

Another alternative approach was to offer group cover to individual employees by the issue of a master policy to employers, but there was some resistance to this alternative, since it facilitated actions by the employees against their employers in an already litigation-conscious area, strongly influenced by the activity of trade unions.

It is for a parallel reason that composite insurers have generally shied away from the business. They anticipated a situation where

they would be financing the legal expenses of one policy-holder against another, and such a conflict of interests could be both embarrassing and expensive.

Against this background, it is unlikely that the insurance of legal expenses in South Africa will develop beyond its present limited scope, but in a market that is presently so hungry for premium income for the purposes of investment, it is unwise to make a firm prediction.

A reversion to the pre-existing status quo

Copyright in employees' works

The Copyright Act 98 of 1978 came into force on 1 January 1979 and repealed the Copyright Act 63 of 1965 with effect from that date. An important aspect in which the 1978 Act differed from its predecessor was in regard to the question of the first ownership of works made by employees and by persons acting in pursuance of a commission.

The basic principle of copyright law is that the author or maker of the work is generally the first owner of the copyright in a work. In fact, the whole purpose of copyright is to enable authors to control the use of their works and thus derive financial benefit from them.

The 1965 Act departed from this general principle and awarded the first ownership of copyright in a work to someone other than the author in the following situations:

- (a) Where an author created a work during the course of his employment by a newspaper, magazine or similar periodical the copyright in that work accrued to his employer in so far as it related to the publication of that work in a newspaper, magazine or similar periodical, but the copyright in the work accrued to the author himself in all other respects.
- (b) Where a person made or created a photo-

graph, a gravure, a portrait, a sound recording, or cinematograph film pursuant to a commission and the person giving the commission paid or agreed to pay for the work so created in money or money's worth the ownership of the copyright accrued to the person giving the commission and not to the author.

- (c) Where a person made or created a work in the course of his employment by another person under a contract of service or apprenticeship the ownership of the copyright in that work accrued to the employer and not to the author.

The 1978 Act removed these exceptions to the general principle regarding the first ownership of copyright. The effect of this change in the law was that, apart from works made by employees of the state, the first ownership of the copyright in a work invariably resided in the author of that work even when the work was created in the circumstances outlined in paras (a) to (c) above. Although the 1978 Act is retrospective in effect, the change in the law did not affect works that were created prior to 1 January 1979 — the ownership of such works was not influenced by the new Act.

I discussed the full implications of the change in the law regarding the first ownership of copyright in an earlier article.¹ For the present purposes I merely mention that in

many instances employers and persons commissioning others to make works were placed in a difficult position. As a result, the way in which the 1978 Act dealt with this question was heavily criticized.

The issue was investigated by the standing Advisory Committee under the 1978 Act, and, following on a recommendation by this Committee, the Act was amended with effect from 23 May 1980 so as to reinstate the position regarding the first ownership of copyright as it existed under the 1965 Act, as described above in paragraphs (a) to (c). In other words, under the 1978 Act, as amended, the exceptions described in paras (a) to (c) above are again made to the general rule that the first ownership of copyright in a work accrues to the author of that work.

The 1978 Act makes provision for the assignment of copyright, whether in whole or in part. The Act provides, in addition, that the copyright in future works may also be assigned. In other words, a prospective copyright owner may assign the copyright in works that he will make or create in the future even though those works might not even be contemplated when an assignment is made. The 1980 amendment to the 1978 Act has not changed this position.

After 1 January 1979 it frequently happened that when employers became aware of the disadvantageous position in which they had been placed by the change in the law of copyright relating to the first ownership of copyright brought about by the 1978 Act they required their employees to execute assignments in their favour of the copyright in works produced in the past (particularly subsequent to 1 January 1979) and to be produced in the future.

While generally it was undoubtedly the intention of most employers to do no more by means of these assignments than to place themselves in the same position relative to the works of their employees as they had been under the 1965 Act, in some instances assignments were worded in such a way that they covered works made in circumstances that were beyond the scope of the exceptions contained in the 1965 Act. For instance, in the circumstances described in para (c) above, the works of which the ownership of the copyright accrued to an employer were those that were created by the employee 'in the course of his employment' by the employer, that is, works made by an employee during the course of carrying out his job. The exception does not cover works made by an employee while he is employed by an employer but falling outside the scope of his job. Some assignments that

employees were required to execute did not make this distinction, and covered all works created by an employee while he was in the employment of the employer. In fact, therefore, some employees were worse off as a result of assignments that they executed, which were brought about by the change in the law of copyright, than they had been under the 1965 Act.

Unless terminated by agreement, assignments of copyright in future works executed by employees at the insistence of employers who wished to allow for the change in the law brought about by the 1978 Act will continue to operate, in spite of the amendment to the 1978 Act in 1980. In general, these assignments will cease to be of any significance, since the law as amended in any event awards the ownership of the copyright in works created after May 1980 to the employer. Where, however, an assignment exceeded the scope of the exceptions contained in the 1965 Act that have now been re-introduced into the 1978 Act (for example, where it covered all works made during a period when the employee was in the employment of an employer) the assignment, in so far as it falls outside the scope of the exceptions, will continue to operate. In other words, an employee who assigned away his copyright in all future works that he would make while in the employment of his employer is not assisted by the amendment in any way. If he wishes to retrieve his position regarding works falling outside the scope of the exceptions, he should terminate the assignment by agreement with his employer. In fact, strictly speaking, the need for the assignments has really fallen away.

The 1980 amendment is not, however, retrospective in effect, with the result that the exceptions, having operated prior to 1 January 1979 and having been recently reintroduced, will operate only for works made after 23 May 1980. The intervening period remains a hiatus, and, unless varied by an assignment between employer and employee, the ownership of the copyright in works made by employees during that period will have vested in themselves and not in their employers. If employers wish to acquire the ownership of the copyright in such works, they will have to acquire the copyright by assignment from their employees.

The position as presently regulated by the 1978 Act may be varied by agreement between the parties; thus an employer and employee may agree that the copyright in a work made by the employee during the course of his employment by the employer will vest in the employee and not the employer.