

Changes to the law of copyright brought by the Copyright Act 98 of 1978

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The Copyright Act 98 of 1978 which was passed by parliament during the course of 1978 came into force on 1 January 1979 and repealed all previous copyright legislation, including the Copyright Act of 1965 except for s 46 of the aforementioned Act, the section dealing with the obligation of publishers to submit copies of books to certain specified libraries. Although the 1978 Act repeals the 1965 Act except as aforesaid, it does not repeal any proclamations, regulations or rules made under the previous Act and such measures continue to be in force as though they had been issued under the new Act until such time as they are specifically repealed by new measures.

The 1965 Copyright Act was based very closely on its British counterpart which has meant that British case law has been of considerable assistance in the past in interpreting the provisions of the 1965 Copyright Act. The 1978 Act has, however, broken away to a significant extent from the previous Act and therefore from the British Act and has tended to move in the direction of incorporating provisions of the Berne Convention of which South Africa is a member, with the result that British case law may well prove to be of less assistance in the future than it has been in the past.

The 1978 Copyright Act has introduced a number of changes in our law of copyright as it existed up until 31 December 1978, and we will deal with some of the more important changes.

1 Authors

New persons designated as authors or creators of works

The 1965 Act contained a number of exceptions to the general rule that the author or creator of a work is the first owner of the copyright in that work. These exceptions occurred in the following instances:

(a) Where the author was employed by a newspaper, magazine or similar periodi-

cal, and a literary, dramatic or artistic work was made by him during the course of his employment and was made for the purpose of publication in a newspaper, magazine or similar periodical, the employer was the owner of the copyright in the work insofar as the copyright relates to its publication in a newspaper, magazine or similar periodical, but the author was the owner of the balance of the copyright in the work.

(b) Where a person commissioned the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, and paid or agreed to pay for it in money or in money's worth, and the work was made in pursuance of that commission, the person who commissioned the work was the owner of the copyright in such work.

(c) Where a literary, dramatic or an artistic work was made by the author during the course of his employment by another person under a contract of service or apprenticeship, that other person was the owner of the copyright in the work in question.

(d) Where a sound recording or a cinematograph film was made by the author in pursuance of a commission by a person who paid for the making of the work in money or money's worth, the copyright in the work was the property of the person giving the commission.

The 1978 Copyright Act has abolished all these exceptions with the result that the general principle that the author is the first owner of the copyright in a work now applies universally save for works which are made by or under the direction or control of the state, the copyright in which vests in the state and not in the actual author.

The implications of this change are far-reaching, particularly insofar as the employer-employee relationship is concerned. Under the 1978 Act the copyright in all works created by employees, even those made on behalf of employers, vests in the employee. Consequently, the management of for instance a newspaper

will have to obtain authority from a journalist on its staff who has written an article for publication in that newspaper, if the management wishes to publish that article in the newspaper or to licence its publication in other journals or newspapers. An advertising agency which commissions a commercial photographer to take a series of photographs to be used in advertising will have to obtain an assignment of the copyright in those photographs if it wishes to control their use.

It must be emphasized that copyright, both under the 1965 Act and under the 1978 Act, is freely transmissible from one person to another by *inter alia* assignment or transfer of rights, with the result that the effects of the position under the 1978 Act can be counteracted by arranging for the author in each case to assign his copyright to his employer or the person who commissions his work, as the case may be.

An assignment can be in respect of the copyright in existing works and in future works, ie works to be created by the author in the future, and in one deed provision can be made for, by way of example, an employee to assign to his employer the copyright in both his existing works and the works which he will create in the future. If this approach is adopted no future assignments will be necessary as the copyright in each future work will immediately pass over to the employer as soon as it is created. To be valid, the 1978 Act prescribed that an assignment of copyright must be in writing and must be signed by the assignor.

