

## Tax tips

by bequeathing a legacy to the relative concerned instead of an annuity. For example, if he intended to provide his relative with an annuity of R5 000 a year for ten years, he can instead bequeath him a legacy of R50 000 payable in ten equal instalments of R5 000 each. These instalments will constitute capital receipts when received by the relative and will thus not be taxed.

But a word of caution is necessary. When contemplating whether to bequeath a legacy or provide for an annuity in his will the testator will also have to consider the effect of each alternative on the liability to tax of his estate. For example, if the annuity would be paid out of the capital of the estate or out of certain income

derived by the estate that is exempt from taxation, it may be advantageous to avoid the payment of the annuity.<sup>2</sup> But if the annuity would be paid out of the taxable income of the estate, the payment of the annuity would mean simply that the liability for tax on the income in question would be shifted from the estate to the annuitant. Whether to pay the annuity in these circumstances would, therefore, largely depend upon whether such a shifting of liability is desirable when the marginal rates of tax of the annuitant and the estate are compared. Such an exercise may be well worth while.

<sup>2</sup>The Department of Inland Revenue considers that an annuity is taxable even if it is paid out of exempt interest derived by the estate.

## The Copyright Act and the creative person — V

### Rights of the author

***In the previous article in this series<sup>1</sup> I discussed the right of the author, as the first copyright owner, to restrain the infringement of his copyright. In addition to this right there are various special remedies available to him under our law in respect of his work. The author may also assign copyright in his work or grant a licence in relation to it.***

The Copyright Act 98 of 1978 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 that 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 is enforceable in the same way as copyright, and any encroachment on it is treated by the Act as an infringement of the copyright. The author's moral right endures for the duration of the term of copyright in the work and is a right that

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.

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

The remedy in respect of passing-off is derived from the common law. In a situation where, by virtue of the renown or reputation that an author or his work has attained, a work by another person is associated with that author or his work through similarity between the two works or aspects or characteristics of them, the author can have recourse to the court to restrain the sale of the offending work or the actions that are causing offence. The essence of a passing-off claim is that the author is able to protect the goodwill that he has built up in his own name or in his works and prevent it from being misused by others.

In addition to being liable to civil proceedings at the suit of the copyright owner, a person who, with guilty knowledge, infringes copyright in certain instances is guilty of a criminal

<sup>1</sup>See (1979) 8 BML 237.



offence and is liable to prosecution by the State.

Copyright in respect of any particular work is in effect a monopolistic right to a number of different acts. The sum total of all these rights constitutes a whole copyright. Copyright or a portion of copyright may be assigned or bequeathed, or a licence may be granted in relation to it. Copyright may be apportioned in the following ways or a combination of two or more of these ways:

- As to the nature of the act permitted, that is, in respect of any one or more or a portion of one of the acts that the owner has the exclusive right to do, for example, the right to publish a work or the right to broadcast a work.
- As to the nature of the right granted, for example, the right to translate the work.
- As to any country in respect of which copyright subsists.
- As to the duration of the right granted.

For example, the owner of the copyright in a literary work can assign to one person the right to publish the work in book form in the Republic, to another the right to publish in book form in the United States, and to others rights such as dramatization, filming, translation or publication in serial form; or he may assign certain of these rights and license others. He may set a time limit on the granting of any of these rights.

A licence can be granted in respect of copyright and it can be assigned, or transmitted, by testamentary disposition or by operation of law. Of these forms of transmission of rights, a closer look will be taken at assignments and licences:

### Assignment

The author, as the first owner of the copyright in the work, or any subsequent owner can transfer all or some of his rights under the copyright to another person. Where a transfer of rights or assignment has taken place, the assignor divests himself entirely of the right or rights concerned, and these fall under the ownership of the assignee. The assignor has no further claim to those rights and he is in fact no longer able to perform the acts covered by those rights without the authority of the assignee. Consequently, an author who has assigned all the rights under the copyright in a work of his to, say, a publisher, no longer has any rights in that work, for those rights have vested in the publisher.

The Act provides that no assignment of copyright, whether total or partial, will be effective unless it is in writing, signed by or on behalf of the assignor. An oral or tacit agreement to assign copyright will be ineffective and

invalid.

It is possible for a prospective owner of copyright to assign any future copyright wholly or partially to another person and, on the copyright's coming into existence, it will vest in that other person. For example, an artist can assign the copyright in a painting that he is about to undertake to another person and, upon the work's being completed, that other person will become the owner of the copyright.

