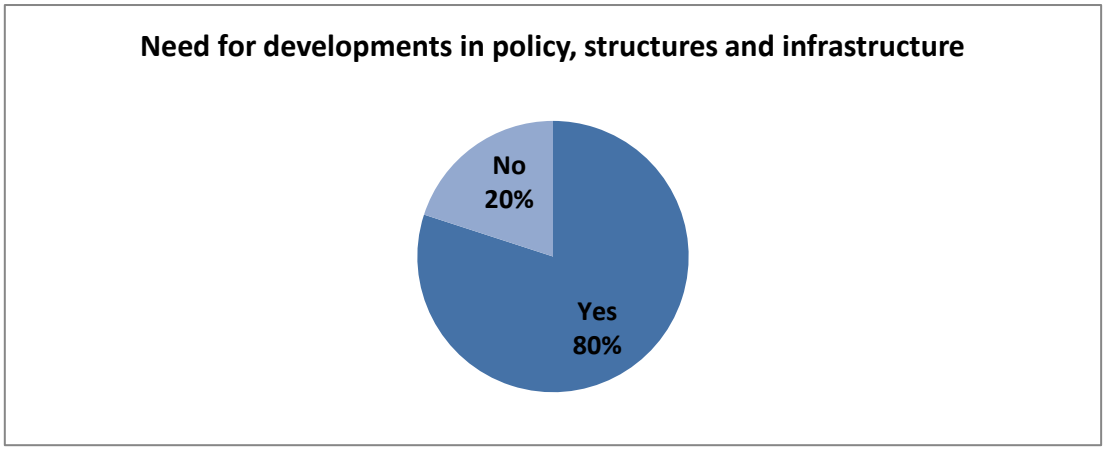
In terms of the relevance of national policy in online music, this section will assess the benefits of national policy balancing the 'value commons' and 'creative commons' in online music for "creators, rights holders, technological innovators and the public, alike" (Barnes, 2008: 2). In his essay entitled, Inquiry on Copyright Policy, Creativity and Innovation in the Internet Economy, Gregory Barnes (2008:1), asserts that national policy will aid to:

> "Enhance [and protect] benefits for rights holders of creative works that are accessible online while also facilitating innovation and growth of the Internet economy and simultaneously combating infringement and safe-guarding end-users interests in freedom of expression, due process and privacy".

It can be inferred from the above-mentioned quote that if government are able to create and implement current and contemporary 'value commons' and 'creative commons' policies in line with the needs of Internet users, the multitude of current issues that the industry is faced with may begin to be overcome.

If national policy is able to deal adequately with 'vale commons' and 'creative commons' theories and consequently infringement and piracy, this will open the landscape for legitimate online businesses to operate on the Internet, providing a viable distribution system for artists and a larger library of content for consumers. Currently, a combination of high licensing and copyright fees combined with restrictive bandwidth, slow ADSL lines and the booming piracy market, online music providers are unable to afford a large catalogue of music and consumers' needs are not being met by legitimate means. As a result, artists that should be benefiting from the copyright fees paid by legitimate companies are losing out on a potential income stream. On a larger scale the music industry and the country which should be profiting from the growth of the Internet are not because policy protecting and supporting local online music providers, rights holders and consumers, is underdeveloped.

The following pie chart illustrates the opinions of the 10 South African recording artists with regard to the need for developments in policy, structures and infrastructure that protect artists' work online and control and regulate online interactions and transactions. The 20% that do not see the need for developments in policy, structures and infrastructure, advocate that the Internet should be used as a platform for promotion, creativity, innovation and freedom of expression. As discussed later, these artists believe that policy will hinder and limit these online actions and possibilities.



