

## Intellectual property

## Hello, is there anyone out there?

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Copyright in South Africa runs the risk of becoming an endangered species and ultimately suffering the fate of the dinosaur. The reason for this unhappy state of affairs is that, like all species which have faded into extinction, it is failing to adapt to changed and ever-changing circumstances. The blame for this must be laid squarely at the door of government.

The parlous state of the music and record industries in South Africa as a direct result of piracy and counterfeiting of CDs and tapes is well known. The film industry and the computer software industry aren't far behind. The publishing industry, increasingly impacted by the illegal photocopying of books, is fast becoming a fellow traveller.

The ineffectiveness of our current copyright laws and of their enforcement (the two are related) are the dominant contributing forces to this unhappy state of affairs. Matters have reached the stage where there have been reports of vigilante groups in the music industry taking the law into their own hands in order to protect their livelihoods.

Copyright is the branch of the law which has the mission of protecting the rights of creative people. The purport of copyright law is to enable creators to reap the material fruits that their application of effort and talent warrant. In essence, copyright law grants a monopoly to the copyright owner in the performance of certain acts in relation to his work. These are essentially the various manners in which the works in question are capable of economic exploitation. Perhaps the foremost of these rights is the right to restrain, or control, reproduction of the works, hence the term, copyright.

The current South African Copyright Act, dating from 1978, is inherently a reasonable piece of legislation. In 1978 it could be said to have been "state of the art." Through the 80s and 90s it was regularly amended and updated in an attempt to keep pace with modern circumstances and in particular technological advances which made copying so much easier and the results of copying of increasingly good and acceptable quality.

However, with the dawn of the new millennium this evolutionary adaptation process ground to a halt. One can speculate as to the reasons for this. Whatever they may be, the result is that the law is now outdated, ineffective and no longer doing its job.

One of the largest obstacles to the enforcement of copyright, and one which is increasingly rendering it impotent, is the practical difficulty of proving subsistence of copyright in a work and the ownership of that copyright. There is no registration system for copyright – it exists automatically provided certain conditions are met. In order to establish copyright in a work, the Act requires that it must be proved by way of admissible evidence (not hearsay) that the author or maker of the work is a citizen or perma-

nent resident of South Africa or of a country which has been proclaimed under the Act as being a member of the Berne Convention, the international convention which regulates international copyright.

Alternatively, it must be shown that the work was first published, (that is, distributed to the public in commercial quantities), in South Africa or in a Berne Convention country. Furthermore, it must be shown that the work is original, namely that it is the author's own independent product and is not simply copied from an earlier work. Regrettably this is not as simple in practice as it sounds. This will be illustrated by way of an example.

Suppose that a copyright owner wishes to bring a copyright infringement case for an unauthorised performance of a work of American origin. The work is a musical work composed by, say, the famous composer John Williams (who has written the musical scores for many famous movies). The plaintiff must adduce admissible evidence showing that he indeed wrote the work in question, did not copy it from elsewhere and is an American citizen or permanent resident. If the court proceedings for which the evidence is required is a civil trial or a criminal prosecution, John Williams would have to appear in person before the South African court. This may be difficult to procure.

In the event the proceedings are an application before the high court, an affidavit must be secured from John Williams. This can also apply in exceptional instances in civil trials and criminal prosecutions. It may be difficult to persuade John Williams, who doubtless has many better things to do, to go to the trouble of deposing to an affidavit before a Commissioner of Oaths in the United States of America so that court proceedings can be brought in far-flung South Africa because of peculiarities of the South African law which do not apply in most other countries.

Assuming that the co-operation of John Williams can be secured to the extent that he is prepared to travel to South Africa to give evidence in the South African court or is prepared to depose to an affidavit, his music publisher, who is the plaintiff, must then show how he secured ownership of the performing rights of the musical work in question. In all probability this was done by way of an agreement which would have to be proved before the South African court by a signatory. The witness identifying the agreement would have to appear in person or alternatively, in the case of application proceedings would have to make an affidavit. This situation as described is but an example of the problems which all copyright owners face in bringing court proceedings to enforce their copyright.



Dean

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The logistics of putting together evidence, and the costs of doing so in view of the complexity of the situation, are nightmarish. It can be done, and has been done, but at what cost and effort? This unhappy situation has been described primarily with reference to civil copyright infringement proceedings. How much greater the problem when it comes to criminal enforcement of copyright?

In this instance the state, namely investigating officers of the SA Police and harassed and overworked prosecutors, must put the evidence together; the mind boggles. Imagine the State, or the copyright owner in civil proceedings for that matter, faced with the situation where hundreds of pirate CDs have been seized in a raid and it becomes necessary to prove the copyright in the same way in respect of each and every one of the works involved. This virtually defies contemplation. Small wonder that effective enforcement of copyright is very sparse and copyright industries are in their present plight.

Other countries, and notably the United Kingdom, the genesis of our copyright law, have overcome this problem in a very simple manner. The law contains a provision that where assertions of fact relating to the subsistence and ownership of copyright are made in copyright infringement pro-

ceedings, these facts will stand unless they are properly placed in dispute by the alleged infringer. The logistics of proving subsistence and ownership of copyright becomes a relatively simple and swift process enabling easy and effective institution of enforcement measures.

The Copyright Act makes provision for the Minister of Trade and Industry, the responsible minister, to be assisted by an advisory committee. Such a committee is, and has been since 1978, in existence. In the 20th century the advisory committee was very largely responsible for the regular amendments of the Copyright Act and for keeping the law abreast of the times.

In the late 1990s various amendments to the Copyright Act, aimed at dealing inter alia with the electronic media and the internet, but most pertinently with the introduction of a measure along the lines of the provision in the United Kingdom Copyright Act (for simplifying proof of subsistence and ownership of copyright as described above), were put to the Advisory Committee. The provision said that statements of fact regarding proof of copyright would stand in court proceedings unless placed in issue by the alleged infringer. This meant adducing evidence which suggested that the facts on which reliance were placed were not correct; a mere denial was insufficient to place the issue in dispute. It is believed that this proposal, along with the others, was submitted to government with the recommendation that they be adopted. They have simply disappeared into the abyss.

Seven years later there is no trace of them, let alone any amendments to the law. Enquiries about the fate of the proposals have been fruitless. Indeed, while prior to the new millennium the Copyright Act was amended virtually on an annual basis, amendments in this millennium have been few and far between, and pressing issues have not been addressed. This is simply not good enough if the law is to remain relevant.

It is time for a serious wake-up call. ♦

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