

When is a dividend not a dividend?

porting that 'the Receiver of Revenue had decided not to allow Wit Deep to avoid undistributed profits tax by issuing bonus shares'. Neither the Secretary nor any receiver has a discretion in this question, which involves a straightforward application of the terms of the Income Tax Act. In fact, any other response from the Revenue authorities would in all likelihood have been most improper.

Thus the references in the further extract from the report in the *Financial Mail* reproduced below to a 'ruling' and a 'rationale' are irrelevant, but the final sentence is the one that should drive home the lesson:

'The Secretary for Inland Revenue's ruling on bonus shares is not new. Evidently Wit Deep was allowed to go ahead with its bonus issues due to an oversight on the part of an assessor, who seems to have missed the rationale that bonus shares are always part of a company, and so cannot be construed as a distribution. And this was to shareholders' detriment since the R227 000 paid in UPT is lost, whereas it might otherwise have been distributed to them.'

Directors of companies and financial reporters should finally note that the award of capitalization shares as part of the equity share capital of a company does not constitute the distribution of a dividend for any purpose of the Income Tax Act.

The Copyright Act and the creative person — III

Works that enjoy copyright

It is self-evident that the creative person who produces a work can own copyright in that work only if the work itself is the subject of copyright. What types or categories of works fall within the scope of the Copyright Act of 1978 and what requirements or conditions must these works meet in order to enjoy copyright?

The types of works that can be the subjects of copyright are as follows:

Literary works

Section 1 of the Act defines a 'literary work' as follows:

' "[L]iterary work" includes, irrespective of literary quality and in whatever mode or form expressed —

- (a) novels, stories and poetical works;
- (b) dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts;
- (c) textbooks, treatises, histories, biographies, essays and articles;
- (d) encyclopaedias and dictionaries;
- (e) letters, reports and memoranda;
- (f) lectures, addresses and sermons; and
- (g) written tables and compilations.'

The term 'literary work' is something of a misnomer, and a description such as 'written works' would probably convey a more accurate impression. What is in fact meant by 'literary works' in the Copyright Act is any combination

of letters or numerals or both which embodies the results of a measure of intellectual effort or skill. Mere sentences or slogans, however mundane, can qualify as literary works under the Act.

It is interesting to note that the definition of 'literary works' also includes dramatic works. Under the 1965 Act, dramatic works were treated as a separate category, although in practice there was very little, if any, difference in the treatment meted out by the 1965 Act to literary and dramatic works.

Musical works

There is no definition in the Act of a musical work, and the term must therefore be interpreted according to its ordinary meaning, with the important qualification that the music must have been reduced to writing or musical notations or otherwise preserved on a record or a tape.

Artistic works

Section 1 of the Act defines an 'artistic work' as meaning

'irrespective of the artistic quality thereof —

- (a) paintings, sculptures, drawings, engravings and photographs;
- (b) works of architecture, being either buildings or models of buildings; or
- (c) works of artistic craftsmanship, not falling within either paragraph (a) or (b).'

Some of the terms used in the definition are themselves the subjects of definitions in the Act. I mention only that 'drawing' is defined as

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Works that enjoy copyright

including any diagram, map, chart or plan, and 'photograph' means any product of photography, but does not include any part of a cinematograph film.

The term 'artistic work' is also something of a misnomer. In effect the description embraces visual representations of ideas or the results of intellectual effort. The qualitative standard or assessment which is normally conveyed by use of the word 'art' is not applicable in this situation or context. The foregoing may not be entirely true of the category 'works of artistic craftsmanship', since in this category the word 'artistic' is once again introduced, which may have the effect of conveying a qualitative standard. The view has been expressed that whether or not a particular article is a work of artistic craftsmanship will depend, not on the assessment of the beholder, but on the intention of the author or creator of the work at the time of creation.

Sound recordings

Section 1 of the Act defines a sound recording as a direct exclusively aural fixation of the sounds of a performance or of other sounds capable of reproduction. Sounds embodied in the sound-track of a cinematograph film are, however, specifically excluded from the definition.

It must be emphasized that the work that we are dealing with here is the actual record or tape, not, for instance, the musical work that is embodied in the record. The musical work as such is a separate work and is an independent subject of copyright. So, too, the record is an independent work and an independent subject of copyright, although it may embody another copyright.

Cinematograph films

These are defined in s 1 of the Act as

'the first fixation by any means whatsoever on film or any other material of a sequence of images capable, when used in conjunction with any mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a sound-track associated with the film'.

Once again I must emphasize that a cinematograph film is a separate and independent work and subject of copyright and must be distinguished from the scenario of the film, which is a literary work and the subject of independent copyright.

Sound and television broadcasts

These types of works are defined in s 1 as having the same meaning as is assigned to them in the Broadcasting Act 1976. Like cinematograph films and sound recordings, broadcasts are independent subjects of copyright

and may comprise other independent works that are the subject of copyright, such as artistic works or literary works.

Programme carrying signals

This type of work is an innovation in the Act of 1978. In effect it is a broadcast while in the course of transmission.

