A pitfall for many employers

The employee and the Copyright Act

The legal term often used to describe the relationship in law between an employer and his employee is 'master and servant'. In this situation the employee has the role of the 'servant', while the employer is considered to be the 'master'. Has the Copyright Act 98 of 1978 brought about a change in this relationship, and have the tables been turned, with the employee becoming the 'master' and the employer the 'servant'?

One of the basic principles of copyright law is that the author or maker of a work is the first owner of the copyright in that work. When the work comes into existence the copyright vests in the author. This principle was recognized in the Copyright Act 63 of 1965, which was repealed by the Copyright Act 98 of 1978, which came into force in January 1979. The 1965 Act contained a number of exceptions to the general rule that the author or creator of a work is the first owner of the copyright in that work. These exceptions occurred in the following instances:

Exceptions

- Where the author was employed by 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 employer 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 copyright in the work.
- Where a person commissioned the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a sound recording and the making of a cinematograph film, paid for or agreed to pay for it in money or 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 and not the author or the maker of 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 and not the author.

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Of particular importance is the last exception, since it provided for a very logical and practical arrangement. Where an employee creates or makes works that are eligible for copyright during the course of carrying out his duties and obligations in terms of his contract of employment with his employer, for which service he is paid a salary or remuneration, probably more often than not directly related to the quality and perhaps quantity of the works that he creates, it seems only fair and equitable that the employer should be in a position to control the use of the work and to exploit it if possible. Conversely, it would appear to be manifestly unfair that an employee who is employed for the specific purpose of creating works eligible for copyright and is paid handsomely for carrying out his duties should be in a position to withhold the use and exploitation of his works by his employer.

This entire question should be viewed in the light of the fact that artistic quality or merit is generally not a requirement for a work to enjoy copyright. Consequently, items such as letters written, memoranda prepared, drawings made and photographs taken by an employee are works that will enjoy copyright. The owner of the copyright in such works has the right to authorize or prevent a wide variety of acts in relation to the works, which, if they are literary or artistic works, include reproduction of the work and distribution of reproductions to the public.

Under the 1965 Act, by virtue of these exceptions to the general rule that the author is the first owner of the copyright in a work, the employer's position was safeguarded. The Act conferred upon the employer the ownership of the copyright in all works created or made by any or all of his employees during the course of their employment by him. Thus the employer had the full right of disposition over items such as drawings prepared, letters and memoranda written by each and every one of his employees.

But this happy position for the employer has now been changed. The 1978 Act has abolished all of these exceptions to the general rule, with the result that the general principle that the author is the first owner of the copyright in a work now applies universally, save for works that are made by or under the direction or

control of the state. The copyright of such works vests in the state and not in the actual author.

Far-reaching

The implications of this change are far-reaching, particularly in so far as the relationship between an employer and his employee is concerned. Under the 1978 Act the copyright in all works created by employees during the course of their employment will vest in themselves and not in the employers. Consequently, the management of, for instance, a design firm will have to obtain authority from the draughtsman on its staff who has created a design if the management wishes to sell or use that design or to licence its use by others. Similarly, a professional assistant with a firm of accountants will be able to prevent his employers from reproducing or publishing a memorandum that he has written, possibly even on the direct instructions and with the assistance of his employers, on tax havens or non-taxable fringe benefits. A firm that commissions a commercial photographer to take a series of photographs or a designer to prepare a design will not, unless special arrangements are made, be able to control the use of those photographs or that design.

It could thus be said with some justification that employers have become the servants or slaves of their employees and that the employees have become the masters. How else would you describe a situation where an employer must effectively ask the permission of his employee to use a memorandum that he paid the employee to write?

But the position is not necessarily quite so gloomy. Both under the 1965 Act and the 1978 Act copyright is freely transmissable from one person to another, for example, by assignment or transfer of rights, with the result that the effects of the 1978 Act can be counteracted by arranging for the author to assign his copyright to his employer or to the person who commissions his work.

An assignment can be made in respect of the copyright in existing works and in future works, and in one deed provision can be made for an employee to assign to his employer the copyright in both his existing works and the works that he will create in the future. If this approach is adopted, no future assignments will be necessary since the copyright in each future work will immediately pass over to the employer as soon as it is created or comes into existence. The 1978 Act prescribes that in order for it to be valid an assignment of copyright must be in writing and must be signed by the assignor.

Thus all that an employer need do is to ensure that each and every one of his employees executes and signs a written document in which the copyright in all works made or to be made by him during the course of his employment is assigned to the employer. The position where one person commissions another to do a work on his behalf is a little more complicated, but will be described in a future issue.

Reputation

Another innovation of the 1978 Act that is relevant to the relationship between an employer and his employee is the provision that deals with the so-called residuary rights of the author of a work. In terms of this provision, notwithstanding the fact that the author or maker of a work might have assigned the copyright in that work to another, he retains the right to object to any alteration or modification of that work that is prejudicial to his honour or reputation. This is a right that always attaches to the author and of which he cannot divest himself even if he should so desire. It is even debatable whether the author can validly assume a contractual obligation not to enforce this right. It may, however, be possible for a person to secure an acknowledgment from the author of a work that alterations or modifications to the work will not be injurious to his honour or reputation. The effect of such an acknowledgement would, in the employer-employee situation, be to place an employer who has taken assignment of the copyright in a work from his employee in a position where his use of the work in question will not be subject to the limitation that the author will have a residual right to interfere with that use.

Mutinous situation

Through the abolition of the exceptions to the rule of first ownership of copyright that were contained in the 1965 Act the legislature has possibly created a mutinous situation. It has certainly promoted a vast amount of uncertainty in relationships in the commercial field and has caused the execution of a plethora of deeds of assignment of copyright. It is to be hoped that the legislature will realize the undesirability of the situation and restore it to that which obtained under the 1965 Act. No system can operate with optimum efficiency and effectiveness if the servant rules the master!