Commissions

It will be clear from the foregoing that it is a fairly straightforward matter for an employer to ensure that he will own the copyright in all works produced by his employees in terms of their contracts of service with him. However, the position where one person commissions another to do a work on his behalf is a little more complicated. Let us take the example of a product manager who commissions an advertising agent to devise an advertising campaign involving the production of artistic works in the form of photographs etc. If the product manager wishes to acquire the copyright in the works produced for his company, he will have to arrange for the advertising agents to assign their copyright to him or his company. However, the actual works will probably be created by the employees of the advertising agents and not by the company or firm itself. Since, under the new Act, the employees of the advertising agents will themselves be the owners of the copyright in any works they produce, the advertising agents will not be in a position to assign that copyright to the commissioner unless they have themselves obtained ownership of that copyright from the employees by means of assignment. In the circumstances it will be clear that an assignment of copyright from the advertising agents to the commissioner will be of value to the commissioner only if he can be assured that the advertising agents have acquired the copyright in any works produced by their employees or even by third parties whom the advertising agents commission to produce works. It is suggested that agreements whereby one person commissions another person to execute works on the former's behalf should include a provision to the effect that the person accepting and executing the commission warrants that he has acquired or will acquire the copyright in any works which are produced pursuant to the commission.

Apart from the abolition of the aforementioned exceptions, the 1978 Copyright Act has also in respect of certain of the types of works which can be subjects of copyright, changed the identity of the person who is considered to be the author of the work in terms of the Act. This has occurred in the following instances:

(a) Photographs

Under the 1965 Act the person who owned the material on which a photograph was taken at the time when it was taken, was designated the author of the photograph. The 1978 Act designates the person responsible for the composition of the photograph as the author.

(b) Sound recordings

The 1965 Act designates the person who owns the record at the time when the recording was made as the author of a sound recording while the 1978 Act designates the person by whom the

arrangements are made for the first fixing of the sounds of a performance or of other sounds as the author.

It will thus be clear that in these two instances as from 1 January 1979 it could well happen that a new person will be the first owner of the copyright in the works.

The 1978 Act is retrospective in effect since s 43 provides that the Act applies in relation to works made before the commencement of the Act since it applies in relation to works made thereafter. Accordingly, subject to certain qualifications, regard must be had to the 1978 Act to determine the copyright in all existing works. In principle this would mean that in the case of all situations discussed above, the ownership of the copyright in a number of existing works would have changed overnight with the coming into force of the new Act. However, s 43(a) of the 1978 Act specifically provides that nothing in the Act will affect the ownership, duration or validity of any copyright which subsists under the 1965 Act. Accordingly, the changes discussed above will not bring about any change of ownership of the copyright in existing works but merely effectively come into operation on 1 January 1979.

2 "Artistic works"

The term "artistic work" is defined as follows in the 1978 Act:

"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 artistic craftsmanship, not falling within either paragraph (a) or (b)."

This definition differs from the corresponding definition under the 1965 Act in that the expression "irrespective of the artistic quality thereof" only applies in the former definition to category (a) of the present definition. The effect of this change is to afford copyright protection to works of architecture and works of artistic craftsmanship irrespective of their artistic quality. By implication, it seems that under the old definition these categories of works were required to have some degree of artistic quality. The change raises an interesting question as to what is a work of artistic craftsmanship which has no artistic quality? Will, for instance, a well designed and manufactured crankshaft for a motorcar be considered as a work of artistic craftsmanship which does not have to have artistic quality? The answers to questions of this nature will have to be provided by the courts in due course.

A very important change with far-reaching consequences brought about by the 1978 Act is the abolition of a statutory defence which was available to a potential infringer of the copyright in an artistic work under the 1965 Act. The 1965 Act in s 11 sought to bring about a situation where there would be no overlap

in the protection afforded to an artistic work under the Copyright Act and the protection which was afforded to a design corresponding to that artistic work under the Designs Act. The basic principle was that where a design which corresponded to an artistic work eg a drawing, was registered as a design under the Designs Act or, although unregistered, was utilized as a design in practice and was exploited commercially, those rights under the copyright in the artistic work which would have overlapped with the rights conferred by a design registration in the corresponding design were for practical purposes forfeited. The effect of this provision was that if the owner of the copyright in a drawing allowed his drawing to be used as a design for an article, or registered his drawing as a design for say a toy, he would not be able to sue a person who made three-dimensional reproductions of his drawing in the form of a toy, for copyright infringement.

This change in the law relating to the copyright in artistic works must be viewed in the context of the following two factors:

(i) The copyright in a two-dimensional artistic work can be infringed by reproducing that work in a three-dimensional form, and conversely the copyright in a three-dimensional artistic work eg a model, can be infringed by reproducing it in a two-dimensional form.

