

The author and copyright

Under the Copyright Act of 1978 the creative person, or the author, as he is called in the Act, is the most important person. The long road that commenced with the Statute of Anne, described in the introductory article elsewhere in this issue, has now reached its destination, and in the field of copyright the author has vanquished all his rivals. With the exception of employees of the State, the author is now the owner of the copyright of all the various types of work covered by the Act.

Under the 1978 Act the author has further improved his position, since under the Copyright Act of 1965 there were certain instances in which his right to the ownership of the copyright in his work was not recognized, and the right was granted to others, for example:

- Where the author was employed by the proprietor of a newspaper, magazine or similar periodical and a literary, dramatic or artistic work was made by him during the course of his employment for the purpose of publication in a newspaper, magazine or similar periodical, the proprietor was the owner of the copyright in the work in so far as the copyright related 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.
- Where a person commissioned a photograph, a painting, a drawing, a sculpture or an engraving 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 the work.
- 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.
- 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.

In consequence, the author of a work is, under the 1978 Act, the owner of the copyright in the work irrespective of whether he made it pursuant to a commission given by another person or whether he made it during the course of his employment by another person, even if the work was made primarily for the use or benefit of his employer.

In the eyes of the law, who is the author of a work? Which creative person who undertook the creation of the work is considered to be the author and the owner of the copyright? As I have said in the introductory article, what is protected under copyright is the physical or perceptible form of expression of a work of the intellect. Accordingly, in the first place, the author is the person who is primarily responsible for the creation of the physical or perceptible work. This person may not necessarily be the person who conceived the idea that gave rise to or even that is comprised in the physical or perceptible work. Ideas as such cannot be protected by copyright, and therefore the originator of an idea cannot claim any right in his idea. This principle is admirably summed up by Mr Justice Farwell in the case of *Donoghue v Allied Newspapers Ltd*¹ as follows:

'A person may have a brilliant idea for a story, or for a picture, or for a play, and one which appears to him to be original, but if he communicates that idea to an author or an artist or a playwright, the production which is the result of the communication of the idea to the author or the artist or the playwright is the copyright of the person who has clothed the idea in form, whether by means of a picture, a play, or a book, and the owner of the idea has no rights in that product.'

While it is true that the person who embodies ideas in a physical or perceptible form is under the law the author of the work, his activity in regard to the work must involve the application of independent intellectual effort or skill. If the activity of the person who reduces the work into its physical or perceptible form is purely mechanical, in the sense of a shorthand typist who takes down what is dictated to her and reproduces it in a written form, that person is not the author but rather the agent of the author.² On the other hand, a reporter who listens to a speech and then writes a summary of it will be the author of the summary.

No tests have been laid down by the courts as to exactly how much skill or labour must be ex-

¹ [1938] Ch 106 at 109.

² Cf Farwell J loc cit. For further consideration, see A J C Copeling 'Copyright' in *The Law of South Africa* ed W A Joubert V (1978) para 330 pp 278-9.

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pendent during the embodying of ideas in a physical or perceptible form to qualify the person embodying the work as the author. Each case will depend upon its own facts, and as a practical proposition the courts would undoubtedly regard the person or persons who expended the most intellectual effort or skill on the creation of the work in its physical or perceptible form as the author.

Where two or more persons are engaged in the creation of a work in a physical or perceptible form, they can be joint authors and co-owners of the copyright in that work.

The Copyright Act assists in the determination of which person is the author of a work. The question of who is the author of a literary, musical or artistic work is a relatively simple one, namely the maker or the creator of the work. With the perhaps more

impersonal types of works covered by the Act, in which a number of different people are often involved in different aspects of the creation of the final work, it is in principle difficult to designate any person as being the person in the main responsible for the creation of the final work. In this respect the Act creates finality, sometimes perhaps rather arbitrarily, on the question: The Act designates the person responsible for the composition of a photograph as the author; the person by whom the arrangements for the first fixing of the sounds of a performance or of other sounds are made for a sound recording is the author; the person by whom the arrangements for the making of a cinematograph film were made is the author; the South African Broadcasting Corporation is designated as being the author of both broadcasts and programme-carrying signals.

The right of pre-emption

Selling shares of private companies

Every company must register a constitution consisting of a memorandum and the articles of association. The articles of companies with a share capital may consist of the Tables in Schedule 1 of the Companies Act 61 of 1973: Table A for a public company and Table B for a private company. A Table may be adopted in toto without any alteration, or it may be adopted subject to the additions, omissions and modifications stated in the articles. The articles of the Tables will apply to the company if they are applicable and are not excluded or modified.¹

Section 20 of the Act requires a private company, in its articles, to restrict the right to transfer its shares. Table B provides for such restriction in various of its articles, which are reproduced below:

'11. The directors shall have power to refuse to register the transfer of any shares without giving reasons therefor.'

'21. If a member of the company desires to sell all or any of his shares of the company he shall give notice, in writing, of

his intention to sell, to the directors of the company, and state the price he requires for the shares.

'22. The directors shall within one month of the date of receipt of the notice referred to in article 21 advise every other member of the company of the contents thereof and each such member shall be entitled to acquire the shares so offered within one month after the date of the receipt of such advice: Provided that if more than one member makes an offer for all of the shares so offered, the shares shall be sold to each such member in equal proportions, and where fractional proportions of shares remain, such members shall become joint holders of such fractional proportions of the shares.

'23. If the members of the company are unable to agree upon the selling price of the shares, the auditor of the company may be requested to determine the true and fair value thereof and the members shall accept that value as the selling price of the shares.

'24. If none of the members of the company offers to purchase the shares within the time referred to in article 22, or if members of the company offer to purchase a part of the shares so offered, the member who is offering the shares for sale may offer the shares or the remaining portion of the shares which have not been purchased by members of the company, for sale to any other person and, notwithstanding the provisions of article 11, the directors shall approve the registration of the shares in the name of that person unless they have good reason to refuse such registration.'

Articles 21-4 create a right of pre-emption. A member wishing to sell his shares must first offer his shares to the other members before he can offer them to outsiders. What happens if a member, A, offers his shares to an outsider, C, without

¹Section 59.