Treasure trove raiders

Owen Dean

Another foreign raid on the treasure trove of indigenous South African music has been thwarted – this time by the Belgium court. This episode follows in the wake of the *Lion Sleeps Tonight* case in, which the executor of the estate of the late Solomon Linda successfully intervened in the efforts of the Walt Disney Company and others to make unauthorised use of the song by that name that was an adaptation of a South African song named *Mbube*, composed by Solomon Linda (see 2006 (July) *DR* 16 'Stalking the sleeping lion').

In the latest case Gallo Music Publishers successfully claimed before the Brussels court in Belgium that Piet Roelen Publishing Limited, Helmut Lotigiers and Wim Bohets infringed copyright owned by it in the songs *Tula Baba* (composed and written by Egnos, Domingo and Gray) *Jikel Emaweni* (composed and written by Joseph Mogotsi) and *Qongqothwane* (written and orchestrated by the Manhattan Brothers).

The alleged infringers had collaborated in the making and distribution of a record album performed by Lotigiers, whose performing name is Helmut Lotti. It was claimed by Gallo that the versions of the songs included in the record album were reproduced and so included without its authority, as the copyright owner. In the final outcome, the court upheld Gallo's claim.

Background and procedure

In the late 1990s Helmut Lotti, a singer of international renown, conducted a performing tour of South Africa. This tour gave rise to a record album entitled '*Out of Africa*' on which Lotti performed various songs of African origin, including the three songs in dispute. On becoming aware of the inclusion of the three contentious songs in the album, Gallo advanced a claim that its copyright in the three songs had been infringed by Lotti and the producers of the album since they had been incorporated in it without Gallo's authority.

Gallo conveyed this claim to the Belgium Musical Collecting Society (SABAM) that had responsibility for collecting royalties arising from public performances of the album. SABAM took the decision to freeze the account into, which royalties arising from the performance of the album were paid with a view to determining the question of to whom such royalties should be paid. Piet Roelen Publishing, Lotigiers and Bohets thereupon instituted court proceedings in the Brussels court seeking a declaratory order from that court that, as the songs were traditional and they had introduced sufficient new material into the versions of the songs incorporated in the album to entitle them to claim their own independent copyrights in such songs, they were entitled to receive the royalties retained by SABAM. Gallo was cited in these proceedings as a co-defendant.

Gallo defended the case on the basis that, irrespective of whether the applicants had introduced sufficient new material into their versions of the songs such as to make them copyright owners in respect of such versions, the real issue was whether they were entitled to incorporate the songs in the album at all by virtue of the fact that they had not sought or obtained the authority of Gallo, being the copyright owner, to do so. It was further argued that, on this basis, the royalties being held by SABAM were payable to Gallo. The applicants countered this argument by saying that since all three songs were traditional, and therefore in the public domain, there was no substance in Gallo's claim.The court appointed a panel of experts, all of whom were musicologists and one of whom was South African and nominated by Gallo, to investigate the genesis of the versions of the songs incorporated in the album and to make a finding as to the originality of the applicants' versions of the songs. They were to compare such versions with previous versions of them in order to establish whether there was substance in the applicants' claim to own copyright in their versions of the songs and that they were therefore entitled to receive the royalties.

After the litigation had been pending already for some years, in November 2004 the experts lodged their report with the court in, which they set out their findings. In essence the experts found that, although *Jikel Emaweni* and *Qongqothwane* were both essentially traditional songs, and therefore in the public domain, in the course of their evolution over the years in the music industry, versions having original elements attracting copyright in such elements were made, in the case of *Jikel Emaweni*, by Joseph Mogotsi, and in the case of *Qongqothwane*, by the Manhattan Brothers.

In the case of *Tula Baba*, it was found that the song was indeed composed by Egnos, Domingo and Gray for the movie *Dingaka*. To the extent that these songs were original, or contained original elements, they

were eligible for copyright and any such copyright was owned by Gallo as the succesors in title to the makers of the original elements. The committee found, further, that the versions of *Jikel Emaweni* and *Qongqothwane* utilised by the applicants were in fact derived largely from the Gallo owned versions of the songs and not from the traditional versions that were in the public domain. As far as *Tula Baba* was concerned, it followed as a matter of course that the Gallo owned version had been the forerunner of the version featured on the album. The experts confirmed the applicants' stance that they had made sufficient fresh contributions to their versions of all three songs to qualify the new material comprised in such versions for independent copyright.

On receipt of the report of the experts, Gallo brought a counter-claim against the applicants for infringement of their copyright. Gallo claimed that the findings of the experts were in themselves sufficient evidence and substantiation of their copyright infringement claim. This strategy turned the tables on the applicants because, despite the experts apparently justifying the applicants' claim that as owners of the copyright in the new elements of their songs, they were entitled to receive the royalties collected by SABAM, and in fact they had provided Gallo with a readymade copyright infringement case.