(ii) It is tripe law in the United Kingdom and generally accepted in South Africa that the copyright in an artistic work is infringed not only by direct copying but also by indirect copying. Indirect copying takes place when what is copied is not the original work itself but a reproduction of the original work. So for instance, the British courts have held that where a yacht manufacturer produced a yacht by copying another yacht which was manufactured in accordance with a set of drawings or plans, such yacht manufacturer infringed the copyright in those drawings even though he had never had access to them and had only copied the actual yacht constructed from the drawings.

The amendment in this respect brought about by the 1978 Act places the owner of the copyright in an artistic work in a very powerful position since he can prevent others from making either direct or indirect copies of his work which need have no artistic quality and could therefore in principle merely be a mechanical drawing of for instance a spare part for a piece of machinery. In these circumstances the copyright owner can make use of his copyright as a sort of *quasi* patent.

3 Definitions

The 1978 Act has given sound recordings, cinematograph films and literary works new definitions, namely the following:

(i) **Sound recording**

"a direct exclusively aural fixation of the sounds of a performance or of other sounds capable of reproduction".

(ii) **Cinematograph films**

"the first 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 sound-track associated with the film".

(iii) **Literary works**

"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, addresses and sermons; and
- (g) written tables and compilations".

The new definition of a sound recording does not in my view bring about any material changes but the new definition of a cinematograph film in my opinion removes any doubt which might have existed as to whether the definition of cinematograph film under the 1965 Act covered videotapes. In my view there can be no doubt that the new definition covers videotapes.

The new definition of a literary work does not in my view bring about any material change in the law but it is significant to note that "dramatic works" are specifically mentioned as a type of work falling within the definition. In the 1965 Copyright Act dramatic works were treated as a wholly separate category of works which could be the subject of copyright but there were not really any material distinctions drawn in the 1965 Act between literary works and dramatic works.

4 New category

Program carrying signals

The 1978 Act has created a new category of work which can be the subject of copyright, namely program carrying signals. The Act contains no definition of program carrying signals but there are definitions of "program" and "signal". These are as follows:

(i) **Program.**

"in relation to program carrying signals, means a body of live or recorded material consisting of images or sounds, or both, embodied in signals emitted for the purpose of ultimate distribution".

(ii) **Signal**

"means an electronically generated carrier capable of transmitting programs".

In practice, program carrying signals are broadcast in the process of transmission from a transmitter to a receiver.

The essence of the copyright in program carrying signals which in terms of the Act is owned by the South African

Broadcast Corporation, is the right to prevent the interception and subsequent distribution of the signals by an unauthorized receiver.

5 Published editions

The 1965 Copyright Act afforded copyright to a category of works termed "published editions". The term was not defined in the Act but could be interpreted to mean the typographical arrangement of published editions of literary, dramatic or musical works. The copyright in published editions served to prevent the photocopying of a published edition, i.e. physically making copies of a page or the pages of a published edition of a work. The 1978 Copyright Act does not protect published editions and protection for this type of work has therefore fallen away. There is, however, an exception in that in terms of s 43(a) and (b) of the 1978 Act, the copyright in existing published editions conferred by the 1965 Act will continue to subsist in such works until the expiration of the term of copyright under the 1965 Act (twenty-five years from the end of the calendar year in which the edition was first published).

6 Conditions

New conditions for subsistence of copyright

In the case of certain of the types of works which can be the subject of copyright, the 1978 Act lays down new conditions which must be met for copyright in those works to come into being. The types of works concerned are the following:

(i) **Sound recordings**

Under the 1965 Act copyright subsisted in every sound recording which was made in the Republic or any other country to which the operation of the Act extended or of which the maker was a qualified person (a person who is a citizen or resident of or domiciled in South Africa or a country to which the operation of the Act was extended, or a company incorporated in South Africa or in a country to which the operation of the Act was extended) at the time when the recording was made. Under the 1978 Copyright Act the author must be a qualified person at the time when the work or a substantial part of it is made or alternatively, if the work is published, the first publication of the work must take place in South Africa or in a country to which the operation of the Act has been extended. It will thus be clear that the principle of publication has been introduced and replaces the criterion of where the work was made.

(ii) **Cinematograph films**

Under the 1965 Act copyright subsisted

in every cinematograph film of which the maker was a qualified person for the whole or a substantial part of the period during which the film was made, and in every published film if the first publication took place in the Republic or in another country to which the operation of the Act was extended. Under the 1978 Copyright Act the author of the film must be a qualified person at the time when the film or a substantial part of it is made, or alternatively the film must be made or first published in South Africa or in a country to which the operation of the Act is extended. The effect of the new provision is to introduce copyright in films which are made in South Africa but which do not meet the other qualifications for copyright which were laid down in the 1965 Act.

