THE APPLICATION OF THE COPYRIGHT ACT, 1978, TO WORKS MADE PRIOR TO 1979

by

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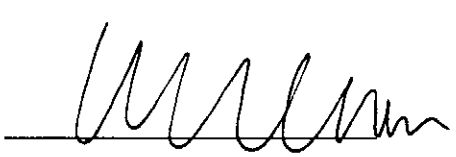
DEDICATION

This work is dedicated to my wife Dana, my sons Ian and Bryan and my daughter Carin.

****

DECLARATION

I the undersigned declare that the work contained in this thesis is my own original work and has not previously in its entirety or in part been submitted at any University for a degree.



Date: 29 November 1988

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CHAPTER I

INTRODUCTION

1. NATURE OF COPYRIGHT

Article 1 Section 8 Clause 8 of the Constitution of the United States of America empowers Congress "*to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries*". This simple clause sums up in a few words the philosophy and underlying principles of modern copyright law. Copyright law, like other branches of intellectual property law (i.e. the laws of patents, trade marks and designs), seeks to create a system whereby the creator of original works or intellectual property is afforded a qualified monopoly in the use or exploitation of his work in order, first, to compensate and reward him for the effort, creativity and talent expended and utilized in the creation of his work, and secondly, to act as an incentive for him to use his talents and efforts to create more and better works or items of intellectual property. The qualified monopoly is limited in duration and after the expiry of the term the work falls into the public domain and can be freely used and reproduced by others. A balance is struck between the interests of the individual and the public interest. The rationale behind this philosophy is the establishment of a profit incentive for creators of intellectual property. The effectiveness of the profit motive is dependent upon the degree to which the creator of the intellectual property is able to maintain and enforce his qualified monopoly. If the law is not effective

in enabling the creator of intellectual property to maintain and enforce his monopoly then the efficiency of the operation of the profit motive will be impaired. Consequently, the soundness and effectiveness of the law of copyright is a significant factor in the promotion of the creation of intellectual property and ultimately in enriching our culture and promoting our knowledge and well-being. Viewed from a different perspective, the purpose of copyright is to prevent one man from appropriating to himself what has been produced by the skill and labour of others[1].

In broad terms, copyright may be described as the exclusive right in relation to a work embodying intellectual property (i.e. the product of the intellect) to do or to authorize others to do certain acts in relation to that work, which acts represent in the case of each type of work the manners in which that work can be exploited for personal gain or profit.

Copyright is an immaterial property right. The subject of the right is a work of the intellect or spirit and thus an intangible. Copyright in a work is akin to ownership in a tangible article. The following analysis of the essential nature of copyright by Slomowitz AJ in **Video Parktown North (Pty) Limited v Paramount Pictures Corporation** is instructive:

> *"It seems to me that when he who harbours an idea, by dint of his imagination, skill or labour, or some or all of them, brings it into being in tactile, visible*

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1. See **The Johannesburg Operatic and Dramatic Society v Music Theatre International & Others**, South African Patent Journal March 1969 223 at 225.

or audible form, capable thereby of being communicated to others as a meaningful conception or apprehension of his mind, a right of property in that idea immediately comes into existence. The proprietary interest in that object of knowledge is the ownership of it and is called 'copyright'. It might just as well be called 'ownership', but we have chosen to call it by another name, reserving 'ownership' as the appellation for the proprietary interest in corporeal things, by way of semantic, but not, as I see it, legal, distinction. In this sense, copyright has sometimes been called 'intellectual property', as it indeed is."[2]

Copyright subsists in the work of the intellect embodied in a material form which is a tangible article. The tangible or physical form of the work embodies two separate items of property, i.e. the copyright in the work of the intellect and the ownership of the tangible article. Ownership of the two items of property must be distinguished and can vest in different persons. Transfer of the ownership of one of the items of property does not necessarily affect transfer of the ownership of the other item of property[3].

2. ORIGINS OF COPYRIGHT

The word "plagiarize" or "plagiarism" means *"take and use another person's (thoughts, writings, inventions or abs.) as*

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2. 1986 (2) SA 623 (T) at p 631.
3. See **Econostat (Pty) Ltd v Lambrecht & Another**, Case No. 19592/81 in the WLD - unreported.

one's own"[4]. This word is an embodiment of the modern concept of copyright or more specifically copyright infringement. It is said to have its origins in the writings of Martial[is], the Roman poet, who in one of his works drew a parallel between his poems and freed slaves; he termed another poet who had misrepresented his (i.e. Martial[is]) works as being his own a '*plagiarius*', i.e. an abductor, of them.