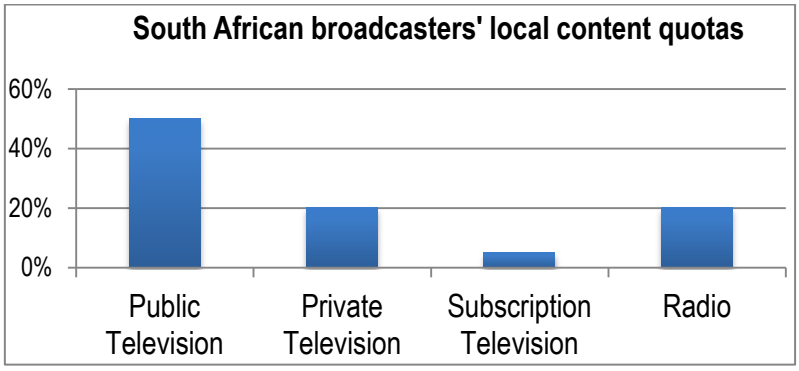
Source: Recording Artist Interviews (2011)

As affirmed in CNN researcher and reporter Tim Lester's blog titled Is the Local Music Industry a Sink or Swim Market? (2010), the fact that government assistance in creating policy that provides a safe place for artists to work online, will help new and old artists in capitalising on the opportunities provided by the Internet, for their commercial and financial success. Lester's blog (2010) asserts that 95% of music is illegally downloaded to the detriment of artists. Lester (2010) sheds light on the changes in consumer and artist behaviour since availability of music online. The Internet has provided artists with a new means of distributing a product to a target audience, and according to the blog, music is being consumed now more than ever before. Lester goes on to say that as a result of these changes, "new artists...have a better chance of getting recognition than ever before...this is where [government] can assist artists in capitalising on these opportunities for commercial success" (Lester, 2010).

An online article by the World Intellectual Property Organization (WIPO) titled Best Practices in the Music Industry and their Relevance for Government Policies in Developing Countries (2001), supports the statements made by Lester that the Internet provides a communication medium in the developing world, but also goes further to illustrate the issues faced by artists and the relevance of national policy in this area. The WIPO article realistically states that availability and accessibility to the Internet "does not guarantee protections or a revenue flow...but the potential for global promotion cannot be ignored" (WIPO, 2001: 8). This article supports the argument for current, contemporary, updated government policy. "The Internet by its very nature is largely unregulated: there is no 'The Internet Company' to turn to when seeking redress. This raises a number of largely unresolved issues regarding responsibilities in 'cyberspace', including privacy, security and copyright" (WIPO, 2001: 8). Access to, and the convenience of, online music sites storing music in established data formats, such as MP3 files, has caused major problems for those controlling large upfront investments in artists, and because of this, government needs to create policy to protect artists' work online.

Nationally created and implemented policies are also beneficial in the shift from revenues based on the physical products, such as CDs, to income from licensing fees for the use of music in media channels as discussed in the article Best Practices in the Music Industry and their Relevance for Government Policies in Developing Countries (2001) by WIPO. National policy is relevant in this time when 'immaterial rights' are more and more becoming a viable source of income for artists. As stated by WIPO (2001:10), "the expanding electronic media are more difficult to monitor than sales of tangible items, and this means that the structure and collection of intellectual property rights have become a more pressing issue than ever before".

Currently the Independent Communications Authority of South Africa's(ICASA) local content quotas are prescribed primarily for local music and television programming, radio and television, as seen in the graph below. The absence of local content quotas for online service providers is glaring and arguably problematic. National creation, development and implementation of copyright policies that ensure content and royalty regulations between different broadcast mediums are fair and current is necessary. For example, stipulating and prescribing certain percentages of local content on South African sites will be beneficial for artists attempting to bypass the established industry and use the Internet as a distribution channel. Although enforcement of compliance may be more difficult online, licensing agreements with Internet service providers need to include quota and monitoring requirements.



Source: ICASA (2000)

Although ICASA's Discussion Paper on the Review of Local Content Quotas (2000) recognises the threat of new technologies to indigenous cultures it talks of new technologies as developments to take place in the distant future. In doing so, ICASA fails to recognise that current technology is new technology ever changing and developing. It notes the challenges for local content regulation and monitoring with the emergence of new global distribution platforms, but also states the undeniable financial, technological and legal support needed for South Africa to take advantage of these new technologies.

National policy in this area and industry is relevant especially to help and support the music industry in response to the changing digital environment. As asserted by one of the record label employees interviewed, although the live music industry is one of the most viable source of revenue for artists and record labels, not every artist plays live music, so for producers, engineers and recording support industries, intellectual property and copyright royalties are of utmost importance and must be protected. WIPO agrees that stronger implementation of needletime rights, for the copyright protection of performers, "which expands copyright protection to generate revenues for other groups of rights holders, will boost national economy" (WIPO, 2001: 43).