(iii) **Sound and television broadcasts**

The 1965 Act provided that copyright subsists in every television or sound broadcast made by the SABC, while the 1978 Act provides that for copyright to subsist in sound and television broadcasts they must be made by a qualified person or made from within South Africa or a country to which the operation of the Act is extended. It will be clear that broadcasts made by broadcasters in other countries are protected under the new Act. However, strangely enough in terms of the Act the ownership of a broadcast made by for instance the BBC, will not reside in the BBC but rather the SABC. This comes about through the Act providing that in respect of a broadcast the "author" is defined to mean the SABC.

7 Scope

Extension of scope of copyright in respect of certain works

The 1978 Act has amended and in most such cases extended the scope of the restricted acts in respect of some of the categories of works which are the subject of copyright. These changes have the effect of altering the scope of the monopoly conferred upon the copyright owner in respect of his work. The scope also, of course, determines which acts in relation to a particular type of work constitute infringement of the copyright in that work.

The scope of copyright has been altered in the following cases:

(i) **Literary or musical works**

One of the restricted acts under the copyright in these types of works under the 1965 Act was "reproducing the work in any material form" (my italics). The corresponding provision under the new Act reads "reproducing the work in any manner or form" (my italics). Consequently, the scope of the copyright has been extended beyond the 1965 provision which only dealt with reproductions in a material form and not with non-mate-

rial forms which are now dealt with in the new Act.

Another of the restricted acts under the 1965 Act was "causing the work to be transmitted to subscribers to a diffusion service". This act has now been limited to a certain extent in the 1978 Act, the corresponding provision of which reads "causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast including the work, and is the original broadcast".

(ii) Artistic works

Here too, the 1965 provision relating to "reproducing the work in any material form" (my italics), has been extended so as to cover reproductions in "any manner or form" (my italics).

One of the restricted acts under the 1965 Act was "including the work in a television broadcast". This provision has been extended in the 1978 Act to include the work in a cinematograph film as well as in a television broadcast.

Another of the restricted acts under the 1965 Act was "causing a television or other program which includes the work to be transmitted to subscribers to a diffusion service". The same qualification has been made to this provision as was made to the corresponding provision in respect of literary works discussed above. The 1978 Act has introduced two new restricted acts namely making an adaptation of the work and doing in relation to an adaptation of the work any of the other acts specified as restricted acts. The 1978 Act defines an adaptation of an artistic work as including a transformation of the work in such a manner that the original substantial features thereof remain recognizable. It could in fact be argued that this does not amount to any extension of the scope of the copyright in an artistic work at all since under the old Act if an artistic work was reproduced in such a manner that the original substantial features remained recognizable, the new work would in all probability have been an infringement of the original work through its being a reproduction of a substantial part of the original work.

(iii) Cinematograph films

In the case of cinematograph films the same qualification in regard to transmission in a diffusion service as has been discussed above in relation to literary, musical and artistic works has been introduced.

One of the restricted acts under the 1965 Act was "making a copy of the film".

This provision has been replaced in the 1978 Act with "reproducing the film in any manner or form", which would seem to be an extension in the scope as compared with the former provision.

As in the case of artistic works, new restricted acts in the form of making an adaptation of the film or doing in relation to such an adaptation any of the other restricted acts have been introduced. There is, however, no definition in the

Act as to what constitutes an "adaptation" of cinematograph film.

(iv) Sound recordings

The 1978 Act has introduced a new restricted act namely "importing and distribution, directly or indirectly, records embodying the sound recording to the general public or any section thereof".

(v) Television and sound broadcasts

Among the restricted acts under the 1965 Act were basically the following:

- (a) Making -
 - (i) a cinematograph film (or a copy of such film of the visual images or
 - (ii) a photograph of an individual image (if the photograph is a means of communicating news) of a television broadcast.An exception was made where the aforementioned material was made for personal private use.
- (b) Making a sound recording (or a record embodying such a sound recording) of a sound broadcast or of the audible part of a television broadcast. Likewise an exception was made in the case where the material was made for personal or private use.
- (c) Causing a television broadcast to be seen and/or heard in public.