Throughout early history and in the Middle Ages instances of copying of works of the intellect occurred but these acts incurred only moral censure and no legal consequences. The development of the printing press by Johannes Gutenberg towards the middle of the 15th century was the event which sparked off the beginnings of the concept of copyright. This event coincided with the Renaissance and the Reformation which led to an increased desire to acquire knowledge. The initiative in creating a form of copyright was taken by the city of Venice in the late 15th century when it established a system of granting monopolies or privileges for printing books. By the 16th and 17th centuries the practice of sovereigns granting monopolies of this nature had spread widely throughout Europe and it had become a common practice. The beneficiaries under the monopolies were willing to pay for the privileges which were bestowed on them and the sovereign, apart from receiving remuneration, derived the advantage of being able to require approval of the material being printed. This enabled censorship to be exercised. The irony of this early form of protection for works of the intellect was that the author who created the works received

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4. The Concise Oxford Dictionary of Current English, 5th Edition.

no benefit at all; the beneficiaries were limited to the sovereigns and the tradesmen who printed the books. Perhaps it was fortuitous that sovereigns, who had the power to influence the course of events, were prejudiced by unauthorized copying of books; as a result in time a practice which had incurred no more than moral censure began to be transformed into a contravention of law.

The development of copyright was given impetus in England in the Sixteenth Century. At that time Roman Catholicism had been restored in England and widespread persecution of Protestants was taking place under the heresy laws. A system of printer's privileges was in operation but the need was felt to impose stricter censorship of written matter. In 1556 Queen Mary chartered the Stationer's Company, a guild of London printers. Monopoly rights in books they published were granted to the members of this guild. In return, however, all books which they published were required to be submitted for official approval and to be registered. A failure to meet these requirements was punished by decrees of the Star Chamber. The Star Chamber was abolished in 1641 by Parliament. The Star Chamber and its transparent limitation of the freedom of the press had become unpopular. It was replaced by a new Printing Licencing Act in 1643. This Act granted arbitrary powers and was very unpopular. It was repealed in 1694 and all restrictions on the copying of books were lifted. This gave rise to widespread copying and anarchy reigned in the printing field.

As a result of pressure by the printing industry in England to restore order in the chaotic situation which prevailed, the Statute of Anne was adopted in 1710. This piece of

legislation was a watershed in the development of copyright because for the first time the author was recognized as the cornerstone of a system for protecting literary works and the term of the monopoly granted by the state was of limited duration, namely twenty-eight years. The Statute of Anne thus changed the fundamental concepts of the protection of works of the intellect and it exercised a far reaching effect on the development of copyright throughout the civilized world.

The granting of copyright spread from England to other parts of Europe. Denmark adopted copyright legislation in 1741 and France in 1793. The French legislation later served as a model for many European systems of copyright. Throughout the 19th Century most civilized countries adopted copyright legislation. The underlying principles of these laws were those first given expression in the Statute of Anne, namely, making the author the cornerstone of the legislation and the primary beneficiary, and granting protection of predetermined limited duration. The trend throughout the 19th Century was to expand the types of works protected by copyright and the scope of the copyright (i.e. activities which gave rise to infringement), and to lengthen the term of copyright[5].

The further development of British copyright law will be dealt with in Chapter III.

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5. See RF Whale and Jeremy J Phillips, **Whale on Copyright** p 1 *et seq*; EP Skone James, JF Mummery, J Rayner James, **Copinger & Skone James on Copyright**, 12th Edition, p 7 *et seq*; A Latman, **The Copyright Law**, 5th Edition, p 2 *et seq*; and **Encyclopaedia Brittanica**, 15th Edition, Vol 5 p 152 *et seq*, J. Lahore **Intellectual Property in Australia - Copyright**, p

3. DEVELOPMENT OF COPYRIGHT IN SOUTH AFRICA

The first legislative enactment which had any direct bearing on copyright in South Africa was the British Literary Copyright Act of 1842 which had replaced the Statute of Anne. This Act conferred copyright on any work first published in the United Kingdom, irrespective of the country of origin of the author. The copyright conferred by this Act in literary works subsisted not only in the United Kingdom but also in the "British Dominions", which term was defined to include *"all the colonies, settlements and possessions of the Crown which now are or hereafter may be acquired"*.[6] Consequently, to the extent that areas of South Africa were colonies, settlements or possessions of the Crown from time to time during the currency of this Act (until 1917) works first published in the United Kingdom enjoyed copyright in South Africa. The British International Copyright Act, 1886, also applied to the British dominions. This Act extended the protection of British copyright legislation, including the Act of 1842, to works originating from the dominions.

The first of the South African colonies or republics to adopt copyright legislation was the Cape Colony which passed Act No. 4 of 1854 authorizing the importation of foreign reprints of books. This Act was followed by the Copyright Act, No. 2 of 1873, The Books Registry Act, No. 2 of 1888, The Copyright Protection and Books Registration Act, No. 18 of 1895, and The Copyright in Works of Art Act, No. 46 of 1905.

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17 *et seq.*
6. Section 2.

The Natal Colony followed after the Cape Colony in introducing copyright legislation. The earliest copyright legislation in Natal was Ordinance 14 of 1856 which was to the same effect as Act No. 4 of 1854 adopted in the Cape Colony. This Ordinance was repealed by Act 9 of 1896 which was in turn repealed by the Copyright Act, No. 17 of 1897. This Act was followed by the Play Right's Act, No. 44 of 1898 which was subsequently amended by Act No. 18 of 1899.

