

QUO VADIS COPYRIGHT?

INTRODUCTION

Copyright law had its origins in the 18th Century when the need was felt to protect the investment of printers in carrying out the new-fangled process of mass production of books. Its ambit was extended over the years to cover additional forms of works such as musical and artistic works and then in the 20th Century a major quantum leap was made and works such as sound recordings, published editions, television broadcasts and others were brought within its ambit. Throughout the ages, copyright has shown the ability and a willingness to adapt to meet changed circumstances and to cater for new forms of expression of the fruits of intellectual activity. In this way, rules formulated to deal with the printing and distribution of books were successfully adapted to deal with far removed exigencies such as computer programs and the dissemination of works over the internet.

In the result, the horizons of copyright law have been broadened over the ages and it has been able to remain relevant. Technological changes and developments have posed enormous challenges to the ability of copyright to evolve and expand and the phenomenon of the internet has tested the adaptability of copyright to the ultimate and perhaps to breaking point. The ease and speed with which works can be disseminated worldwide in an instant over the internet has caused copyright to reach a crisis and new ways of enforcing copyright and giving effect to the rights which it confers upon creative people are required. The real challenge to copyright in the future lies in its enforcement and not necessarily with its ability to adapt itself to deal with ever evolving forms of like types of works. It is intrinsically up to this latter challenge.

BASIC PRINCIPLES

The secret to copyright's adaptability has been its foundation on certain basic principles which have proved to be evergreen and enduring. In order to qualify for copyright, a work must be original, that is to say it must be the result of the independent effort and expertise of the maker or author; it must exist in a material form, which means that there is no copyright in ideas but simply in the manner and form of their expression; the author of the work must be identifiable and have certain

characteristics or attributes; and the work enjoys protection for a limited and predetermined period, whereafter it falls into the public domain and is free for use by all.

The application of these basic principles to new forms of essentially homogenous works which have arisen over the years has enabled copyright to evolve with the times. Computer programs, could, for instance, be accommodated because they and their circumstances of creation could be fitted within these basic principles. In general it has not been sought to fit within the ambit of copyright works which cannot comply with these basic conditions or requirements, i.e. heterogeneous works.

SUBVERSIVE TREND

A trend has developed in recent times to try and protect under the aegis of copyright works which do not, and cannot, comply with these basic tenets. The South African Government is a prime transgressor in this regard. By means of the Intellectual Property Laws Amendment Act, 2011 (which has been passed by Parliament but not yet assented to by the State President) it is sought to protect works of so called "traditional knowledge" as species of works qualifying for copyright. These works of "traditional knowledge," or more correctly, "cultural expressions," entail folklore, traditional stories, traditional music, traditional art and the like, which have no known author or maker, and which have been in existence for ages and currently fall outside the parameters of works eligible for copyright.

The South African legislation will for the sake of convenience be referred to as the "traditional knowledge law". The law seeks to create protection for traditional knowledge by introducing amendments into the Performance Protection Act, the Copyright Act, the Trade Marks Act and the Designs Act. These amendments purport to adapt the existing statutes so as to make them applicable to, and govern, traditional works as distinct species of those categories of works currently already provided for in such legislation. In other words, for instance, traditional stories will become a sub-category of literary works. It is beyond the scope of this discussion to examine the effect that the legislation will have on each of these intellectual property statutes, and attention will be devoted entirely to the Copyright Act.

For the purposes of this discussion attention will be focused on stories comprised in folklore as an example of the difficulties which obtain in treating traditional works under copyright. The works in

question are traditional stories which have been handed down from generation to generation within a particular community. Similar considerations apply to traditional music and traditional art and in general the points that will be advanced apply to these types of works in the same way as they apply to stories which are part of folklore.

COMPLIANCE WITH BASIC PRINCIPLES

The cornerstone of copyright is the “author” or maker of a work. In accordance with the basic theory of copyright, it exists in order to enable the author of a work to gain a reward from the material benefits which can flow from the use of the work, and to provide an incentive to him/her to create more and better works. Whether a particular work enjoys copyright is largely dependent on how the author went about creating the work and in normal circumstances the author is the initial owner of the copyright in the work. One cannot assess the subsistence and ownership of copyright in a work without in the first place identifying the author.

A traditional story which is a part of folklore is generally one which has been handed down over many generations and its author is unknown. At the outset, then, it is impossible to determine whether its author meets the criteria laid down in copyright law for a work to qualify for copyright, namely the author must be a citizen or permanent resident of a particular country. Furthermore, the initial ownership of the work cannot be determined in accordance with the normal principles of copyright law. The traditional knowledge legislation seeks to make the community of which the story is a tradition the author and first owner of copyright. There is no basis in copyright theory and law for an amorphous non-juristic entity to be designated as the author of a work. In copyright terms it is simply factually incorrect for a community, as distinct from individuals within a community, to be regarded as the author or creator of a literary work.

