

intermediate step in the arbitration process. Mediation, on the other hand, has a close connection with the process of arbitration.

Mediation could fulfil an important preliminary step to arbitration, and it is desirable that before the parties resort to arbitration, media-

tion should first be attempted. Such an attitude would facilitate a more streamlined procedure for the settlement of disputes and would possibly secure a speedier settlement of a dispute should the matter be referred to arbitration.

How to obtain relief

Piracy of cinematograph films — II

In an earlier article,¹ I briefly set out our law of copyright in cinematograph films and the position of the copyright owner and those deriving title from him, and submitted that claims that our law does not protect the owners of copyright in films against piracy of their property in the form of video tapes are unfounded. In this article I shall show that relief is available to the copyright owner provided that he is prepared to go about seeking it in the correct way, and that by virtue of the introduction of a system of registration of copyright in films our law places the copyright owner of a film in a favourable position to take action against pirates.

A person wishing to take action in South Africa on the basis of an infringement of copyright in a film must be either the owner (if necessary, by assignment) or the exclusive licensee of the right that is being infringed. In order to succeed in proceedings for the infringement of copyright a copyright owner or exclusive licensee must basically prove:

- That the work enjoys copyright in South Africa.²
- That the alleged infringer has performed one of the infringing acts.³
- His own title to the copyright, and specifically the right that is being infringed.

It is important to emphasize that when an indirect or secondary infringement⁴ is involved it is essential that the party aggrieved must establish the required guilty knowledge on the part of the alleged infringer.

Should a copyright owner or exclusive

licensee establish infringement of copyright, he is in principle entitled to obtain the following relief from the court against the infringer:

- An interdict restraining the continuation of the unlawful conduct.
- Compensation for damages that he can prove he has suffered, and in certain circumstances penal damages, provided, however, that in both instances the infringer does not satisfy the court that he was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work in question.
- An account of profits, which, it is considered, means that the infringer must pay over to the party aggrieved all the profits that he made as a result of his unlawful conduct. Here innocence on the part of the infringer as to knowledge of the existence of copyright is not a defence.
- Delivery of all infringing copies or plates used or intended to be used for the making of infringing copies in the possession or under the control of the infringer.

The major practical difficulty that faces a copyright owner or exclusive licensee who wishes to bring proceedings for the infringement of copyright in a film against another party is to establish that copyright subsists in South Africa in the film in question and that he has the purported title to that copyright. It has frequently happened in the past that aggrieved parties have attempted to take short cuts in establishing these two points in view of the practical difficulties involved, and have ultimately failed to obtain redress because the necessary proof of these two points has been lacking. It is thus essential in any proceedings

¹ See (1981) 11 BML 61.

² Idem at 61.

³ Idem at 62.

⁴ Idem at 62-3.

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for the infringement of copyright in a film that proper care be given to prove these two points properly.

In accordance with the standard rules of evidence, the subsistence of copyright in a film in South Africa would have to be established by the production of evidence by a person or persons with first-hand knowledge of the facts of the identity of the author of the film and his nationality, place of domicile or residence or alternatively the place where the film was first published or where it was made. The title of the party aggrieved to the copyright in question would be proved by the production of direct evidence from which it may be established whether the author or some other person is or was the first owner of the copyright in the film, or evidence of the transfer of rights under the copyright along a chain of transactions culminating in the vesting of the relevant right in the party aggrieved. This chain of transmission should be established by the production of copies of the documents that effected each transfer of rights from one person to the next down the line. (In most instances evidence on these issues would be adduced by way of affidavit, but it might ultimately be necessary to have individual witnesses appear in person to present their evidence before the court.)

In order to overcome the practical problems arising from the practical difficulties in the presentation of evidence as described above, the legislature has passed the Registration of Copyright in Cinematograph Films Act 62 of 1977. This Act, which was brought into operation on 1 November 1980,⁵ makes provision for the registration in South Africa of copyright in films with a view to facilitating the presentation of proof that copyright subsists in a film and that a person claiming title to the copyright in that film in fact possesses the title that he claims.

Basically, the Act enables a copyright owner to adduce evidence in order to establish that his film enjoys copyright in South Africa, that he is the owner of the copyright and that some or other person has been granted a licence under that copyright at his leisure or in his own time, and to obtain registration of the copyright in that film, against which will be recorded that he is the owner and that some or other person is a licensee. The evidence filed in support of an application for registration will not necessarily have to comply with the strict rules of evidence that apply in proceedings in a court of law. Once registration has been effected, the relevant facts can be proved in any proceedings in court by the mere production of a certificate from the

Registrar of Copyright. Therefore the mere production of such a certificate will greatly facilitate and speed up the process of launching proceedings for the infringement of copyright.

Where the owner of copyright in a film chooses not to register his copyright, or even where he does register his copyright but prefers for some reason not to rely on the registration, he may institute proceedings for the infringement of copyright in exactly the same manner and circumstances as in any other proceedings in court, but he will have to prove the subsistence of copyright in the film and that he has title to that copyright by adducing evidence of the facts in the normal way, either by means of affidavits or by the presentation of oral evidence. Obviously the bringing of proceedings for the infringement of copyright in this manner will be considerably more time-consuming and cumbersome than simple reliance on a certificate in order to establish the relevant facts, and in turn reduces the ability of the copyright owner to act effectively and promptly.

In many instances infringement of copyright also constitutes a criminal offence. Accordingly, technically the police ought to follow up and institute the prosecution of persons guilty of infringement of copyright. In the past the police have shown a marked reluctance to take this action, probably because they regard the problem as being one that is primarily of a civil nature and, more importantly, because of the considerable difficulty that they would have in establishing not only the subsistence of copyright in a particular film in South Africa but also that the activity complained of is being undertaken without the authority of a person who has title to the copyright, in particular, to the specific right in question. The registration of copyright in a film and the ease with which the relevant facts may be proved by the mere production of a certificate may well and certainly ought to bring about a change in the willingness of the police to take action, which I see as another substantial advantage of registration of copyright.

To sum up, our law clearly prohibits the unauthorized reproduction of films, including video tapes, and the legal machinery exists to enforce the provisions of the law. There are, however, practical problems involved in the enforcement of the rights of a copyright owner, but these practical problems may be overcome. In particular, the position of a copyright owner or exclusive licensee under the copyright to take effective action to deal with infringements of the copyright in a film may be considerably enhanced by the registration of the copyright in that film in terms of the Registration of Copyright in Cinematograph Films Act.

⁵ Proc R202 GG7266 of 24 October 1980.