The implications of policy on market liberalisation and fair use rights

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Due to the fact that industry individuals' agendas differ, policy that may benefit one may impede on another. For artists updated policies that protect their work online may be beneficial due to licensing, copyright and the consequent 'double-dip', where artists are paid a copyright royalty and an additional "public performance" royalty for a download. For Internet companies and consumers, however, more

stringent policies and regulations, such as Digital Rights Management (DRM), that manage their online interactions and transactions, may be impediments to their licenses and fair use rights.

An article entitled Music Industries Need Copyright Law Update to Defeat Piracy in the Marketplace by the Digital Media Association (DiMA) (1998), describes a few problems with current copyright law as it applies to digital music services. The first problem raised is that the licensing process is difficult and expensive, which discourages innovation and increases litigation risk. The fact that music needs to be licensed on a song-by-song basis is long-winded for online music stores and services that require millions of songs and licenses to compete with pirate sites that have catalogues of almost every song ever recorded. Jonathan Potter (2011) agrees, writing that under the current law, let alone a stricter law, it is unreasonably expensive and virtually impossible to licence a comprehensive music catalogue for online music stores. Legal online music services have substantially less music than piracy market networks and these piracy market networks are profiting from unauthorized distribution of music. DiMA (1998) asserts "it is important for digital media innovators that any legislative effort to thwart online piracy is not so far-reaching as to trigger unintended negative consequences for legitimate online services".

Another problem discussed in this DiMA (1998) article is the several different statutory standards governing various industries' royalty-rate arbitrations, which are employed to determine royalty rates that are similar in nature and compete with one another, resulting in competing services paying different royalties. This is detrimental to consumers and online service providers as "Internet access providers may become bottlenecks and tollbooths that favour their own vertically-integrated information services, or that otherwise favour information providers that pay for 'preferred' access to consumers" (Digmedia, 1998).

> "DiMA members believe that competition benefits consumers and creators of information, and that anticompetitive behaviour by content owners or networks should be challenged...Network neutrality principles...essentially state that consumers should be entitled to access lawful Internet content of their choice, run applications over the network that they choose, and attach devices to the network that they choose, so long as the content, applications and devices do not harm the network and so long as the consumers stay within the limits of a chosen bandwidth and quality of service."
>
> (Digmedia, 1998)

National policies, laws and regulations may be argued as absorbing funds to administer music publishing rights, such as licenses and royalties, while simultaneously inhibiting the development and marketing of innovative products and services, which would potentially grow online services, defeat piracy, and grow more royalties. On a technology front, DRM, which was designed to curb online piracy and commonly referred to by opposing Internet users, as 'Digital Restrictions Management', needs to be considered and reviewed in national policy. In relation to music, DRM, which provides the premise of subscription services that allow one to download all the music you want while you are paying, but prevents downloaded music from playing once you have stopped paying; on the other hand, prevents a DRM-protected song that has been posted on the Internet from playing on a downloader's computer or portable music device.

8. WHO IS RESPONSIBLE FOR THE PROTECTION OF ARTIST AND CONSUMER RIGHTS?

The development of the Internet was seen by many in the music industry as the beginning of the end for intellectual property rights. Originally the Internet was used purely for information sharing, with no focus on income generation, which created the perception of it as a free-for-all communication medium. Its economic potential was quickly realised, and regulation had to be created, and the free-for-all perception had to be corrected. There are a few policy-related problems that have been raised by the development of the Internet, the first being that technology changes at a faster rate than policy can be created. The second problem is that the Internet has an international character, but intellectual property regulation and monitoring is facilitated nationally. The latter problem has called for an international standardisation of laws. With the rise of technology and the global Internet, it is now more important than ever for government to administer a culture of international co-operation.

In this age of global information networks where goods and services cross borders at the click of a button, many policy decisions can no longer be made solely and independently on the level of national politics, but are the responsibility of authorities at an international level. Although South Africa is a signatory to these international treaties that impose certain standard and practices, local government does have a role to play in facilitating and enforcing these regulations to ensure local artists' needs are met. Section 1(13) of the *1996White Paper on Arts, Culture and Heritage* stipulates that "it is the role of government to facilitate the optimum condition in which [constitutional] rights may be enjoyed and practised" (1996). This means that government is responsible for facilitating access to opportunities to ensure that artists have access to facilities to create their arts, and receive rightful remuneration for their work online.