In order to qualify for copyright, a story or literary work must be “original”. Someone seeking to exert copyright in a work must provide evidence that time, effort and/or expertise (often known as the “sweat of the brow”) were expended in the making of work and that it was not copied from a pre-existing work but rather is the result of the independent effort of the author. The author himself is the obvious and essential person to provide the relevant facts. In the case of a traditional story of which the author is unknown it is not possible for the appropriate and required evidence to be adduced in order to justify a conclusion that the work is “original”. Against what pre-existing material

can the originality or own effort of the author be tested? As a practical issue, a traditional story by its nature cannot meet the copyright test of originality.

It is trite that copyright does not protect ideas but rather the material expression of ideas or information. The author of a literary work is the person who clothes ideas or information in a material form. However, that person cannot simply copy existing material and there must be an own contribution in a work for copyright to subsist in it. A traditional story which has been in existence for several generations is more often than not in a non-material form and has been handed down by word of mouth from generation to generation. For an existing story that has stood the test of time to be recorded or reduced to a material form at the current stage will create a material embodiment of a work that will not meet the test of originality and thus qualify for copyright. The person creating the material form will be a mere amanuensis whose contribution will not qualify for authorship of a literary work. For as long as it remains inchoate it cannot qualify for copyright since it will not have passed from the realms of ideas into being in a material form.

In terms of copyright theory, a pact is entered into between the individual and the state in terms of which a qualified monopoly to the use of the work is conferred upon the individual by the state as a reward in return for, and subject to, the work passing into the public domain and being free for use by all after the elapse of the predetermined period. In the case of a literary work, the term of the copyright is calculated with reference to the date of the death of the author, who is an individual. The traditional knowledge legislation envisages that copyright in a traditional story will exist in perpetuity and that the work will never enter into the public domain. Indeed, the reverse occurs because the legislation seeks to extract works which are currently in the public domain and convert them into protected works with a perpetual term of protection. In truth, it would be difficult to apply the standard rules of copyright regarding the term of protection to a traditional story because there is no known individual author whose lifetime could determine the term of protection.

UNWHOLESOME ADAPTATION

It is beyond the scope of this discussion to analyse all the weaknesses, anomalies and contradictions contained in the traditional knowledge legislation. It suffices to make the point that traditional stories are not suitable subject matter for copyright protection because they cannot meet the basic precepts of copyright law. Yet, the South African government has decreed that they shall

be protected by copyright. In order to attempt to give some effect to the legislature's intention it will perforce be necessary to adapt or vary the previously mentioned basic principles of copyright law. Some way will have to be found to conclude that a traditional story is original and in a material form, and that the amorphous community (whatever that may be) can meet the qualifications laid down in existing copyright law for it to be a person capable of making and being the owner of a literary work. The perpetual life of the copyright in the traditional story will have to be made an exception to the fundamental principle that works protected by copyright pass into the public domain with the efflux of time. A different set of standards will have to apply to this particular species of literary work as compared to all other species of such category of work

The adaptations referred to above will necessitate that the established copyright concepts of "authorship", "originality," "material form" and limited term are fundamentally altered and undermined. Arguably, doing injury to these concepts will debase copyright law and transform it into something different.

The simple fact of the matter is that traditional stories are not adapted to enjoy copyright protection because they cannot meet the basic requirements for such protection, in accordance with the long standing basic requirements of the law. Artificially imposing traditional stories on copyright law cannot be achieved without riding rough shod over the fundamental elements of copyright.

It is one thing to adapt copyright law on an evolutionary basis so as to cover new types of works if those new works can meet the basic requirements of the law. It is an altogether different proposition to attempt to adapt the law to deal with heterogeneous types of works which are not suited to incorporation into the fold. Adapting copyright law in this manner cannot but undermine it and ultimately lead to its destruction. Copyright law should not have to deal such attacks on its basic fibre. Whatever the merits for granting some form of protection to traditional works might be, this objective should not be achieved at the cost of the destruction of a body of law which has successfully evolved with the times for several centuries and fulfilled an important purpose. A new form of protection couched in custom made legislation designed and suitable for the purpose should be devised for traditional works if it is considered that they warrant protection. The form and extent of the protection may well differ from copyright because of the different nature and circumstances of the type of work.

SURVIVAL OF COPYRIGHT

Countries, and in particular South Africa, as it is one of the negative front runners, should be dissuaded from attempting to bend copyright law so as to meet their policy objectives and expediencies to such an extent as is likely to break it. Copyright still has a critical role to play in a progressive society and economy and it faces a difficult enough challenge in having to deal with problems and shortcomings associated with the digital age without having to be torn in a different direction by imposing upon it heterogeneous works for the protection of which it is fundamentally ill-suited. The international community must resolve to safe-guard copyright from being distorted and abused and should make its voice heard to governments and others who would lead it down the path to destruction.

To sum up, if copyright is to survive into the 21st Century and beyond, it must adapt to cater for new forms of homogeneous works and for modern means of disseminating works. However, if it is to be adapted to try and protect arbitrary forms of heterogeneous works, for which it is fundamentally unsuited, it will not survive in a coherent form. Copyright will have an unpromising and bleak future.

Prof. O H Dean

23 April 2012