Protection of the Author's Moral Rights in South Africa

by Owen H Dean

The South African Copyright Act, 1978, regulates copyright and rights in the nature of copyright in South Africa in their entirety and no such rights subsist otherwise than under that Act or in another statutory enactment dealing specifically with such type of rights.[1] This provision is however subject to the proviso that nothing contained in the Act shall derogate from any rule of law relating to confidential or privileged information, unlawful competition or personality rights.[2] The only other statutory enactment which has relevance in the present context is the Performers' Protection Act, 1967.

Section 20 of the Copyright Act provides as follows:

"Moral Rights

(I) Notwithstanding the transfer of the copyright in a literary, musical or artistic work, in a cinematograph film or in a computer program, the author shall have the right to claim authorship of the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author: Provided that an author who authorises the use of his work in a cinematograph film or a television broadcast or an author of a computer program or a work associated with a computer program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work.

(2) Any infringement of the provisions of this section shall be treated as an infringement of copyright under Chapter 2, and for the purposes of the provisions of the said Chapter the author shall be deemed to be the owner of the copyright in question."

Moral rights are thus classified as rights in the nature of copyright, or are deemed to be copyright, and recourse must be had to the Copyright Act for their enforcement. The Copyright Act may however be supplemented in this regard by the Performers' Protection Act and the common law relating to confidential or privileged information, unlawful competition or personality rights. The law of unlawful competition incorporates the law of passing-off which is considered to be a species of unlawful competition in South Africa.[3]

Nature of Moral Rights

Section 20 of the South African Copyright Act is closely derived from article 6 *bis* of the Paris Convention. The moral rights comprise the right of paternity, i.e. the right to claim authorship of the work, and the right of integrity, i.e. the right to object to any distortion, mutila-

tion or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author. The right of integrity is subject to certain qualifications which will be discussed below.

The author's moral rights are separate and distinct from the copyright subsisting in a work. This is borne out by the fact that an assignment of copyright, even of the full and complete copyright, in a work does not transfer the author's moral rights to the Assignee. The moral rights attach invariably to the author throughout his lifetime and are akin to, or in the nature of, his personality rights derived from the common law. The author's moral rights are complementary to the copyright in his work and it is possible in differing circumstances for misuse of a work to give rise to a claim of either copyright infringement or infringement of the author's moral rights or both. For instance, where a work is reproduced virtually verbatim without authority and the derived work is claimed to be authored by another person, infringement of copyright and of the author's right of paternity can arise. On the other hand, an adaptation of a work may be made with the copyright owner's authority, in which case there is no copyright infringement, but the adaptation might infringe the author's right of integrity if modifications prejudicial to the honour or reputation of the author are made.

The author's moral rights are essentially personal rights. They are not economic rights. They do not create any rights of property.

Works in respect of which Moral Rights Subsist

Section 20 of the Copyright Act provides that moral rights can subsist in respect of literary, musical and artistic works, cinematograph films and computer programs. It follows from this that moral rights do not subsist in the other categories of works eligible for copyright, namely sound recordings, broadcasts, programme-carrying signals and published editions.

The term "literary work" is defined in the Copyright Act to mean the following:

> "literary work" includes, irrespective of literary quality and in whatever mode or form expressed (a) novels, stories and poetical works, (b) dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts, (c) textbooks, treatises, histories, biographies, essays and articles; (d) encyclopaedias and dictionaries; (e) letters, reports and memoranda, (f) lectures, speeches and sermons, and (g) tables and compilations, but shall not include a computer program,"[4]

Data bases are regarded as compilations and are thus a species of literary work.

A ""musical work" is defined in the Copyright Act as a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music[5].