It is important to realize that there are significant differences between the Copyright Act of 1978 and the Copyright Act of 1965 in regard to the first ownership of the copyright in various types of works. Under the 1965 Act various commissioned works (photographs, paintings, drawings, sculptures, engravings, cinematograph films and sound recordings) and various works made by an employee during the course of his employment by another person were exceptions to the general rule that the author is the first owner of copyright in a work. Up until the end of 1978 clients who commissioned certain artistic works and employers could rest secure in the knowledge that works produced pursuant to commissions or in the course of employment would be controlled from the outset by them. This seemed a very practical and useful arrangement, since in these situations clients and employers were generally people who in all fairness should have had the control over the works. The position under the 1978 Act is changed; the copyright in all commissioned works and in all works produced by employees during the course of their employment will vest in the authors. If commissioners and employers wish to place themselves in the same position in which they were up to the end of 1978, it is essential that they obtain assignment of the copyright in the works that they commission or the works that are produced by the employees from the authors of these works. It is in this situation that it is very useful that the Act makes provision for the assignment of the copyright in future works, because this provision enables a client or an employer to obtain all the copyright in both past and future works from the person he commissions or his employee in a single written document.

### Licences

A copyright licence is tantamount to an undertaking by the copyright owner not to sue the licensee, or his sub-licensee, for infringement. Except for an exclusive licence, it confers no rights in the licensee as against third parties. In other words, the copyright owner remains the owner of the right and merely allows the licensee to exercise that right. Since he does not own the right, the licensee cannot enforce it



## Rights of the author

against third parties. A licence can be contrasted with an assignment. Whereas by assigning the whole or part of his copyright an owner divests himself of all rights in it, by granting a licence the copyright owner retains the ownership of the rights concerned, even though he might have undertaken not to exercise the particular rights himself during the currency of the licence. Upon the termination of the licence the full rights revert to the copyright owner.

A non-exclusive licence under the copyright in a work may be written or oral or may even be inferred from conduct. There is thus an important distinction between an assignment and a licence — an assignment must be in writing while a licence need not. Thus oral permission to perform or reproduce a work cannot operate as an assignment and will normally constitute a licence.

With regard to the assignment of copyright subject to an existing licence, the position is that a licence granted by the owner or prospective owner of copyright is binding upon every successor in title of that owner except the purchaser in good faith and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser.

A licensee can grant sub-licences that fall within the scope of his own licence, and acts performed by the sub-licensee are deemed to have been done with the authority of the copyright owner.

An exclusive licence is a licence in writing signed by or on behalf of the owner or prospective owner of copyright authorizing the licensee, to the exclusion of all other persons, including the owner of the copyright himself, to exercise acts that fall within the scope of the copyright. An exclusive licensee, unlike an ordinary licensee, is specifically given the right, in terms of the Act, to take action against third parties for infringement of copyright in his own name.

Subject to any obligations that he may assume in agreements with third parties, a copyright owner can grant as many licences as he likes under the copyright in his work. The Copyright Act makes provision for a body known as the Copyright Tribunal to determine disputes arising between licensing bodies and persons requiring licences or organizations claiming to be representative of such persons, either on the reference of a licence scheme to the Tribunal or on the application of a person requiring a licence either in accordance with a licence scheme or in a situation not covered by a licence scheme. The type of licences that the Copyright Tribunal is competent to adjudicate upon are basically licences in respect of performing rights.

## Facts about BML

Although we are still analysing the flood of completed questionnaires returned to us in our recent survey of readers (over 36% of subscribers responded — a truly remarkable percentage), some of the comments made indicate a little confusion about *BML* that can easily be cleared up:

### Index

An index to the eight issues in each volume is published. It is sent to subscribers together with the last issue of each volume and is printed on heavy paper so that it can be inserted on the ninth rod of the binder for each volume. The most recent index issued accompanied issue no 8 of vol 8, which was published on 1 August 1979. Spare copies of the index for vol 8 and for most of the past volumes are available free of charge from the publishers.

### Binder

Here is the way to make the most efficient use of the binder: When you receive the binder insert no more than two rods in each of the first three pairs of slots in the metal brackets at the top and bottom of the inside of the spine of the binder and three rods in the fourth pair of slots. As each issue arrives, remove a rod from the binder, open the issue at the centre page, place the rod along the spine of the issue, close the issue and insert the rod, with the issue hanging from it, in the appropriate slots. One end of the rod should be inserted in the bottom slot and the rod should then be slightly bent so that the other end can be inserted in the top slot. When the binder is full there will be two issues hanging from rods in each pair of slots, while the index will hang from the ninth rod in the last pair of slots.

### Number of pages

Since its inception over eight years ago *BML* has *never* appeared with less than thirty two pages.

### Letters from readers

Readers are very welcome to write to the editors. Unless a reader does not wish it, his letter, together with a reply from the editors if one is called for, is published in the 'Readers Views' section. In its entire history *BML* has *never* failed to publish a letter to the editors intended for publication. In addition, all letters are individually acknowledged.