The Transvaal Republic followed the example of the Cape and Natal and introduced copyright legislation. The first statute was The Copyright Act, No. 2 of 1887. This law was modified slightly in the First Volksraad Resolution of June 20, 1895 - Article 420. This was followed by Proclamation No. 24 of 1902 which dealt with copyright in military maps.

The Orange Free State Republic passed no copyright legislation during its existence as a separate territory.

Not long after the formation of the Union of South Africa in 1910, the Union Parliament passed the Patents, Trade Marks, Designs and Copyright Act, No. 9 of 1916. This Act repealed all the copyright legislation which had previously existed in the provinces which composed the Union. This Act marked the beginning of modern copyright in South Africa.

The 1916 Act was a composite Act dealing with the laws of patents, designs, trade marks and copyright. Copyright was dealt with in Chapter 4 of the Act, in Sections 141 to 160, and in the Third Schedule to the Act. The Third Schedule consisted of the text of the Copyright Act 1911 of the Imperial Parliament, the so-called "British Copyright Act". Section 143 of the 1916 Act declared the British Copyright

Act to be in force in South Africa, subject to certain modifications and additions provided for in Sections 141 to 160 of the 1916 Act. In other words, subject to minor alterations, the British Copyright Act was incorporated holus bolus into South African law.

The 1916 Act and the Third Schedule contained provisions perpetuating copyright which subsisted in South Africa in works in existence prior to 1917. Such copyright was derived from the earlier South African legislation, i.e. the so-called "Provincial Copyright Acts", the British Copyright Act of 1842, or from the Roman-Dutch common law. In terms of Section 147(1) of the 1916 Act copyright subsisting in musical, dramatic and artistic works subsisting in the United Kingdom prior to 1917 was recognized and conferred in South Africa. These works had not necessarily previously enjoyed protection in South Africa. In other words, the 1916 Act perpetuated the copyright in works which previously enjoyed copyright in South Africa under British legislation, the Provincial Copyright Acts and the common law, as well as copyright in musical, dramatic or artistic works which previously subsisted only in the United Kingdom. The way in which this was achieved was to create a system whereby substituted rights under the new legislation were granted in respect of existing rights under the common law, early South African legislation or British legislation. Henceforth only the substituted rights would continue to subsist. Works made prior to 1917 in which no substituted rights subsisted after that date fell into the public domain.

The Act of 1916 was repealed by the Copyright Act, No. 63 of 1965 which came into force on 11 September 1965. This Act was very closely based on the British Copyright Act of 1956,

which had repealed the British Copyright Act of 1911. Unlike the Act of 1916, the Act of 1965 did not, however, declare the British Act of 1956 to be in force in South Africa but simply adopted substantial portions of the language of the British Act of 1956.

The 1965 Act repealed the 1916 Act in its entirety, including the Third Schedule. It dealt with existing works in Section 48, read together with the Sixth Schedule. In terms of Section 41(1) of the Sixth Schedule, the provisions of the 1965 Act applied, except insofar as was otherwise expressly provided in that schedule, in relation to things which existed at the commencement of the Act in 1965 in the same way as they applied in relation to things which came into existence after 1965. In other words, it was envisaged under the 1965 Act that no reference, or very little reference, was necessary to the 1916 Act and that the law of copyright was regulated both in regard to then existing and future works by the provisions of the 1965 Act. In essence, however, the essential provisions of the 1916 Act, particularly those relating to the subsistence, duration and ownership of copyright, were embodied in the 1965 Act, read together with the provisions of the Sixth Schedule. It was virtually a case of the relevant provisions of the 1916 Act being re-enacted in the 1965 Act for application to pre-1965 works.

The Act of 1965 was repealed by the Copyright Act, No. 98 of 1978 which came into force on 1 January 1979. Although the Act of 1978 shows a degree of similarity to the British Copyright Act of 1956, it has departed from the British Act in several material respects and it really amounts to the South African legislature departing on an independent course

in the field of copyright law, as compared with its predecessor, the 1965 Act.

The Act of 1978 has been amended by Act No. 56 of 1980, Act No. 66 of 1983, Act No. 52 of 1984, Act No. 39 of 1986 and Act No. 13 of 1988. The dates of the coming into force of the aforementioned amendments are 23 May 1980, 17 October 1983, 22 June 1984, 23 April 1986 and 23 March 1988, respectively.

