

The law affords adequate protection

Piracy of cinematograph films

The claim has frequently been made and aired in the press of recent times that our law of copyright does not protect the owners of copyright in cinematograph films against piracy of their property in the form of video tapes. It has been alleged that piracy of films in South Africa is more rife than in virtually any other country in the world, owing to the lack of protection granted by our law. It is submitted that these claims are unfounded and that our law of copyright does grant effective protection in this area — as effective as in the United Kingdom or any other country of the Berne Convention.

Indeed, 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 more favourable position to take action against pirates than in most if not all other countries of the Berne Convention.

In the following résumé I have briefly set out our law of copyright in films and the position of the copyright owner and those deriving title from him. In a subsequent 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.

As already indicated, films, including video cassettes, are protected by copyright in South Africa. The actual work that is protected and must meet the requirements for protection laid down in the Copyright Act 98 of 1978 is the first version of the film that is produced, that is, the master version. All subsequent copies of the film derive their protection through the master version, no matter whether they are in the form of celluloid films or video cassettes.

The enjoyment by a film of copyright in South Africa is not dependent upon compliance with any formalities such as registration. Certain conditions for the subsistence of copyright are laid down in the Copyright Act. These conditions relate to the circumstances sur-

rounding the making or first release of the film. Unless the film meets these conditions it will not enjoy copyright, and no subsequent steps may be taken in order to acquire copyright in the film.

Considerable importance is placed in the law of copyright on the identity and personal circumstances of the maker, or 'author', of a film. In terms of the Copyright Act the author of a film is considered to be the person by whom the arrangements for the making of the film were made. That person may be either an individual or a corporate body, depending entirely on the facts of the matter. As a general rule, it is probably true to say that the producer of a film is the author of that film.

For a film to enjoy copyright in South Africa it must meet either of the following conditions:

- The 'author' of the film must be or must have been a citizen of South Africa, the United States of America or of a country of the Berne Convention, must have been domiciled or a resident in any of these countries, or, if a corporate body, must have been incorporated under the laws of any of these countries at the time the film or a substantial part of it was made.
- The film must have been first published (in the sense that reproductions of it were issued to the public — screening of the film is not sufficient) or must have been made in South Africa, the United States of America or a country of the Berne Convention.

As a general rule, when copyright in a film comes into being it is owned by the author of the film, as described above. This rule is, however, subject to the following exceptions:

- Where a person commissions another (the author) to make a film and pays or agrees to pay for the making of the film in money or money's worth and the film is made pursuant to that commission, the person giving the commission and not the author of the film will be the first owner of the copyright in the film.
- Where a film is made by a person (the author) during the course of his employment by another person in terms of a contract of service, the employer and not the author will be the first owner of the copyright in the film.

Owen Dean BA LLB (Stell)

Where questions of international copyright are involved (for example, copyright enjoyed in South Africa by a film made in America) it is important to realize that the questions whether or not the film enjoys copyright and, if so, who owns that copyright are determined by South African law and not by the law of the home country of the film. Thus, for instance, the fact that the copyright in a film made in America by A may vest in him under American law is irrelevant in regard to the South African copyright in that film. Consequently, the copyright in a film made in America could theoretically be owned by A in the United States, by B in South Africa and by C in France, depending entirely on the person to whom the law of each country awards the first ownership of the copyright in the particular circumstances.

Infringement

Generally speaking, the copyright in a film will extend to a number of countries and will cover a variety of different activities in regard to that film, depending upon the laws of each country in which it is sought to enforce the copyright. For instance, a particular activity that constitutes an infringement of the copyright in a film in the United States might not constitute an infringement of the copyright in that same film in South Africa, and vice versa. The scope of protection afforded to a film by copyright in any country depends entirely on the laws of that country.

In general, when one refers to the copyright in a film one means the full copyright in that film in whatever countries it enjoys copyright. This all-embracing right may, however, be subdivided into a plethora of smaller rights, such as the right to reproduce and distribute all manner of reproductions on the continent of Africa, or the right to reproduce the film on video tapes and to distribute the video tapes in South Africa, in the Transvaal, in the City of Johannesburg or in the suburb of Houghton.

The copyright as a whole in a film or separate rights comprised in the copyright may be assigned or licensed to another party. For instance, the right to distribute reproductions of the film in the form of video tapes in Cape Town may be assigned or licensed to one party, and the right to conduct the same activities in Johannesburg may be assigned or licensed to another party. Unless contractual restrictions are placed on assignees or licensees, they themselves may effect further assignments or give further licences or sub-licences to others.