Artists, however, cannot sit back and wait for necessary policies and technologies to be created to protect their work. They need to experiment with alternative distribution, licensing and advertising models. Consumers also have a role to play in taking responsibility to get educated on public policy, human rights, copyright and legal Internet practices. Considering the fact that national and international policy and technology developments are driven primarily by the music industry wanting to maintain the status quo and producer-consumer relationships, public education is necessary to ensure that issues of access, information dissemination and freedom of expression are not disregarded or controlled too stringently by national policies and technologies.

> "South Africa is now once more part of the international family of nations. We not only derive benefits from such acceptance, but also have the responsibility to pursue and implement internationally agreed and accepted norms and standards in various sectors of our society including the arts and culture".
>
> (White Paper on Arts, Culture and Heritage 1996: chapter 1, paragraph 8)

International Responsibility

Currently, international relationships in the intellectual property area in South Africa are governed by several international conventions and agreements, most notably the *Berne Convention on Copyright, the Rome Convention* and the *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)*. Although the TRIPS agreement makes some enforcement of intellectual property rights across borders, all of these conventions and agreements were concluded before the Internet became the force that it is today and they therefore do not address the unique problems arising from it. Recent attempts to make intellectual property law more uniform have culminated in the *World Intellectual Property Organization (WIPO) Copyright Treaty* based on revisions of the *Berne Convention*.

Many of the largest media companies are active in international markets and have long enjoyed close relationships with trade authorities. According to Bach (2008), consumer organizations and primarily domestically-oriented niche competitors or new entrants, in contrast, generally do not have such access and trade authorities usually do not view them as an important constituency. Trade policymakers in advanced countries, have the power to favour producer interests' even more than traditional copyright, patent, and trademark officials (Doern, 1999). The move toward "trade-based" international intellectual property enforcement, in short, has further tilted the balance in producers' favour.

Although at first glance the thought of internationally created policy might seem controlling, monopolizing and restrictive to artists and consumers advocating a 'creative commons', WIPO promotes the global protection of intellectual property through international cooperation. Amongst other things, WIPO encourages the creation of new international treaties and the modernization of national legislation; gives technical assistance to developing countries; assembles and disseminates information; assists in obtaining protection of inventions, marks and industrial designs for which protection in several countries is desired; and promotes administrative cooperation among member states.

The bulk of the WIPO Copyright Treaty, completed in 1996, consists of provisions to ready copyright for the digital age. These include classifying computer software as literary works to make it eligible for copyright protection; extending protection to certain aspects of databases; and guaranteeing authors the exclusive right of authorizing commercial rental of their works. The really critical provisions, however, relate to rights management technologies. Articles 11 and 12 require signatories to ban the circumvention of technological mechanisms that owners of copyright may deploy to protect their works, and to criminalize the development or distribution of circumvention technologies. In other words, the

provisions not only make it illegal to tamper with an electronic lock for the purpose of piracy, they also criminalize merely telling somebody how a lock may be broken.

Historically, copyright has always been about balancing the legitimate interests of both producers and consumers. Tools for such balancing are fair use licenses. Copyright law includes instances of permitted, "non-infringing" copying of copyrighted materials. Making a copy of a purchased videotape is entirely within the law. Similarly, one need not pay royalties to photocopy an article from the newspaper. Quoting protected works in academic publications or other reviews is another instance of non-infringing use. The combination of DRM anti-circumvention provisions puts fair use in jeopardy. Legislation according to 'creative commons' advocates should not, therefore, prevent the owner of a legitimately purchased CD from uploading a few songs onto a laptop. An increasing number of ordinary audio CDs, however, now come with copy protection, making such copying technically impossible.

The relationship between IP rights and technology transfer is, however, not clear-cut. On the one hand, artists and consumers interviewed believe that stronger IP rights could lead to slower rates of imitation, which in turn slows down the rate of innovation as there is less competitive pressure. On the other hand, however, record label employees assert that technology diffusion is strengthened by stronger IP rights as foreign direct investment (FDI) and licensing replace imitation and quality of transferred technology is improved. It is apparent that IP regimes advocate the development of these regimes in South African music policy. Essentially IP rights give 'statutory expression' to the moral and economic rights of creators and to the obligations of the public in return for access to these creations. As affirmed by Ethél Teljeur, "the main rationale for these rights is correcting for market failures. The inventor is able – through the right to prevent others from exploiting her invention – to derive material benefits from the invention as a reward for intellectual effort and as a compensation for research expenses that she would not be able to reap if unbridled copying of the invention were allowed" (Teljeur, 2003: 4).