4. CURRENT SOUTH AFRICAN COPYRIGHT LAW

The law of copyright in South Africa is currently regulated entirely by the Copyright Act, 1978, as amended. All prior copyright legislation which applied in any way in South Africa has been repealed. In terms of Section 43, the Act applies to works made before it came into operation in the same way as it applies to works made thereafter. This principle is however subject to certain provisos the most important of which is that the Act in no way affects the ownership, duration or validity of any copyright which subsisted under the Copyright Act, 1965, and that it does not create any copyright which did not subsist prior to 11 September 1965, the date on which the Copyright Act, 1965, came into operation and repealed the copyright chapter of the Patents, Trade Marks, Designs and Copyright Act, 1916. The effect of the aforegoing apparently simple principle will be examined in detail in this thesis and it will be shown that the application of Section 43 could involve recognizing or perpetuating rights under copyright derived from 19th century and subsequent British and South African copyright law. These rights, however, owe their current existence to the

Copyright Act, 1978, as amended, and their content and enforcement are regulated by it. It is therefore necessary to commence the analysis of copyright in works made prior to 1979 by examining the Copyright Act, 1978, as amended, and the way in which it regulates the field of copyright law.

CHAPTER II

CURRENT SOUTH AFRICAN COPYRIGHT LAW

1. WORKS WHICH ENJOY COPYRIGHT

Current South African law is regulated by the Copyright Act, 1978, as amended (hereinafter referred to as "the Copyright Act"). Current South African copyright law is entirely a creature of statute. Our common law has long since not granted, and at the present time does not grant, any protection in the nature of copyright to works of intellectual property. Indeed, the current Copyright Act specifically provides in Section 41(4) that no copyright or right in the nature of copyright shall subsist otherwise than by virtue of the Act or some other enactment in that behalf.

A. SUBJECTS OF COPYRIGHT

The types of works which can be the subjects of copyright will first be dealt with. They are the following:

(1) Literary Works

The Act gives a definition of *"literary works"* which reads as follows: *"'literary 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."[1]

It will be noted that the definition of *"literary work"* includes dramatic works. *"Dramatic work"* is defined in the Act as follows:[2] *"'Dramatic work' includes a choreographic work or entertainment in dumb show, if reduced to the material form in which the work or entertainment is to be presented, but does not include a cinematograph film as distinct from a scenario or script for a cinematograph film."*

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 and/or numerals which embody the results of a measure of intellectual effort or skill.[3] Mere sentences or slogans, however mundane, can qualify as literary works under the Act.[4] The British courts have even not excluded the possibility that a single word can be a literary work and thus the subject of copyright.[5] It follows from the aforegoing that, for instance, a book or an article in a

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1. Section 1(1) definition *"literary work"*.
2. Section 1(1) definition *"dramatic work"*.
3. **Northern Office Micro Computers (Pty) Ltd & Others v Rosenstein** 1981 (4) SA 123 (C) at 129. See also **Klep Valves (Pty) Ltd v Saunders Valve Co Ltd** 1987 (2) SA 1 (A) at 21.
4. **Exxon Corporation v Exxon Consultants International Ltd** (1982) RPC 69.
5. **Exxon Corporation v Exxon Consultants International Ltd**, *supra* at 83.

journal, being a literary work, embodies a host of separate literary works, i.e. each paragraph or even each sentence or possibly each phrase.

Computer software[6] and wage and salary forms[7] have been held by our courts to be literary works and to be protectable as such. A literary work must exist in writing or in some other material form, for instance a speech recorded on a tape.[8] The term *"writing"* is defined in the Act to include any form of notation, whether by hand or by printing, typewriting or any similar process.[9]

(2) Musical Works

There is no definition in the Act of a musical work and the term must therefore be given its ordinary meaning with the important qualification that music must have been reduced to writing or musical notations or otherwise have been preserved in a material form, e.g. on a record or a tape.[10]

(3) Artistic Works

The Act defines *"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; and

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6. **Northern Office Micro Computers (Pty) Ltd & others v Rosenstein**, *supra*; **Econostat (Pty) Ltd v Lambrecht & Another**, *supra*.
7. **Kalamazoo Division (Pty) Ltd v Gay & Others** 1978 (2) SA 184 (C).
8. Section 44; **Northern Office Micro Computers (Pty) Ltd & Others v Rosenstein**, *supra*.
9. Section 1(1) definition *"writing"*.
10. Section 44.

(c) works of artistic craftsmanship, or works of craftsmanship of a technical nature, not falling within either para (a) or (b)."[11]

Some of the terms used in the definition are themselves the subjects of definitions in the Act. We mention only that *"drawing"* is defined to include any drawing of a technical nature or any diagram, map, chart or plan,[12] and *"photograph"* means any product of photography or of any process analogous to photography, but does not include any part of a cinematograph film.[13]

As in the case of the term "literary work", the term "artistic work" is also something of a misnomer. What is in effect included in the description are visual representations of ideas or of the results of intellectual effort, in a material form.[14]

Works such as cutlery, needlework and stained glass would constitute works of artistic craftsmanship,[15] while to date it has been stated by our courts that the glass fibre hull of a boat,[16] the prototype of a motor car silencer,[17] a wooden model of a kitchen appliance[18] and a valve[19] are