As I have said, the 1978 Act does not give protection to published editions, that is, the typographical arrangements featured on the page of a book or other material, but the Act does make provision for published editions that enjoy protection under the 1965 Act to continue to enjoy such protection until the expiration of the term of copyright. I might mention at this point that the author of a published edition is the publisher.

What conditions or requirements must the types of works that I have discussed meet in order to qualify for copyright? Before going on to state the conditions or requirements, I must emphasize that there are no formalities as such prescribed for the coming into being of copyright. Unlike other forms of intellectual property law, the Copyright Act does not make provision for any form of registration or the taking of any formal step in order to obtain copyright in a work. Registration of the copyright in a work, except for cinematograph films, is neither necessary nor possible. The Registration of Copyright in Cinematograph Films Act was passed in 1977, but it has not yet come into force. It makes provision for the registration of copyright in cinematograph films, but registration is purely voluntary and is intended purely to facilitate the proof of copyright and title in that copyright. Copyright in a cinematograph film exists irrespective of registration under the new Act when it comes into force.

There are three general requirements not dealt with specifically in the Copyright Act that are derived from the common law:

Propriety

The British courts have held, and it is generally accepted, that the law will not protect works that are considered by society to be defamatory, indecent, immoral or lacking in propriety.

Originality

It is a requirement for the subsistence of copyright in a work that the work must be original. This requirement does not mean that the work must be in any way unique or inventive, but merely that it should be the product of the author's or maker's own labours and endeavours and should not be copied from other sources.

Material form

For copyright purposes, a work does not come into existence until it is reduced to a material or perceptible form.¹ So, for instance, a musical work does not come into being while it exists only in the composer's mind, even though he might give a rendition of it on a musical instrument; it will come into being only when it is reduced to some material form, such as a written notation. The same principle would apply to a novel or a lecture. I must iterate the maxim that there is no copyright in ideas. It is the material or perceptible form of expression of the idea that is the subject of copyright.

Before dealing with the specific requirements or conditions laid down in the Copyright Act for the subsistence of copyright in a work I must mention two relevant and material concepts:

Qualified person

When it deals with the personal circumstances of the author of a work, the Copyright Act refers to a 'qualified person'. Speaking generally, as far as the claim of the author as an individual to copyright in his work is concerned, the Act is interested only in authors who are qualified persons.

A qualified person in terms of the Act is an individual who is a citizen of or is domiciled or resident in South Africa or a country to which the operation of the Act is extended by proclamation, and a company must be incorporated under South African law or under the law of a country to which the operation of the Act is extended by proclamation.

Publication

Section 42(a) of the Act states that publication of a work means that, with the exception of a cinematograph film, copies of the work have been issued with the consent of the copyright owner to the public in sufficient quantities so as, having regard to the nature of the work, to satisfy the public's reasonable requirements. A cinematograph film is considered to be published if copies of the film are sold, let for hire or offered for sale or hire to the public. The Act states specifically that certain acts in relation to works do not amount to publication, namely:

- The performance of a dramatic or dramatic-musical or musical work, or of a cinematograph film.
- The public delivery of a literary work.
- The transmission of a work in a diffusion service.
- The broadcasting of a work.
- The exhibition of a work of art.
- The construction of a work of architecture.

I come now to the specific conditions laid

down in the Copyright Act that must be met before a work can enjoy copyright in South Africa:

The author, or one of the authors where there is joint authorship, must have been a qualified person at the time when the work or a substantial part of it was made. Alternatively, if the work has been published, the first publication of the work must have taken place in South Africa or in a country to which the operation of the Act has been extended by proclamation.

The author of a cinematograph film must have been a qualified person at the time when the film or a substantial part of it was made, or alternatively the film must have been made or first published in South Africa or in a country to which the operation of the Act is extended by proclamation.

Broadcasts and programme carrying signals must have been made or emitted by a qualified person or alternatively must have been made or emitted from within the Republic or a country to which the operation of the Act is extended by proclamation.

Book Review

Law, Legislation and Liberty – A New Statement of the Liberal Principles of Justice and Political Economy: vol 1 Rules and Order (180 pp) vol 2 The Mirage of Social Justice (190 pp) by Professor F A Hayek. Published by Routledge, Kegan & Paul.

Rules and Order is a scholarly study of the history and nature of the forces of order in society. Professor Hayek distinguishes between spontaneous (taxis) and directed (cosmos) order. He shows how judges 'find' common law and compares this phenomenon with the constructivist procedures adopted by so many legislative bodies in their law-making activities.

The theme of *The Mirage of Social Justice* is simply that the clamour for 'social justice' when that expression is used in the context of distributive justice (just prices, just incomes, just interest rates et al) is 'either thoughtless or fraudulent'. This volume would be compulsory reading for public opinion makers, except that Professor Hayek would shrink from being associated with anything so coercive.

A third volume, *The Political Order of a Free Society*, is to be published 'as soon as the advance of old age permits'. Professor Hayek may think that he is slowing down, but there is no corroborative evidence in the first two volumes, and if the third book of this well-researched trilogy follows the same pattern, it will be difficult for *Law, Legislation and Liberty* to avoid the acclaim of being hailed a classic.

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¹See (1979) 8 BML 171.