National Responsibility

South Africa became party to the *Berne Convention for the Protection of Liberty and Artistic Works of 1886 (the Convention)* on 3 October 1928 and in doing so secured protection for all artists and their work in all countries of the Union. The provisions of the Convention do not override or lessen the right of the national Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right (1886: 12). The Convention does, however, instruct any country party to it to adopt, in accordance with its constitution, the measures necessary to ensure its application.

> "Against the background of a long history of cultural isolation from the rest of the World, it is the goal of the [Arts, Culture and Heritage] Ministry to facilitate international cultural exchange so that more South African artists take their places on the world stage, and so that local art and artists may benefit from international experience, exposure and expertise...It is the imperative of the Ministry's policies for international relations to maximise opportunities for South African arts, culture and heritage practitioners and institutions to interact with the rest of the world".
>
> (White Paper on Arts, Culture and Heritage: 1996, Chapter 1, Paragraph 8)

With respect to the *White Paper's* principle encouraging "exchange and interaction between local, regional, continental and international culture", chapter 4 states that "the future of the arts and cultural expression lies in the development of new audiences and markets" (1996, 43). Whereas, previously, audiences were defined by geographical location and disposable income, the Internet has now created a global market with no geographical barriers, but in countries such as South Africa, access to technology in itself is a barrier to access these global markets. As seen in the *White Paper*, the 'four-pronged strategy' of the Ministry's commitment to develop new markets excludes the global market.

This four-pronged strategy, which currently focuses on arts education, effective use of infrastructure, developing infrastructure, and raising public awareness of the arts, needs to be expanded and developed to include a fifth element detailing the government's commitment to developing online policy and markets for recorded music and other art forms.

The South African Music Rights Organisation (SAMRO), which was established to protect intellectual property rights and ensure that copyright holders are credited both locally and internationally for the use of their music, focuses on collecting royalties. SAMRO has a significant role to play in the enforcement of copyrights online. International relationships and licensing agreements need to be strengthened to ensure that SAMRO is able to collect royalties from online music sales.

National government need not only strengthen international relationships to support organisations such as SAMRO, but also need to develop funding models to support and promote the work of non-profit organisations like the Association of Independent Record Companies (AIRCO). AIRCO may be seen as the answer to the exclusion of independent artists in its proactive representation of the interests and development of South African Independent Companies across South Africa and the world based on its mission, to "grow the Independents' market share, improve visibility of independent music and artists, and promote key issues such as market access and cultural diversity in all national, regional and international policies" (AIRCO, 2006). In South Africa's difficult corporate funding landscape, non-profits are primarily dependent on a certain amount of government funding to operate efficiently. Government need to support these non-profits to encourage continued non-profit assistance in protecting the rights of artists.

Artist Responsibility

It would, however, be unfair to place total responsibility on government to improve and develop policy. As mentioned by David Bunn (2009), pre-1994, South Africa had one of the most politicized art cultures in the world, where artists were agents and 'cultural workers' in the forward-movement of the industry. Post-1994, however, "the visibility of artists as public intellectuals active in the making of culture and citizenship declined sharply" (Bunn, 2009: 1). As discussed by Bunn (2009), this decline in artists' agency can be attributed to the fact that technology has been an innovation that has lead artists to believe that they can operate outside of the unpredictable funding environment, and in the case of recording artists, outside the traditional industry structure – as independent artists. According to Bunn (2009), this has resulted in the disintegration of a 'music community' which has consequently lead to a 'lack of critical articulation between artists, provinces and central arts governance'. This independence and individualism poses a challenge as the creation of a comprehensive South African music policy will require government, the music industry, artists and consumers to collectively decide on necessary policy.