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11. Section 1(1) definition *"artistic work"*.
12. Section 1(1) definition *"drawing"*.
13. Section 1(1) definition *"photograph"*.
14. See Laddie, Prescott and Vitoria, **The Modern Law of Copyright**, paras 3.12, 3.13 and 3.25. See also **Klep Valves (Pty) Ltd v Saunders Valve Co Ltd**, *supra* at 19.
15. **Laddie, Prescott and Vitoria**, *op cit*, para 3.24.
16. **Butt v Schultz & Another** 1984 (3) SA 568 (E); **Schultz v Butt** 1986 (3) SA 667 (A).
17. **Bosal Afrika (Pty) Ltd v Grapnel (Pty) Ltd & Another** 1985 (4) SA 882 (C).
18. **Kambrook Distributing v Haz Products & Others** Case No 21810/84 in the WLD - unreported.
19. **Insamcor (Pty) Ltd v Machinenfabriek Sidler Stalder AG t/a Sistag & Another** 1987 (4) SA 660 (W).

included in the concept of "works of craftsmanship of a technical nature".

(4) Sound Recordings

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.[20]

The Act defines *"record"* to mean "*any disc, tape, perforated roll or other device in or on which sounds are embodied so as to be capable of being automatically reproduced therefrom or performed*".[21]

It must be emphasized that the work which is here being dealt with is the actual record or tape, not, for instance, the musical work 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 copyrighted work.

(5) Cinematograph Films

This type of work is defined in the Act as being

> *"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 sound*

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20. Section 1(1) definition *"sound recording"*.
21. Section 1(1) definition *"record"*.

embodied in a sound-track associated with the film".[22] The Act extends this definition so as to cover also works expressed by a process analogous to cinematography.[23] The "*sound track*" referred to in the definition is a record of sounds which is incorporated in any print, negative, tape or other article on which the film or part of it is recorded or which is issued for use together with the film.[24]

The definition of cinematograph film is very wide in its scope and includes conventional celluloid films as well as video tapes. Our courts have held that even a micro-chip embodying computer software for a video game falls within the definition.[25]

Once again it must be emphasized that a cinematograph film is a separate and independent work and the subject of copyright and must be distinguished, from, for instance, the scenario of the film, which is a literary work, or the musical score, which is a musical work - these works are the subjects of independent copyright.

(6) Sound and Television Broadcasts

These types of works are defined to have the same meaning assigned to them in the Broadcasting Act 1976.[26] The Broadcasting Act defines "*broadcasting service*" to mean "a *telecommunication service of transmissions consisting of sounds, images, signs or signals which takes place by means of radio and is intended for reception by the general pub-*

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22. Section 1(1) definition "*cinematograph film*".
23. Section 2(1)(d).
24. Section 1(2).
25. **Atari, Inc. & Another v J B Radio Parts (Pty) Ltd** Case No 17419/83 in the TPD - order granted, but no written judgement delivered.
26. Section 1(1) definition "*broadcast*".

lic".[27] The Copyright Act, however, elaborates on this definition so as to clarify that "broadcast" includes the emitting of programme carrying signals to a satellite.[28] As in the case of cinematograph films and sound recordings, broadcasts are independent subjects of copyright and may embody other independent works which are the subjects of copyright, such as artistic works, literary works or cinematograph films.

(7) Programme Carrying Signals

This type of work is an innovation in the Act of 1978 and in effect is a broadcast while in the course of transmission through the ether from a satellite. The following definitions have relevance to this type of work.[29]

(a) *"programme"* means a body of live or recorded material consisting of images or sounds or both, embodied in signals emitted for the purpose of ultimate distribution;
(b) *"signal"* means an electronically generated carrier capable of transmitting programmes.
(c) *"emitted signal"* means a programme carrying signal which goes to or passes through a satellite;
(d) *"satellite"* means any device in extra-terrestrial space capable of transmitting signals;
(e) *"derived signal"* means a signal obtained by modifying the technical characteristics of the emitted signal whether or not there have been one or more intervening fixations.

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27. Section 1 of the Broadcasting Act, 1976, Act No. 73 of 1976.
28. Section 1(1) definition *"broadcast"*.
29. See the definitions of these terms in s 1(1).

This type of work, while being the subject of independent copyright, also may embody other independent copyrighted works.

(8) Published Editions

This type of work is defined in the Act to mean: "*the first print by whatever process of a particular typographical arrangement of a literary or musical work*".[30]

In effect this type of work amounts to the typographical arrangements featured on the page of a book or on other material. This category of work was protected under the 1965 Act[31] but the protection was done away with in the 1978 Copyright Act, initially, save to the extent that published editions which had enjoyed protection under the 1965 Act continued to enjoy such protection until the term of copyright under that Act, i.e. 25 years, has expired.[32] Protection for published editions was reintroduced into the 1978 Copyright Act in the 1984 Amendment.[33] By virtue of the retrospective operation of the Act,[34] the reintroduction of published editions as a category of work capable of enjoying copyright has had the effect of conferring copyright on published editions made during the period 1979 to 1984, as well as on published editions made subsequent to the coming into operation of the amendment in 1984.[35]

A published edition, being the subject of independent copyright, often embodies other independent copyright works.