The Copyright Act defines ""artistic work" as follows:

"'artistic work' means, irrespective of the artistic quality thereof -

(a) paintings, sculptures, drawings, engravings and photographs,

(b) works of architecture, being either buildings or models of buildings; or

(c) works of craftsmanship not falling within either paragraph (a) or (b),[6]"

Some of the terms used in the definition are themselves the subject of definitions in the Act. "Drawing" is defined to include any drawing of a technical nature, or any diagram, map, chart or plan,[7] and "photograph" means "any product of photography or any process analogous to photography, but does not include any part of a cinematographfilm"[8].

The Act defines "cinematograph film" to mean "the fixation by any means whatsoever on film or any other material of a sequence of images capable, when used in conjunction with any mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a soundtrack associated with the film, but shall not include a computer program"[9].

The South African Copyright Act, unlike most other Copyright Acts, confers copyright in computer programs as a *sui generis* category of work eligible for copyright. The term "computer program" is defined to mean "a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer directs its operations to bring about a result"[10]. It is important to note that a "computer program" is by definition excluded from being a "literary work" or a "cinematograph film". This means that once a work falls within the definition of "computer program" it ceases to be, insofar as it may have been, a literary work or a cine-

matograph film.

Section 20 of the Act does not distinguish between published and unpublished works and moral rights thus subsist in respect of both unpublished and published works of the specified types. Literary, artistic or any other form of merit are not required before a work qualifies as being the subject of moral rights.

Conditions for Subsistence of Moral Rights

Section 20(1) of the Copyright Act states that notwithstanding the transfer of the copyright in an appropriate work the author is vested with a paternity right in the work subject to the provisions of the Act and is vested with the right of integrity of his work. Although the point has not come up for consideration before the South African court, it would seem to follow from the aforegoing that moral rights can only subsist in a work if that work enjoys copyright in South Africa. The paternity right is specifically made subject to the provisions of the Act, which would include those provisions which regulate the subsistence of copyright in a work, and the moral rights in general are stated to remain vested in the author notwithstanding the transfer of the copyright in a work. It is submitted that this linking of the moral rights with the copyright is indicative of the legislature's intention that moral rights can only subsist in the work if copyright subsists in it. The moral rights are also enforced as though any infringement of them were an infringement of copyright. It would also be anomalous for a copyright act which deals with moral rights in a very subsidiary manner to confer these lesser companion rights in respect of a work in which it does not confer copyright.

In brief, copyright subsists in an eligible work in South Africa if the work is original[11] and exists in a material form[12] and if either the author is a so-called "qualified person"[13] or if first publication of the mark takes place in South Africa or a country which is a member of the Berne Convention.[14] A ""qualified person" is an individual who is a citizen of, or is domiciled or resident in South Africa or a country which is a member of the Berne Convention, or in the case of a juristic person, a body incorporated under South African law or under the law of a Berne Convention country[15]. This general proposition is amplified in the case of certain works. Copyright subsists in addition in works of architecture erected in South Africa or in any other artistic work incorporated in a building or any other permanent structure in South Africa.[16] In the case of a cinematograph film or a computer program the author must have been a qualified person at the time when the work or a substantial part of it was made. Moreover cinematograph films and computer programs can also enjoy copyright if they were made in South Africa.[17]

Authorship

In general, the author of a work is the person who is responsible for the creation of the material embodiment of the work. His activity in regard to the work must involve the application of independent intellectual effort or skill. Identification of an author of a work is largely a question of fact. Where two or more persons are engaged in the creation of a work in a material form, they can be joint authors of that work.[18]

More specifically, the Copyright Act provides that the author of a literary, musical or artistic work (besides a photograph) is the person who first makes or creates the work; in the case of a photograph, the author is the person who is responsible for the composition of the photograph. The author of a cinematograph film is the person by whom the arrangements for the making of the film were made, while in the case of a computer program, the author is the person who exercised control over the making of the computer program.[19]

