Book Review: Collective Management of Copyright in South Africa: A Review of D. O. Oriakhogba Copyright Collective Management Organizations and Competition in Africa (Juta, 2021)

By:

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Dr Desmond Oriakhogba's work, *Copyright Collective Management Organisations and Competition in Africa* is poised to become a seminal reference work in the field of collective management, for a number of reasons: first, it is one of only a paucity of dedicated full texts on the subject of collective management in Africa; secondly, it is the first such text to explore in-depth the question of the application of competition law in the area of collective management – a subject-matter that has been fully explored in other mature jurisdictions such as the United States and the European Union, but hardly

considered within the African context; thirdly, it explores the law and practices in three key jurisdictions in the South, the East and the West of Africa; and fourthly, it is an expertly written text and a veritable scholarly work, while simultaneously written in a flowing, easy-to-follow style making for a good long-weekend read.

My task in this regard is an enviable one, having been called upon to review the South African perspective of the book. This is considering the fact that South Africa is a jurisdiction that I am well familiar with, not the least because I am South African but having also been extensively involved in the field of collective management of copyright. My involvement in this field has been in various respects, including as an official and senior manager and lawyer for the Southern African Music Rights Organisation (SAMRO), the largest collective management organisation (CMO) in Africa; as a scholar and author in this field, having made some maiden contributions to the field; and as an active participant and recognized voice in public policy and lawmaking processes in the field of copyright. I am therefore, I presume, well capable of giving this review of Oriakhogba's work.

Oriakhogba aptly begins his chapter on collective management in South Africa by providing an adequate snapshot of the applicable regulatory framework (and later, in paragraph 5.3, providing an in-depth analysis thereof). In the same vein, he provides an essential historical overview of the development of collective management in South Africa. In this regard, he makes reference to relevant legislation and the Collecting Societies Regulations; while noting that the Competition Act 89 of 1998, while applicable to the copyright industry, "has so far not been applied to collective management in South Africa" (at 99). This is an important observation because, with competition law not really having been invoked when determining copyright-industry matters, it is easy to think that this area of law does not apply to the copyright industry. In providing a historical overview of collective management in south Africa Oriakhogba makes reference to relevant textual and contemporary sources, which lend credence to his treatment of the subject, writing as he is, on a jurisdiction that is not his home jurisdiction.

Throughout the text Oriakhogba demonstrates his expertise in and understanding of the subject-matter by interpolating his own original thoughts

and opinions on particular matters. In this way he provides a needed contextual support to his arguments and demonstrates his research acumen. For example, while commenting on the change of SAMRO ‘s legal status from being a company limited by guarantee into a non-profit company under a new Companies Act, Oriakhogba relates this to the recommendation of the Copyright Review Commission (CRC) in this regard (at 100). In another instance Oriakhogba proffers an opinion as to the justification for SAMRO’s control of another CMO, namely DALRO (now an entity independent of SAMRO), arguing – I assert correctly – that what is critical is for the CMO to operate with the mandate of relevant copyright owners and for such copyright owners to be “part of its decision-making process”, regardless of the form of control or ownership of the CMO (at 103). In the same vein Oriakhogba opines on the feasibility of a CMO, as in the case of DALRO, being controlled by publishers and not authors – again invoking his knowledge of copyright law and practice, by referring to the practice of assignment of copyright by authors to publishers (ibid).

In his in-depth analysis of the legislative history of South Africa’s regulatory framework Oriakhogba demonstrates his research expertise by placing reliance on both primary and secondary sources. He for example provides insight as to how Chapter 4 in the South African Copyright Act of 1965, which introduced provisions relating to the Copyright Tribunal, “[i]n effect … was meant mainly to regulate the licensing practice of CMOs” (at 105). He then also mentions an important point – namely the fact that CMOs were only “introduced into the regulatory lexicon” in 2002 in South Africa, specifically in relation to needle-time rights (ibid). Oriakhogba also provides a useful, contextual history of the development of the needle-time right in South Africa – including an insightful analysis of the current legal position (at 102 – 108).

In his treatise Oriakhogba does not shy away from proffering his own scholarly opinion on particular aspects of the subject-matter. For example, Oriakhogba proffers a cogent, credible reason for the introduction of a regulatory regime in respect of needle-time rights in South Africa, as follows: “The framers of the draft amendments that led to the CAA [Copyright Amendment Act] and the PPAA (Performers Protection Amendment Act] probably recognized the danger of allowing CMOs to exist almost unregulated” (at 107). Another example is Oriakhogba’s insightful view with regard to the role of the Companies and

Intellectual Property Commission (CIPC) not only in relation to the provisions of the Copyright Act but also in respect of provisions of the Companies Act, where he opines that “the Companies Act applies to all CMOs on general issues relating to corporate governance …[t]hus, the CIPC regulates all CMOs from the perspectives of corporate governance and other general provisions of the SA Copyright Act …” (at 109).

The rest of Chapter 5 focusses on an in-depth analysis of the system of CMO regulation in South Africa (at 111 – 139), culminating in an analysis of the proposed new regime of regulation of all CMOs under the Copyright Amendment Bill, and providing advice as to how the regime for the regulation of collecting societies in Nigeria can be of assistance in the formulation of a future CMO regulatory regime in South Africa. This section provides detailed technical information that would be of assistance to any student of collective management in South Africa as well as serving as a quick reference source for judges and practitioners. The hallmark of Oriakhogba’s work, only mentioned here *en passant*, is of course how he highlights the interfaces between competition law and the functioning of CMOs. This he deals with in-depth in Chapter 7 of the book, but provides a background when addressing the regulatory regime for CMOs in South Africa, where he asserts that “the Competition Act is applicable to CMOs in principle, although the reality is that only the SA Copyright Act, PPA and CS Regulations have been applied to CMOs in practice” (110). These are insightful contributions and there is no doubt that Oriakhogba’s work will, for the foreseeable future, prove to be a reliable companion for all those interested or working in the field of collective management, as a reliable, go-to reference source.

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