The aforementioned provisions have now been replaced in the 1978 Act with a provision which reads "reproducing, directly or indirectly, the broadcast in any manner or form, including, in the case of a television broadcast, making a still photograph of an individual image". If the new provision is compared with the position under the 1965 Act, it will be observed, firstly, that the exception which was made in the 1965 Act in the case of potentially infringing acts for the purposes of personal private use has been abolished; secondly, since what is restricted is the reproduction of the broadcast in any manner or form, the new provision amounts to an extension of the scope of the copyright as compared to the old provision. However, what is not clear from the new provision is whether performing a broadcast in public is restricted. The determination of this question will turn on whether positioning a television set and receiving and showing a broadcast in public can be considered to be reproducing that broadcast either directly or indirectly.

8 Duration

In the case of some of the types of works which are the subject of copyright the duration of the term of copyright provided for in the 1965 Act has been changed. This is the case in the following instances:

(a) Cinematograph films

Under the 1965 Copyright Act a film which has been approved under the Patenters (Censorship) Act and the Pu-

blications and Entertainments Act enjoys copyright for a period of fifty years from the end of the calendar year in which the film was so approved; a film which has not been approved under the aforementioned Acts enjoys copyright for a period of fifty years from the end of the calendar year in which the film is first published. Under the 1978 Copyright Act the copyright expires fifty years after the work is first lawfully made available to the public (as distinct from published) or if the work is not lawfully made available to the public during the fifty-year period, the copyright expires fifty years after the making of the work. In terms of this provision, a film which is lawfully made available to the public immediately prior to the expiration of a period of fifty years from its making can enjoy copyright for just under one hundred years.

(b) Photographs

Under the 1965 Act the copyright in a photograph expires fifty years from the end of the calendar year in which it was first published. Under the 1978 Copyright Act a photograph is in exactly the same position as a cinematograph film as discussed above.

(c) Sound recordings

The 1965 Act provided for the copyright in sound recordings to extend for fifty years after the end of the calendar year in which the recording was made. The 1978 Act provides that sound recordings enjoy copyright for a period of fifty years from the date on which they were first published, ie not when they were first made.

9 Exemptions

Like the 1965 Act, the 1978 Act provides for a number of exemptions from copyright infringement. These are dealt with in the main in s 12, while s 13 (although its interpretation is the subject of some dispute) probably provides for further exemptions or exceptions to be provided for in regulations under the Copyright Act. It is not feasible within the scope of this article to make a detailed analysis of the differences between the various exemptions or exceptions under the two Acts but I merely wish to highlight certain of the exemptions provided for in s 12 of the 1978 Act.

The new Act provides for exemptions from copyright in *inter alia* the following instances:

(i) The copyright in literary, musical and artistic works, cinematograph films, sound recordings and broadcasts is not infringed if the work is used, solely and to the extent reasonably necessary, for the purposes of research or private study or personal private use, for the purposes of criticism or review of the work or of another work, or for the purposes of reporting current events in a newspaper, magazine or similar periodical or in a

broadcast or cinematograph film. The proviso is made however, that the expression "used" must not be construed as authorizing the making of a copy of the whole or a substantial part of the work in question. This proviso is very puzzling as the provision purports to be an exception to copyright infringement whereas, if the whole or a substantial part of the work is not copied, there could be no question of any infringement. This inconsistency will have to be ironed out in due course.

A further proviso is that where a work is used in the manner described above, mention must be made of the source of the extract and of the name of the author. The counterpart for this provision under the 1965 Act dealt with so-called "fair dealing" for purposes of research or private study or personal private use of the person dealing with any particular work, for purposes of criticism or review of a particular work or of another work, or for purposes of reporting current events in a newspaper or other similar periodical or by means of broadcasting or a cinematograph film. The concept of "fair dealing" is well recognized in the law of copyright and is in my opinion to be preferred above the attempts which the legislature have tried to make to describe it in effect in the new provision.

(ii) The copyright in a literary or musical work or in a cinematograph film, sound recording or broadcast which is lawfully made available to the public is not infringed by making quotations from them provided that the quotation is compatible with fair practice and the extent of the quotation does not exceed what is justified by the purpose for which it is required, and that due recognition must be given to the name of the work and of the author.

(iii) The copyright in a lecture, address or other work of a similar nature which is delivered in public is not infringed by reproducing it in the press or by broadcasting it if the reproduction or broadcasting is for the purpose of information.