There are various international models and concepts that local artists can adopt. For example, a digital version of the 'Grateful Dead model' can be adopted, permitting free, non-commercial distribution of their music and making money only through concerts and merchandise (Bach, 2008). So far, most of these efforts have been at the industry's fringes. A potentially more effective alternative strategy has artists adopt a lesson from the open source software community. Under this model, artists would license their work under a 'Commons' license that specifies which rights they retain. Such licenses are currently being adopted in copyright regulations in a range of European and other countries. While the number of prominent artists committed to this model remains small, it provides a critical focal point for

artists committed to commercial music and copyright on the one hand, yet opposed to a vision of sweeping incumbent control enabled by the 'double punch' on the other.

As asserted by Haupt's (2008) term *Empire*, technology makes it possible for subjects to engage directly with one another without having their interaction mediated, censored or controlled by corporate media, allowing independent artists and Internet users the freedom to use the Internet as a creative and profitable tool. This benefit of technology needs to be considered as it relates to the 'creative commons' theory and the 'value commons' theory. Artists are in a position where they are able to use the medium of the Internet as a means to compete with record labels and shift traditional notions of power in the music industry in ways that they have previously not been able to realize.

Consumer Responsibility

A major emphasis of public policy should be the strengthening and education of consumers. The recording industry has launched a successful media campaign to impress upon consumers what they *may not do* with copyrighted material. As asserted by Nate Anderson (2011), in America and Europe, the recent wave of lawsuits on individual copyright infringers has been argued as being intentionally designed to intimidate consumers. What is necessary as a counterpoint is a concerted effort from consumers to increase their own knowledge of what rights they actually have. Only informed consumers can effectively participate in a contest among different visions for the future of music.

The recording industry's current strategy aims at changing consumers' expectations about what they may legitimately demand from a service provider. As long as vast information asymmetries prevail between producers and consumers, the "market for music business models" is likely to remain

uncompetitive. Strong, informed consumers are necessary to let the market determine the future of digital music.

According to Bach (2004: 26),

> "Looking beyond the immediate case of online music, it is clear there will be more copyright disputes in the information society, not fewer. To clarify consumers' rights and responsibilities, it would be desirable if policymakers moved away from establishing consumer rights through negative exemptions and exceptions from copyright obligations, and instead defined a positive set of rights that cut across industries and types of media".

Policymakers should assure a balance between consumer rights and the rights of copyright holders. Measures taken to prevent piracy should not infringe on the fair use rights of consumers. In this respect, efforts to prevent consumers from exercising their fair use rights are an important step to re-establishing a more balanced policy and technology environment. "Ultimately, the market should determine the future of commercial music production and distribution. Yet the current business environment is heavily skewed in favour of the music industry beneficiaries and consumers are not in a position to effectively dispute practices and policies" (Bach 2008: 26).

9. WHAT IS PREVENTING THE DEVELOPMENT OF ONLINE MUSIC POLICY?

A number of factors have been identified throughout this paper as hindering the growth of the South African music industry and preventing necessary action to solve and overcome problems and challenges increased by the advent of the Internet. Primarily these factors include ineffective policies, politics, limited finances and underdeveloped technology. South Africa developed intellectual property laws and was a signatory to most international treaties that the *Trade-Related Aspects of Intellectual*

Property Rights (TRIPS) agreement incorporates early on, starting with the South African *Patents, Designs, Trade Marks and Copyright Act of 1916*. Teljeur argues whether the early sophistication of the South African intellectual property regime strengthened and supported its standing on the continent and in relationship to international trading partners or if "South Africa had gone too far too rapidly, and [if] its intellectual property laws are too advanced for the country's stage of development, serving minority interests instead of facilitating technology dissemination..." (Teljeur, 2003: 61).

Ethél Teljeur, in her research conducted for the Edge Institute titled, Intellectual Property Rights in SOUTH AFRICA: An Economic Review of Policy and Impact (2003), reintroduces economics into the intellectual property debate and evaluates the appropriateness of South Africa's laws for its stage of development and economic policy framework. Her stance is that although the laws are accurate on paper, enforcement of the intellectual property laws ranges between rudimentary and unduly protracted. It may, therefore, be argued that signatory to treaties on Intellectual Property Rights [IPRs] does not imply adherence to these treaties or sophisticated domestic enforcement. The challenge here is that although IPRs are subject to International agreements, which set minimum standards for signatories, they are essentially national regimes. Teljeur (2003) states that a country's IPRs regime consists of several aspects, including standards, limitations and enforcement.

