The Copyright Act and the creative person – I

# The background to copyright

***Society owes a tremendous debt to the creative person. Without his efforts, there could be no progress or development in the arts or in other fields such as technology and commerce. We have achieved our present-day standards of culture and development through the application of the human mind to the challenges posed by problems and by the attainment of or the striving for perfection in all aspects of human life and experience.***

The worth and value of creativity is generally recognized in modern times. It is also generally recognized that creative minds should be encouraged and stimulated and should be remunerated for their efforts. This was, however, not always the view in the past, and particularly in the arts it has been only relatively recently that proper remuneration has been given to creative minds. In earlier centuries, for example, musicians and authors were largely reliant on the patronage of royalty or wealthy persons for any sort of compensation for their efforts, and many of those who are today considered to be great classical composers lived and died in abject poverty.

One of the most effective ways that society has devised to stimulate and promote the creative mind has been the creation of intellectual property laws. One of the cornerstones of our capitalistic society is the profit incentive. The creative person is in a position where he can profit directly from the efforts and fruits of his intellectual labour. By the creation of intellectual property laws, be it the law of patents or the law of copyright, society has given the creator of an intellectual work the right to control to a large measure its use and to obtain remuneration commensurate to its worth to society. In consequence a talented creative person can earn a good livelihood from the products of his intellect, which in turn is naturally a very strong motivation to produce works in the largest quantity and best quality possible, to the ultimate benefit of the creative person himself and society as a whole.

It seems so manifestly fair and sensible to grant the creative person rights in the use of his work and by doing so to encourage him to produce more and better works that it seems strange that it should have taken so long for this position to have been reached. Of course, the whole principle is based on the premise that society wants more and better works to be produced by the creative mind. Perhaps that view has not always been held. It was certainly not held by Antiphanes, thought to have lived in the fourth century BC, who said: 'Who of the Gods first taught the artists craft laid upon the human race the greatest curse.' Similar views were expressed by Thomas Carlyle in the nineteenth century, who said: 'May the Devil fly away with the fine arts.' At about the same time Oscar Wilde opined that: 'All art is quite useless.' Particular types of art forms have been somewhat irreverently described as follows: 'Sculpture – mud pies which endure'[1] and 'Painting, *n* The art of protecting flat surfaces from the weather and exposing them to the critic'.[2]

The form of intellectual property law with which we are concerned is copyright. Copyright in its present form protects the works of the intellect or of the spirit as expressed in a material or perceptible form. Ideas or concepts as such are not protected by copyright, but merely the material, tangible or perceptible form into which ideas are reduced.

The first developments that ultimately gave rise to copyright in works of the intellect took place some 300 years or more after the invention of printing in the fifteenth century. In 1556 the Stationers Company was incorporated, in order to prevent seditions and heretical publications. An entry in its register of the author of a book gave him the sole right of printing the work. The powers of the Stationers Company, a guild of sellers of parchment, ink and printing requirements, with the exclusive privilege of printing, were enforced by the Star Chamber. In 1640 the Star Chamber was abolished, and the powers of the Stationers Company came to an end. In 1662, however, the Licensing Act (13 & 14 Car 2 c 33) required all books to be registered with the Stationers Company; no one could print or import any book that a person had the right to print through an entry in the register of the Stationers Company, without the consent of that person.

At the end of the century the Licensing Act expired. Authors were unprotected. During and prior to that time the right to copy a manuscript

[1]Cyril Connolly *Enemies of Promise.*

[2]Ambrose Bierce *The Enlarged Devil's Dictionary* Penguin Books (1971) p 240.

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belonged to the person who owned the physical article; in other words the rights to the works of the intellect encompassed in manuscripts were identified and consolidated with the rights in the manuscript itself. During the course of the latter part of the seventeenth century the monopoly of the Stationers Company came in for more and more criticism, and pressure was brought to bear on the governments of the time to abolish it. These efforts were ultimately successful, and in 1709 an Act, called Statute 8 Anne ch 19 – 'The Statute of Anne' – was passed, which for the first time anywhere in the world gave the author of a written work rights in the written work per se as distinct from any rights that he might have in the manuscript in which the written work was contained.

But even the Statute of Anne was not really motivated by any desire to serve the interests of the authors of written works. The main pressure that gave rise to the passing of the Statute came from booksellers, and with the passage of the Statute of Anne the booksellers achieved their objective of breaking the monopoly of the Stationers. The position of the author of a written work was merely the pretext or the motivation for the necessity of the Statute. In terms of the enactment, it is true, the author owned the copyright in his work, but by virtue of mere publication of the work the bookseller was given exclusive rights to it for a period of fourteen years, whereupon the rights were supposed to revert to the author. As a result a generally paltry sum was paid to the author on publication, and the bookseller was then free to exploit the work commercially to his own benefit for fourteen years.

Whatever its demerits might have been, the Statute of Anne laid the foundation for the law of copyright, and its development took place through the passage of several subsequent Acts in the United Kingdom. As the law of copyright developed it came to cover additional types of works of the spirit and in 1916 the first law dealing with copyright in South Africa was enacted (the Patents, Designs, Trade Marks and Copyright Act 9 of 1916). This law, which made the then current British Copyright Act (the Copyright Act 1911) the copyright law of South Africa, covered literary works, musical works, dramatic works and artistic works. The South African Copyright Act of 1965 extended the scope of copyright further so as to cover cinematograph films, sound recordings (both of which had had some indirect protection), radio and television broadcasts and published editions (that is, typographical arrangements) as additional substantive works. The new Copyright Act 98 of 1978 has extended the scope of copyright even further to cover programme-carrying broadcasts, but has excluded future published editions as a form of work. It can therefore validly be said that we have come a very long way since the Statute of Anne.

## Book review

The Law of Privacy in South Africa
*by D J McQuoid-Mason B Com LLB PhD (Natal), Senior Lecturer in Law, University of Natal, Durban. Juta & Co Ltd P O Box* 123 *Kenwyn* 7790. 1978. xi & 272. *Price* R32 (*without tax*) *hard cover only.*

History (not legend) has it that the late Cyril Tolley, when an undergraduate at Oxford, was wont to strike a golf ball with uncanny accuracy from the main quadrangle of University College across the High Street to the corresponding quad of The Queen's College. It is no wonder he became a many-times champion. But one thing he never did – he never relinquished his amateur status: therein lies his other claim to fame.

Mr Tolley was incensed one day to find that his photograph had been used to promote a commercial product. He sued, and won – right up to the House of Lords. In some ways this was the starting point of a whole new legal concept.

Has one any 'right to be let alone'? This is a tremendously important question in our time and age, with media competition, advertising and technological developments. May we complain that our phones are tapped, that private detectives tail us or that our financial position is computerized in a data bank?

In some countries the legal system has been unable to cope with these questions, and legislation has been necessary to prevent infringements of privacy. In South Africa we are fortunate enough to be able to draw upon the old Roman concept of individual *dignitas*, which was (and still is) protected by the *actio iniuriarum*. Potentially, we have as 'liberal' a law of privacy as any Western jurisdiction.

Our thanks are due to the author for producing the first South African work in this field in English. It must have been a formidable task, since he has foraged widely into the relevant European and Anglo-American systems. And he has had the courage to expose and recommend some startling things about private investigators, data banks and racial and security legislation in this country.

There is no doubt that this book – useful to academics, practitioners and students alike – has staked a claim to, if not appropriated, a field of law which until now has been largely unsurveyed.

**BRB**