An assignment of copyright or a right comprised in the copyright transfers the owner-

ship of that right to the assignee; the assignor therefore divests himself entirely of that right. With a licence, the licensor retains the ownership of the right but merely allows someone else to exercise that right.

The Copyright Act makes provision for exclusive licences to be granted under copyright. An exclusive licence is a licence in writing signed by the licensor authorizing the licensee to the exclusion of all other parties, including the licensor, to perform the particular acts. An exclusive licensee of copyright or of a right under copyright has an independent right to sue others for infringement of copyright in his own name, while a non-exclusive licensee does not have such a right.

The scope of the copyright in a film under South African law is the sum total of the acts listed below. Copyright in a film is infringed by performing any of these acts without the authority of the owner of the copyright.

(1) Direct or primary infringements:

- Reproducing the film in any manner or form.
- Showing the film in public.
- Broadcasting the film.
- Transmitting the film in a diffusion service.

Burglars don't pay tax

I appreciate that the relevant English tax legislation is based upon taxation of the profits of trade, but the remarks, albeit *obiter*, of Lord Denning M R in *Griffiths (Inspector of Taxes) v J P Harrison (Watford) Ltd* [1963] AC 1 at 20 are of interest in showing the need for a commonsense approach. He said:

'... take a gang of burglars. Are they engaged in trade or an adventure in the nature of trade? They have an organization. They spend money on equipment. They acquire goods by their efforts. They sell the goods. They make a profit. What detail is lacking in their adventure? You may say it lacks legality, but it has been held that legality is not an essential characteristic of a trade. You cannot point to any detail that it lacks. But still it is not a trade, nor an adventure in the nature of trade. And how does it help to ask the question: If it is not a trade, what is it? It is burglary and that is all there is to say about it.'

In my view the taxpayer in the appeal before us did not receive the money, he stole it.' (Per Fieldsend CJ in *COT v G* 1981 (4) SA 167 (ZA), 43 SATC 159 at 162.)

- Making an adaptation of the film.
- Doing in relation to an adaptation of the film any of the first four acts specified above.

(2) Indirect or secondary infringements:

Undertaking the following acts in relation to a copy of the film with the knowledge that the making of that copy constituted an infringement of the copyright or would have constituted an infringement of the copyright if the

copy had been made in South Africa:

- Importing it into South Africa for a purpose other than the private and domestic use of the importer.
- Selling, letting or by way of trade offering or exposing it for sale or hire in South Africa.
- Distributing it in South Africa for the purposes of trade or any other purpose to such an extent that the copyright owner is prejudicially affected.

What the law says about

Admitting applicants to clubs

In the past year or so, a major problem has confronted voluntary associations in general, and another the specific kind of association known as clubs.

The problem facing sports clubs in particular has been the scope and applicability of group areas legislation. This problem has generated a great deal of idle and ill-informed comment, but there is no real difficulty if the matter is seen in historical perspective. (We are not for the moment dealing with associated problems arising from liquor and urban Black legislation.)

The starting point was Proclamation No R26 of 1965, which in effect prevented a Black from being present in a white area (without a permit) 'for the purpose of attending any place of public entertainment or partaking of any refreshments ordinarily involving the use of seating accommodation as a customer in a licensed restaurant, refreshment or tea-room or eating-house, or as a member of or guest in any club (save as a representative or guest of the State, a provincial administration, a local authority or a statutory body) . . . '.

A previous similar Proclamation had been considered by the Natal Supreme Court, which held that a Black would not commit an offence unless he was present in the building of a club, and not, for example, merely on its grounds, *and* was so present for the purpose of partaking of refreshment ordinarily involv-

ing the use of seating accommodation.¹

Why did this decision not open up the floodgates to integrated sport? There were at least three reasons. First, the government threatened to tighten up Proclamation 26 if sports clubs did not toe the line (of segregation). Secondly, in the late sixties public opinion was by no means in favour of or conditioned to mixed sport. Finally, the Peter Hain and associated boycotting movements had not yet started to bite.

Things changed dramatically in the seventies. One after the other, like falling dominoes, South African sport-controlling bodies were excluded from the international sporting community (virtually all, except rugby). Despite, perhaps because of, this exclusion, public opinion then began to veer hesitantly towards integration. Whether sensing this, or on pure moral grounds, a few of the more venture-some sports bodies, such as the Aurora Cricket Club, opened their doors to all races — in direct confrontation with government *policy*, but not, in the light of *Brandsma's* case, in contravention of *the law*.

The government reacted, as it had threatened, by tightening up the law. In 1973 Proclamation 26 was withdrawn and replaced by Proclamation R228. This proclamation repeated the previous prohibitions, but with an important addition — a Black was now also barred from being present in a White area 'for a substantial period of time'.