The Act contemplates that the author of a work can be a juristic person[20]. It is submitted that in many instances the author of a cinematograph film or a computer program will be a juristic person. Consideration has been given by the court to the question of whether a juristic person could be the author of a literary work but the court refrained from deciding the question although it accepted for the purposes of the judgment that only a natural person could be the author of a literary work[21]. It is submitted that this is the correct approach and it is equally applicable to musical and artistic works. Apart from any other considerations, the term of copyright in these types of works are calculated by reference to the death of the author, which clearly suggests that the author must be a natural person.[22]

Duration of Moral Rights

Although Section 20 of the Copyright Act does not state the term of the subsistence of moral rights, for the same reasons advanced above in support of the contention that moral rights only subsist in respect of a work if that work enjoys copyright in South Africa, it is submitted that the subsistence of the moral rights is co-terminus with the copyright in the relevant work to the extent that

the moral rights cannot extend beyond the term of the copyright. However, as will be discussed below, it is submitted that there are some circumstances in which the moral rights in respect of work may terminate prior to the expiry of the copyright.

The term of the copyright in respect of a literary, musical or artistic work (besides a photograph) is in general the lifetime of the author and 50 years after his death.[23] The term of copyright in a cinematograph film, a photograph and a computer program is a period terminating 50 years after the work is made available to the public with the consent of the owner of the copyright, or if the work is not so made available to the public within 50 years of its making, then copyright expires 50 years after the making of the work.[24]

The author's moral rights are analogous and closely allied to his personality rights under the common law. Personality rights are only enforceable by the person himself and are not transferable to his heirs. They are accordingly extinguished upon the death of the individual.[25] Personality rights, like moral rights, also concern the honour or reputation of the individual and the right to control the use of his identity. In the absence of any provision in the Copyright Act regarding the duration of moral rights, it is submitted that they too, like the individual's personality rights, expire upon his death. In recent times the South African court has granted recognition to the enjoyment of "personality rights" by a juristic person. It has been held by the court that a juristic person can be defamed[26] and has a right of privacy.[27] By parity of reasoning moral rights vesting in an author who is a juristic person will expire when that juristic person ceases to exist.

No provision is made in the Copyright Act for the moral rights to survive the author. Indeed the wording of Section 20 contemplates the moral rights only being held and being enforced by the author. In other words, it is submitted that the author's moral rights in respect of a work endure for the term of copyright in that work or the "lifetime" of the author "whether a natural person or a juristic person" whichever is the shorter.

Scope and Infringement of Moral Rights

As stated above, the substance of the author's moral rights is that he can claim authorship of his work and he has the right to object to any distortion, mutilation or other modification of such work where such action is or would be prejudicial to his honour or reputation. The latter of these rights, i.e. the right of integrity, is however subject to the following limitations, namely

(a) where the author of a literary, musical or artistic work, a cinematograph film or a computer program authorises the use of his work in a cinematograph film or a television broadcast; or

(b) where the author is the author of a computer program or a work associated with a computer program, e.g. a manual, being a literary and/or artistic work, instructing use of the computer program;

he may not prevent or object to modifications to that work which are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work. It is to be noted that these limitations do not apply to distortions or mutilations, as distinct from modifications, to the work in question. It may be difficult in practice to distinguish between changes which are on the one hand modifications and those which on the other hand are distortions or mutilations.

It is implicit in Section 20 that lack of acknowledgement of authorship or distortion, mutilation or modification of a work only infringes the author's moral rights if they do not enjoy his approval or are unauthorised by him. His moral rights are infringed when without his approval his authorship of his work is not acknowledged or an unjustifiable distortion, mutilation or other modification of the work takes place. The Section provides that such an infringement is deemed to be an infringement of the copyright in the work and can be acted upon as though an infringement of copyright had taken place. For purposes of enforcing his moral rights as though they were copyright, the author is deemed to be, and is placed in the position of, the owner of the copyright in the work. In other words he enjoys the same remedies and rights as would a copyright owner upon the infringement of his copyright.