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30. Section 1(1) definition "*published edition*".
31. See Section 16 of the Act of 1965.
32. See Section 43(b) prior to its amendment by the Copyright Amendment Act 1984.
33. See, *inter alia*, Section 2 of the Copyright Amendment Act, 1984.
34. See s 43 and page 94 *infra*.
35. cf **Butt v. Schultz & Another**, *supra*, and **Schultz v. Butt**, *supra*.

The product of intellectual activity cannot be protected by the law of copyright unless it can be accommodated within one of the above categories of works.[36] So, for instance, computer software cannot be protected by copyright save insofar as it can be considered to be a literary work, artistic work, cinematograph film, etc. A work should thus always be categorized in one of the recognized classes when copyright is sought to be exerted in it. As will appear below the scope of the copyright in a work is also determined to a large extent by into which class or type it falls.

B. CONDITIONS FOR SUBSISTENCE OF COPYRIGHT

What conditions or requirements must the types of works discussed above meet in order to qualify for copyright? Before going on to state the conditions or requirements it is necessary to 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.

(1) General Requirements

There are two general requirements which a work must meet in order to enjoy copyright, namely, the following:

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36. See **Northern Office Micro Computers (Pty) Ltd & Others v. Rosenstein**, *supra*.

(a) Originality

It is a requirement for the subsistence of copyright in a work that the work must be original.[37] This 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.[38] It is submitted that a work can be partially original, i.e. where it is based on a previous work but contains new matter; it is original to the extent of the new matter. Insofar as an independent copyright subsists in the work, it covers that part of the new work which is original to the author and is new matter. It is specifically provided in Section 2(3) of the Act that a work is not ineligible for copyright simply because making it involved doing something which infringed the copyright in an existing work. Insofar as the second work consists of copied material it is not original and may infringe another copyright, but insofar as it contains new matter it is original and eligible for copyright.[39]

(b) Material Form

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37. Section 2(1).
38. For discussions on the question of "originality", see **Topka t/a Topring Manufacturing & Engineering v. Ehrenberg Engineering (Pty) Ltd**, an unreported decision of the Appellate Division; **Kalamazoo Division (Pty) Ltd v. Gay & Others**, *supra*; **Northern Office Micro Computers (Pty) Ltd & Others v. Rosenstein**, *supra*; **Econostat (Pty) Ltd v. Lambrecht & Another**, *supra*; **Barber-Greene Company & Others v. Crushquip (Pty) Ltd**, Case No. 14752/83 in the WLD - unreported; **Saunders Valve Co. Ltd v. Klep Valves (Pty) Ltd**, 1985(1) SA 646 (T); **Baker & Nelson (Pty) Ltd v. Procast Holdings (Pty) Ltd & Another**, Case No. 10555/83 in the CPD - unreported; **Pan African Engineers (Pty) Ltd v. Hydro Tube (Pty) Ltd & Another**, 1972(1) SA 470 (W); **Klep Valves (Pty) Ltd v. Saunders Valve Co. Ltd**, *supra*; **Kambrook Distributing v Haz Products & Others**, *supra*.
39. See in this connection **Bosal Afrika (Pty) Ltd v. Grapnel (Pty) Ltd & Another**, *supra*; **Kambrook Distributing v Haz Products & Others**, *supra*.

The work must exist in writing or some other material form.[40] The Act defines *"writing"* to mean "*any form of notation, whether by hand or by printing, typewriting or any similar process*".[41] For copyright purposes, a work does not come into existence until it is reduced to a material form.[42] So, for instance, a musical work does not come into being while it only exists in the composer's mind even though he might give a rendition of it on a musical instrument; it will only come into being when it is reduced to some material form such as a written notation. The same principle applies to a novel or a lecture, etc. It is a maxim in copyright law that there is no copyright in ideas. It is the material form of expression of the idea which is the subject of copyright.[43]

It is difficult to reconcile the requirement that a work must exist in a material form with the nature of broadcasts and programme carrying signals, which are electrical impulses often not embodying pre-recorded material. It is submitted that this requirement must be adapted in the case of these works to allow for the existence, and thus protection, of the work when it is in a form in which it is capable of being received and recorded and thus of being reduced to a material form.

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40. Section 44; s 2(2) in regard to literary, musical and artistic works.
41. Section 1(1) definition *"writing"*.
42. **Northern Office Micro Computers (Pty) Ltd v. Rosenstein**, *supra*.
43. In regard to the question of copyright not subsisting in ideas but in the material expression of ideas see **Natal Picture Framing Co. Ltd v. Levin**, 1920 WLD 35; **Boshoff v. Art Metal & Electroplating Works (Pty) Ltd**, 1939 WLD 198; **Pan African Engineers (Pty) Ltd v. Hydro Tube (Pty) Ltd & Another**, *supra*; **Barber-Greene Company & Others v. Crushquip (Pty) Ltd**, *supra*; **Erasmus v. Galago Publishers (Pty) Ltd & Another**, Case No. 8310/85 in the TPD - unreported; **Kambrook Distributing v Haz Products &**