> "The standards define the scope of the innovator's exclusive rights, the limitations set the boundaries of those rights (e.g. by allowing compulsory licensing) and the administrative and judicial enforcement determine the effectiveness of the IPRs regime. All three elements vary widely across countries, even among developed economies".
>
> (Teljeur, 2003: 50).

Correspondingly it can be inferred that the standards of innovator's exclusive rights, limitations and boundaries of these rights, and the enforcement of these rights will be ineffective, and will need to be developed if a country's IPRs regime is underdeveloped, as can be argued is the case in South Africa.

One of the barriers of current policy preventing the development of updated South African music policy is the promotion of local artists recording 'indigenous music'. This is a barrier to the development of the music industry as artists creating what may be perceived as 'imported' contemporary popular music are excluded from policy provisions. The redistributive focus of the *White Paper* on 'indigenous knowledge systems' and art forms, fails to see the already, always, hybridized nature of these apparently indigenous forms that has resulted from globalisation centuries ago. One of the difficulties afforded by the global nature of the Internet is that everything is hybridized as the forum for inspiration and influence has expanded beyond national borders. Continued focus on redistribution and lack of policy development in this digital era, as affirmed by Bunn, could lead to "and exaggeratedly patriarchal bias against new urban forms (kwaito and hip-hop, for instance), perceived to be polluting outside influences, whether originating in Kinshasa or Chicago" (Bunn, 2009: 8). It is for this reason that South African music policy needs to be created and developed to promote contemporary local artists operating globally on the Internet.

Bunn asserts that "one of the greatest challenges for a new South African [policy] model, is to prevent the emphasis of race redress, indigenous knowledge, and lost traditions [as promoted by the *White Paper*] from contributing to the proliferation across the country of sites for tourist spectacle alone" (Bunn, 2009: 9).

Although there are currently institutions representing the music industry sector, the lack of coordination, and ineffective use of resources, between different initiatives by the leading industry institutions causes

a barrier to effective South African music policy development and implementation. "The current lack of coordination means that developmental efforts are often duplicated and investments often fragmented" (CIGS, 1998: 74). This duplication and investment fragmentation means that there are a variety of small and similar initiatives being conducted; however, because these developmental initiatives are not strategically coordinated they will have a limited impact on South African music policy development.

As stated in the Cultural Industries Growth Strategy (CIGS) report, copyright collection agencies generate more revenue than any other African agencies, however, legal disputes and uncertainties over copyright payments and artists' contracts may be a barrier to effective South African music policy development. As stated in the CIGS report, "South Africa faces a significant piracy problem that in 1996 totalled about R200 million or 33% of the total value of the industry" (CIGS, 1998: 74). Piracy, which has since increased to R500 million a year, is a widespread issue across African countries and results in a significant loss to the South African music industry (RiSA 2012). With the advent of the Internet and digital technology, the need for comprehensive copyright policy is arguably now, more important than ever. For as long as legal irregularities over copyright protection are not corrected and agreed on, these factors will remain barriers to comprehensive and effective development of South African music policy.

10. CONCLUSION

There is no doubt that technology is ever changing and unfolding at a speed that makes it difficult for rights holders and rights protectors to keep pace. The implications of this responsive policy are that artists and Internet service providers are unable to benefit financially from global interactions due to underdeveloped policy, licensing and pricing factors. Globalisation and changes in technology have

spurred rapid changes in music consumption patterns and new emerging platforms for production, promotion and distribution of music. Artists and music companies were undeniably forced to adapt rapidly with innovative marketing and distribution strategies. According to an online article by Anderson (2011), the music industry has responded to the digital environment by "licensing repertoire in new ways that respond to what the consumer wants; public education to explain copyright laws and highlight legal services; and copyright enforcement to protect our [music industry players] rights. Rights organisations and associations had to be quick to follow suit with newly developed policies and regulations for the relentless worldwide web. South African government has, however, been slow to get involved in developing supporting policy and education programmes due to limited finances and policy-making resources and underdeveloped technology.