Attention is drawn to the fact that Section 20(2) provides that an infringement of the author's moral rights is to be treated as "an infringement of copyright under Chapter 2". Chapter 2 of the Copyright Act is that part of the Act which deals with copyright infringement and the consequences which flow from it. It does not however deal with the exemptions or exclusions from copyright infringement such as fair dealings with works and such exemptions or exclusions do not therefore apply to the moral rights. It comprises sections which render infringement of copyright a criminal offence in certain circumstances. In consequence, infringement of the author's moral rights can give rise not only to the author having civil law remedies against an infringer but also to

the imposition of criminal penalties on the infringer.

In civil proceedings for the infringement of copyright, and therefore for the infringement of the author's moral rights, the Plaintiff can claim damages, an interdict or injunction restraining the unlawful activity, delivery up of infringing copies or plates used or intended to be used for making infringing copies, and the costs of the legal proceedings.[28] In general, the damages which can be claimed are ordinary delictual damages - the patrimonial loss suffered by the Plaintiff. An alternative mode of calculating damages is on the basis of the amount of a reasonable royalty which would have been payable under the circumstances by a licensee.[29] Provision is also made for the court to make an award of so-called "additional damages" or penal damages where, having regard to the flagrancy of the infringement and any benefit which has accrued to the Defendant, the court is satisfied that effective relief would not be available to the Plaintiff if only the normal remedies were granted. On the other hand, if the Defendant can show that at the time of the infringement he was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work in question the Plaintiff is not entitled to an award of damages.

The criminal penalties which can be imposed for copyright infringement, and thus for infringing the author's moral rights, can be very severe. In the case of a first conviction, the court may impose a fine of up to R5,000,00 (U.S.$1 500) or a period of imprisonment of up to three years, or both, for each article to which the offence relates. In the case of a further conviction the amount of the fine can be increased to R10,000,00 (U.S.$3 000) and the period of imprisonment to up to five years.[30]

The scope of moral rights can be supplemented or reinforced by contract. For instance an author could grant an assignment or licence of the copyright in his work subject to certain conditions such as that no modifications whatsoever be made to the work if and when it is published. Such a contractual obligation placed on an assignee or licensee would extend the scope of the author's rights in this work beyond the scope of that offered by the moral rights provisions of the Copyright Act.

Transmission and Waiver of Moral Rights

The point has been made above that the author's moral rights are in the nature of personality rights and they are separate and distinct from the copyright in a work which is essentially an economic right. Save to the extent that comparable rights are granted by the common law or under the Performers' Protection Act, to which we will revert below, the author's moral rights owe their existence entirely to the provisions of the Copyright Act and they are therefore a creature of statute. Their nature and substance are regulated entirely by the Copyright Act. It is specifically provided in the Copyright Act that copyright is transmissible as movable property by assignment, testamentary disposition or operation of law.[31] Were it not for this provision copyright, being a creature of statute, would not be transmissible. No equivalent provision exists in respect of the author's moral rights. It is submitted that it follows from this that moral rights are rights which are not capable of transmission to another person. This is in keeping with their essential character as being in the nature of personality rights. They attach to the author and are only exercisable by the author. The moral rights, unlike copyright, are not rights of property but are personal rights. In consequence, only the author and not even his heirs can enforce the moral rights.

Moral rights, as personal rights, can, however, be waived and an author can undertake not to enforce them. A copyright licence has been described by the court as being in essence a "*pactum de non petendo*" or an undertaking not to sue[32]. In this context it could be said an author can grant a licence under his moral rights but in essence there are only two courses of action open to an author in this respect, namely he can enforce them or he can waive them, whether explicitly or by implication. No formalities are laid down for a waiver of moral rights although generally such a waiver would in practice be reduced to writing. In the case of a work of joint authorship, a waiver would have to be obtained from each author.