The British courts have held, and it is widely accepted, that the law will not protect works which are considered by society to be improper, indecent or lacking in propriety.[44] Propriety has sometimes been laid down as a condition for the subsistence of copyright.[45] However, the Copyright Act is silent on this question and, particularly as the norms of our censorship authorities undergo frequent modification, it cannot be that propriety of a work is a condition for the **subsistence** of copyright. Rather propriety is a condition for the **enforcement** of copyright. In other words, it is submitted that copyright subsists in a work irrespective of its propriety or otherwise but, depending on the norms prevailing from time to time, our courts will not come to the assistance of the owner of the copyright in a work which is lacking in propriety or is otherwise *contra bonos mores* in the same way as the courts may refuse to enforce a right where the person claiming the enforcement of the right has so-called "unclean hands".[46]

(2) Specific Requirements

Before going on to deal with the specific requirements or conditions laid down in the Copyright Act for the subsistence of copyright in a work it is necessary to deal with two concepts which are relevant and material to the conditions:

(a) Qualified Person

Others, *supra*.

44. See Goeie Hoop Uitgewers (Edms) Bpk v. Central News Agency & Another, 1953(2) SA 843 (W).

45. See Copeling Copyright and the Act of 1978, para 15.

46. See Royal Baking Powder Co. v. Crystallisers Ltd, 1928 CPD 448;

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 has been extended by proclamation, and in the case of a juristic person, a body incorporated under South African law or under the law of a country to which the operation of the Act has been extended. The operation of the Act has been extended to specified countries which are signatories of the Berne Convention on copyright and to the United States of America.[47]

(b) Publication

The Act states that publication of a work occurs when, with the exception of a cinematograph film, copies of the work are 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 when copies of the film are sold, let for hire or offered for sale or hire to the public.[48] The Act states specifically that certain acts in relation to works do not amount to publication, namely the following:

(i) The performance of a dramatic, dramatic- musical or musical work, or of a cinematograph film;
(ii) The public delivery of a literary work;
(iii) The transmission of a work in a diffusion service;

Laddie, Prescott and Vitoria, *op cit* para 2.101 *et seq.*

47. Section (1) read together with s 37 and the Regulations published in terms thereof in GN 704 dated 25 September 1987, and in Proc R566 dated 13 March 1981. See p 80 *infra*.

48. Section 2(a); publication can amount to passive availability of copies - see **Fichtel and Sachs A.G. v. Laco Parts (Pty) Ltd & Another**, Case No. 5150/84 in the TPD - unreported; **Klep Valves (Pty) Ltd v. Saunders Valve Co. Ltd**, *supra*.

(iv) The broadcasting of a work;
(v) The exhibition of a work of art; and
(vi) The construction of a work of architecture.[49]

For copyright to subsist in a particular work, in the case of literary, musical and artistic works and sound recordings, the author (i.e. the maker of the work), or in the case of a work of joint authorship, one of the authors, must have been a qualified person at the time when the work or a substantial part of it was made.[50] 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, i.e. a country which is a signatory of the Berne Convention on copyright, or the United States of America (hereinafter referred to as a "recognized country").[51]

In the case of a cinematograph film, the author of the film must have been a qualified person at the time when the film or a substantial part of it was made,[52] or alternatively, the film must have been first published in South Africa or in a proclaimed country, or must have been made in South Africa.[53]

In the case of broadcasts and programme carrying signals, they must have been made or emitted by the South African Broadcasting Corporation,[54] or, alternatively, must have

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49. Section 42(d).
50. Section 3(1).
51. Section 4(1) read together with s 37 and the Regulations issued in terms thereof referred to in footnote 47.
52. Section 3(1).
53. Section 4(1)(d).
54. Section 3(1) read together with s 1(1) definition "*author*", paras

been emitted from within the Republic.[55] Provision is made in the Act for the Minister to extend protection to such works made or emitted by other persons in South Africa besides the SABC or by organizations constituted under the laws of other countries, or made or emitted from other countries,[56] but to date the Minister has not exercised these powers at all.

In terms of Section 5(2) of the Act, any work which is capable of being the subject matter of copyright and which is made by or under the direction of the State or a prescribed international organization enjoys copyright in South Africa irrespective of whether the aforementioned conditions have been met. To date no international organizations have been prescribed as aforementioned.

2. THE AUTHOR

The author or maker of a work is the corner-stone of copyright law. The Copyright Act uses the terminology of "author" to designate the maker of any type of work which can be the subject of copyright. Thus the Act refers to the "author" of an artistic work, the "author" of a musical work, etc.