Gallo's copyright infringement case

Gallo's cause of action in the copyright infringement claim brought against the original applicants was relatively straightforward. *Jikela Emaweni* and *Qongqothwane* were both traditional works and in the public domain. However, Joseph Mogotsi, in the case of *Jikela Emaweni*, and the Manhattan Brothers, in the case of *Qongqothwane*, had introduced variations or adaptations into the traditional works in making their own versions of them and such new material was sufficiently substantial to cause copyright to subsist in the new material. *Tula Baba* as written by Egnos, Domingo and Gray was an original work (despite the fact that there may have been some suggestion that it too had a traditional heritage). When the applicants made and used their versions of the three songs, they incorporated in their versions the innovations or adaptations of Gallo's predecessors in title. While they may have been at liberty to reproduce and use the truly traditional versions of the songs, the sources of their versions were not the traditional versions of the songs but the Gallo versions incorporating the new material. By incorporating the innovations of the Gallo versions into their own versions, the applicants reproduced substantial parts of copyright works owned by Gallo and such reproductions and use of the material in question had not been authorised by Gallo. The fact that the applicants had introduced their own new material into their versions of the songs was of no consequence because the enquiry was whether the applicants' versions reproduced any substantial parts of works in, which Gallo owned copyright, and this was indeed the case. It availed the applicants naught to lay claim to copyright in their own new material embodied in their versions of the songs. That was not a factor that negated Gallo's claim of copyright infringement.

In its judgment handed down in March 2009 (some eight years after the commencement of the proceedings), the court found squarely in favour of Gallo's copyright infringement claim. It ordered the initial applicants to pay damages to Gallo in order to compensate it for its loss of earnings and actual losses suffered. The computation of the amount of damages was referred to a further hearing but in the meantime provisional compensation in the amount of EUR 25 000 was awarded. It also ordered the original applicants to pay Gallo's costs. An interdict restraining the use of the infringing songs in the album was issued coupled together with the imposition of a penalty sum per infringing item for any items disposed of in contravention of the interdict. This marked a very satisfactory conclusion to the litigation from Gallo's point of view, and was more than adequate compensation for the fact that copyright infringement proceedings that had been brought by Gallo against the applicant parties in the South African court had been thwarted by the unwillingness of the applicant parties, who were defendants in the South African action, to consent to the jurisdiction of the South African court, being *peregrini*.

Conclusions

There are several parallels between this case and *The Lion Sleeps Tonight* case. In both cases South African songs were taken by foreign persons and transformed into new versions or derivatives. This was done without the authority of the relevant South African copyright owners and it was justified on a dismissive basis by labelling the songs in question as being traditional and therefore not deserving of any protection.

In both cases, the foreign parties claimed copyright in their versions of the songs and sought to justify their conduct on the basis that they had created new works. In both cases the successful copyright owners had launched their claims, so to say, 'on the back foot' and had fought against significant odds to triumph

in the final outcome.

The net result in both these instances, was that the rights in indigenous South African music have been upheld and the international market place has been forced to readjust its thinking. A message has been given that indigenous South African works cannot be abused and misused with impunity.

The Belgian judgment raises a number of important copyright issues on, which it lays down sound law. The principal of these is that, even though a work may be traditional and in the public domain, an original adapted version of it can nevertheless be made and clothed with copyright. The copyright subsists in that, which is original to the new version of the work and not in the work as a whole, and in particular not in the existing public domain material. When the adapted version of the work is reproduced, it follows that the new copyrighted material is perforce reproduced and it is the reproduction of this material, if done without the copyright owner's authority, that gives rise to copyright infringement. Theoretically, if one was to use the adapted version as a vehicle for copying only the unoriginal or public domain parts of the work, there would be no possibility of copyright infringement. By the same token, the fact that an adapted new version of a work enjoys copyright is no bar to a would-be user going back to the original traditional version of the work and copying it. Accordingly, when copying a revised, updated or adapted version of an old work, be it a song or any other type of work eligible for copyright, one must be slow to assume that this can be done legitimately purely because the work in a general sense is in the public domain.

Furthermore, indirect reproduction of a work (ie, reproducing something that is itself a reproduction of the copyrighted work) nevertheless constitutes reproduction of the work. In the case of *The Lion Sleeps Tonight*, Disney in fact reproduced a song that was an intervening or intermediate version of *Mbube* (the original song), namely the song *Wimoweh*. So too, in the case of, for instance, *Jikela Emaweni*, the original applicants copied a version of the song as performed by the Bloemfontein Children's' Choir, but that version was itself copied from the Gallo version, albeit with permission.

Finally, the fact that an infringer might hold copyright in his infringing work (because it introduces additional original elements) is of no consequence in evaluating whether his version is an infringing copy of an earlier work. The two issues are unrelated. The test for infringement is simply whether the contentious version comprises any substantial part of the earlier work, no matter what else it might also comprise.

In conclusion, South Africa has a wealth – a veritable treasure trove – of songs and other cultural expressions, which are of high quality and can be very attractive to foreign interests who may wish to use and exploit them for their own benefit. Preventing this and controlling this form of exploitation requires vigilance, care and resources. South Africans should be astute to not allow this to happen. Preserving our heritage demands of us that we do not allow our treasure trove to be plundered by others.

Owen Dean *BA LLD (Stell)* is an attorney at Spoor & Fisher in Pretoria. He acted on behalf of Solomon Linda's estate.