As an assignment of copyright leaves the author's moral rights unaffected, an assignee wishing to make or authorise an adaptation of the subject work would have to take account of the author's moral rights and if necessary obtain an appropriate waiver. In this limited sense an assignee of copyright does not have full control over the subject work. The same applies where there is from the outset separation between authorship and ownership of copyright, e.g. in the case of a work made by an employee.

Once a right of action under his moral rights has accrued to an author he can cede his right to claim damages and delivery up pursuant to the infringement to another person. Such a cession of a right of action is not, however, to be confused with an assignment of the author's moral rights. An accrued right of action can also devolve upon the author's heir but that is not to say that

the moral rights are transmissible by testamentary disposition.

International Protection

By virtue of the fact that moral rights subsist in respect of any literary, musical or artistic work, cinematograph film or computer program which enjoys copyright in South Africa, and works of this nature emanating from Berne Convention countries are eligible for copyright in South Africa, it follows that authors of foreign works enjoying copyright in South Africa are vested with moral rights in their relevant works under South African law.

Other Forms of Protection

Roman Dutch Law is the basis of the common law of South Africa. The *actio injuriarium* of Roman Law protected the *fama* or reputation, and the *dignitas* or dignity, of the individual against intentional impairment. These forms of protection are comprised in the individual's personalty rights. Any conduct on the part of someone which intentionally violates the reputation or the dignity of an author gives rise to the author having a delictual claim against the offender and he would be entitled to an interdict or injunction restraining the offending conduct and to payment of damages[33]. These personality rights of the author could overlap with or complement the author's moral rights in the event of his authorship of his work not being acknowledged or being disavowed and distortions, mutilations or other modifications being made to his work.

The Performers' Protection Act, 1967, protects performances of works in certain respects. The performances must be of "works" and must thus exist in a material form prior to the performance. The works in question are literary, musical, dramatic and dramatical-musical or artistic works.[34] The protection granted to performances entails the performer having the exclusive right to broadcast or communicate his performance to the public, to make a recording of his performance and to make reproductions of such recordings.[35] Where an author performs his own work his moral rights in respect of his work can be complemented by his performance rights when recordings or broadcasts, perhaps with alterations, are made of such performances. A truncated recording of such a performance which does not acknowledge him or his authorship of the work being performed and which reflects adversely on his honour or reputation could infringe both his moral rights in respect of the work and his performers' rights in respect of his performance.

The South African common law grants a remedy to an author in a situation where a misrepresentation is negligently or intentionally made that a particular work originates from or is connected with him in circumstances where this is not so. This remedy of passing-off or unlawful competition would be available to an author, for instance, in the circumstance where a severely modified version of his work, modified to the extent that it is in reality no longer strictly speaking his work, is attributed to him. Here too, the author could be in a position to claim infringement of his moral rights as well as passing-off against the guilty party.

South Africa is not a member of the Rome Convention dealing with performers protection, and the protection available under the Performers' Protection Act is only applicable to foreign performances if the country in which such performances take place grants protection to performances made in South Africa and is a member of the Rome Convention[36].

Conclusion

Authors, both South African and foreign, enjoy in South Africa a reasonable measure of protection for their right to claim the authorship of their literary, artistic and musical works, cinematograph films and computer programs, and their right to object to such works being distorted, mutilated or modified in a manner which would be prejudicial to their honour or reputation. Authors have, however, been slow to enforce these rights, or have not in the past had occasion to do so, because there are no South African cases in which the court has made any pronouncements or determinations in this regard. The closest any South African court has come to protecting an author's moral rights has been the case of *RPM Record Company (Pty) Limited v Disc Jockey Music Company (Pty) Limited*[37] in which the Respondent, a record producer/distributor, misrepresented that one of its records featured performances by Lionel Richie of works written *inter alia* by him when in fact the record featured performances by another performer. This case was decided in favour of Lionel Richie's licensees on the grounds of unlawful competition/passing-off.

However, when the occasion arises that an author's moral rights are violated the resources of the South African law and competent courts are at his disposal for his protection.