(iv) The copyright in an article published in a newspaper or periodical or in a broadcast on any current, economic, political or religious topic is not infringed by reproducing the article or the broadcast in the press or broadcasting it, provided the right of reproduction or broadcasting has not been expressly reserved by the copyright owner, and provided due recognition is given to the work reproduced or broadcast. This exception is in effect only a *quasi* exception in that the copyright owner can avoid it merely by stating that he reserves his relevant copyright.

(v) No copyright subsists in speeches of a political nature or in speeches delivered in the course of legal proceedings or in the news of the day that are mere items of press information.

The legislature has in GG 6252 of 1978-12-22 published regulations under s 13 of the 1978 Copyright Act dealing with the questions of the permissible repro-

duction of works by libraries and archives and for educational purposes.

10 Moral rights

In s 43 of the 1965 Copyright Act the legislature dealt with the question of false attribution of authorship and with unauthorized alterations made to works. The author was given a civil right of redress and criminal sanctions were also imposed. The 1978 Act in s 20 confers upon the author the right to claim authorship of his work and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to his honour or reputation. This right which the Act calls the author's residuary right is more commonly known as the author's moral right. The right granted to the author in this respect by the Act is enforceable in the same way as copyright and any encroachment on that right is treated by the Act as an infringement of copyright. The author's moral right endures for the duration of the term of copyright in the work and is a right which always attaches to the author or his heir, notwithstanding the fact that the author might have assigned the copyright in his work to someone else.

In the case of an author who authorizes the use of his work in a cinematograph film or television broadcast, the author's moral right is limited to a certain extent in that he does not have the right to oppose modification which are absolutely necessary on technical grounds or for the purposes of the commercial exploitation of the work.

In effect, the provisions under the 1965 Act for dealing with false attribution of authorship have been replaced by s 20 of the 1978 Act, but the whole basis of the author's rights in this respect has been altered in the new Act.

11 Committee

The new Act makes provision for the appointment of a standing advisory committee to assist the Minister of Economic Affairs in dealing with copyright matters. The advisory committee has in fact been appointed and the chairman is Myburgh J of the Transvaal Provincial Division of the Supreme Court.

The advisory committee is empowered to appoint various subcommittees to deal with particular questions and to date subcommittees have been appointed in regard to sound recordings, cinematograph films and broadcasting.

One of the main functions of the advisory committee will be to deal with possible amendments of the 1978 Copyright Act and consequently persons dissatisfied with the present provisions of the Act or wishing to propose amendments should make representations to the registrar of patents, the convener of the standing advisory committee.

12 Foreign works

Like its predecessor, the 1978 Copyright Act makes provision for the operation of the Act to be extended to cover works of foreign individuals and works made or published in foreign countries. As South Africa is a member of the Berne Copyright Convention, the Minister of Economic Affairs published in GG 6252 of 1978-12-22 regulations which have the effect of extending the operation of the 1978 Act to cover works emanating from Berne Convention countries and authors of those countries.

Under the new Act the position of the United States is, however, unusual. As previously mentioned, the new Act provides that regulations made under the 1965 Act are deemed to have been made under it. Copyright protection for United States works was dealt with in Proc R231 published in RG 1850 of 1973-10-05. The effect of this proclamation was effectively to grant United States works the same protection under the 1965 Act as was granted to Berne Convention country works. Regulation R2565 of 1978-12-22 repeals proclamations made under the 1965 Act dealing with the extension of the operation of that Act to foreign countries but does not repeal Proc R231 which consequently remains in force as if it had been made under the 1978 Act. This would seem then to create the situation that the position of United States works in South Africa is still governed by Proc R231 which applies the provisions of the 1965 Copyright Act to such works. This gives rise to the conclusion that the copyright which United States works currently enjoy in South Africa continues to be regulated by the 1965 Act, notwithstanding its repeal.

13 Operation

The 1978 Copyright Act is retrospective in its effect and regulates the question of the copyright subsisting in works which were made before it came into force and works which were made after it came into force. In other words, existing works must look to the 1978 Act for their protection, irrespective of when they were made. The principle is, however, subject to two basic qualifications namely:

(i) The Act does not operate to create copyright which did not subsist prior to September 1965 (in other words under the 1965 Act); and

(ii) the new Act does not affect the ownership, duration or validity of any copyright which already subsisted on 31 December 1978. As a corollary of this, published editions which enjoyed copyright under the 1965 Act continue to enjoy such copyright under the new Act, even though the new Act does not protect such works until the expiry of the term of copyright under the 1965 Act.