Most South African music artists and rights protections organisations interviewed for this paper, place the right to have their music online for free download with the artist and not with the online service provider. Artists' support of the 'creative commons' principle and their acceptance of fair use rights allowing consumers to download their music for free in relation to their perception of the Internet as a tool of brand and music promotion, innovation, creativity and education, means that a potentially lucrative avenue of income for artists is being ignored as they consequently do not receive all rightful copyright royalties. The South African artists and record labels interviewed, which advocate the 'value commons' principle and argue for all music online to be protected by policy and technology such as licensing protocol and DRM, place the blame of piracy on the Internet service providers who make available catalogues of music for free download without the prior consent or knowledge of the artist. Majority of the music industry perceive piracy as a growing problem and advocate developments in online policy and technology promoting either the 'creative commons' or 'value commons' theories to protect the music of artists who choose to put their music online for free downloads or downloads with a fee.

Although associations like RiSA are taking steps to identify ways to collaborate with ISPs in the fight against online piracy, government initiatives and support are increasingly becoming more necessary, despite developments that have been acknowledged. As evidenced by Mark Katz in his book titled Capturing Sound: How Technology Has Changed Music (2004), digital piracy continues to negatively impact industry revenues, jobs, investment in new music and consumer choice. Katz asserts that piracy "translates into fewer and less lucrative contracts for recording artists, a decline in royalties, and lost jobs, not just for executives, but for producers, engineers, and others" (Katz, 2004: 203). For music companies and legitimate digital music services, the most obvious impact of piracy on licensed services is the removal of the incentive of consumers to pay for music. This growth in piracy has a direct impact on revenue available for the industry to invest in developing artists. China's low-price strategy advocating lower online music prices to compete with cheap, pirate prices and Europe's licensing and pricing agreements with online service providers are solutions that South Africa can adopt to begin to combat piracy and merge the 'value commons' and 'creative commons' approaches.

Innovative new business models being adopted and developed by record labels are a step toward progress but are not enough to combat the high levels of digital piracy or protect the rights and remuneration of artists. Cooperation from ISPs is a key component to tackling the problem and where voluntary agreement is not possible, government regulation should ensure that intellectual property rights are respected online. It may be debated that South Africa was delayed in its response to changes in technology, compared to other countries, due to rapid rate of change. South Africa's inability to contend with these changes may be due to national challenges such as underdeveloped policy and policy enforcement and monitoring systems and resources, and limited finances needed to update technology support measures.

Considering that South Africa and local organisations and associations are signatories to and members of international treaties and organisations, our national arts policy is weak, outdated and irrelevant as it does not make provisions online interactions and global changes and developments. South Africa needs to balance the 'value commons' and 'creative commons approaches by adopting effective licensing models, DRM systems, artist development programmes and anti-piracy regimes from international counterparts to surmount online issues of digital piracy prevention and the protection of artist and consumer rights online. Although it has been argued that it is the responsibility of international and national bodies, artists and consumers to define online practice and protocol to avoid market liberalisation, it is only recently that organisations such as SAMRO have begun putting in place licenses and tariffs to support, protect and remunerate artists for their music online. The efficacy of the implementation, enforcement, monitoring and impact of the licenses and tariffs for the music industry is yet to be seen.

Artists and consumers advocating for the 'creative commons' approach to music copyright development and implementation are beginning to take responsibility for the way in which music is distributed and priced online. This is evident through their actions of uploading and downloading music for fair use purposes such as sampling, education and personal enjoyment without the intention of resale. As previously argued, policy developments need to be made in combination with technology developments to comprehensively and fairly protect artists' copyrights and consumers' fair use rights. Licenses such as the 'commons' license currently effective in European and other countries should be made available to artists to allow them the freedom and right to choose which rights they retain and which are open to allow for consumers' and Internet users' fair use.

In comparison with international counterparts, South Africa is behind in making the move to develop policies and regulations to regulate and control online interactions and merge value, creative and information commons approaches to avoid market liberalisation and promote the sustainability of artists and the music industry and consumer fair use. National government and the local music industry have the advantage of learning from countries that have gone through the process of negotiation between ISPs, rights holders, Government and users. South Africa needs to conduct similar a process and start developing policies and business models to contend with online music related issues of piracy, ownership, rights protection, and remuneration.

> "Governments are responding and there is still time to act before the creative industries suffer catastrophic loss, but [the] fear is that not enough has been done and governments are too willing to respond to those who portray theft as freedom."
>
> (IFPI Digital Music Report 2011: 17)

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