The underlying philosophy or principle of copyright law is to reward or compensate the author of a work for the utilization or expenditure of his talents, time and effort in creating works of intellectual property. Copyright is

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(e) and (f).
55. Section 4(1)(b) and (c).
56. Section 38.

intended to provide and establish the incentive for the author to create more and better works. Copyright law serves to look after the interests of the author and to define and regulate the scope and operation of his qualified monopoly in relation to his work.[57]

As shown above, the subsistence of copyright in a work can depend upon the circumstances of the author (i.e. whether he is a "qualified person")[58] and as will appear below, generally speaking the first ownership of the copyright in a work vests in the author or derives from him.[59] It is thus of paramount importance to identify the person who is the author of a particular work.

The identification of the author can in certain circumstances be very closely interwoven with the recognition of the moment of the coming into being of the work. Unless one knows at what precise stage the work is "born" it is difficult to identify the author of that work. The moment of birth of a work can, depending upon the circumstances, be a difficult moment to isolate. Many types of works go through several stages of development before being cast in their final form, whereafter they are exploited or reproduced in derivative forms. For instance, an artistic work used as the design printed on a textile may be conceived and embodied by the artist in a rough drawing; thereafter he may develop it into a fully fledged painting, which painting is transformed into a textile design.[60] Which version is "the work"? At what stage is "the work" born?

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57. See p. 1 *supra*.
58. See p. 25 *supra*.
59. See p. 32 *infra*.
60. See **Cavendish Textiles Ltd v. Manmark (Pty) Ltd**, Case No. 2218/82 in the TPD - unreported.

Each case will be determined by its own facts but, generally, it is submitted that "the work" is the final complete version which is ready for utilization or commercial exploitation. It is this version which usually forms the basis of any copyright infringement proceedings when the author's finished product or derivative articles are copied or are otherwise misappropriated. In the example quoted "the work" would be the fully fledged painting; the rough drawing is simply a stage in the development of the work and is not a complete work in the sense that it is ready for utilization or commercial exploitation, while the textile design represents the manner of commercial exploitation of the painting and is a derivative work of the painting. It may be that the textile design could constitute a separate and independent work the originality of which lies not in the conception of the design applied to the textile but rather in the transformation of the painting into a textile design. The textile design may thus be a subordinate but independent original work as is the case with the translation of a literary work. In this situation there may be two separate authors each having copyright in separate works but the design as such would be the work of the artist and he would be the author of this work as embodied in the painting. Interim versions of a work in the creation process can, of course, enjoy copyright and if copied or otherwise misused without authority copyright infringement occurs, but this does not alter the general proposition advanced above.

In the first place, the author of a work is the person who is responsible for the creation of the material embodiment of the work. This person may not necessarily be the person who conceived the idea which gave rise to, or which is embodied in the material work. Ideas as such are not pro-

tectable by copyright and therefore the originator of an idea cannot, per se, claim any right in his idea.[61]

While it is true that the person who embodies ideas in a material form is under the law the author of the work, his activity in regard to the work must involve the application of independent intellectual effort or skill. If the activity of the person who reduces the work into its material form is purely mechanical in nature, in the sense of a shorthand typist who takes down what is dictated to her and reproduces it in a written form, that person is not the author but rather the agent or mere amanuensis of the author.[62] This situation can be contrasted with, for instance, a reporter who listens to a speech and then writes a summary of such speech. In that instance the reporter will be the author of the reported speech, being a literary work.[63] Identification of the author of a work is largely a question of fact.[64]

Where two or more persons are engaged in the creation of a work in a material form, they can be joint authors and co-owners of the copyright in that work.[65] If a work has gone through various development phases involving input by several people before reaching finality it can be a difficult question of fact to assess whether a particular individual must be considered to be a co-author. The issue is

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61. **Pan African Engineers (Pty) Ltd v. Hydro Tube (Pty) Ltd & Another**, *supra*; **Klep Valves (Pty) Ltd v. Saunders Valve Co. Ltd**, *supra*. See p. 23 *supra*.
62. See **Donoghue v. Allied Newspapers** (1938), Ch 106.
63. See **Walter v. Lane** (1900) AC 539.
64. **Pan African Engineers (Pty) Ltd v Hydro Tube (Pty) Ltd & Another**, *supra*. See also **Klep Valves (Pty) Ltd & Another v. Saunders Valve Co. Ltd**, *supra*.
65. See s 1(1) definition of *"work of joint authorship"* and, for instance, s 21(1).

one of fact and degree and each case must be judged on its own merits.

The Copyright Act gives guidance in the determination of which person is the author of a work. The question of who is the author of a literary, musical or artistic work is in principle a relatively simple one - the author is the maker or the creator of the work. In the case of the perhaps more impersonal types of works covered by the Act, in which a number of different people are often involved in different aspects of the creation of the final work, it is in principle difficult to designate the person who is in the main responsible for the creation of the final work. In this respect the Act creates finality, sometimes perhaps rather arbitrarily, on the question. In the case of a photograph, the Act designates the person responsible for the composition of the photograph as the author; in respect of a sound recording, the Act designates the person by whom the arrangements for the first fixing of the sounds of a performance or of other sounds are made as the author; in the case of a cinematograph film, the Act designates the person by whom the arrangements for the making of the film were made as the author; in the case of both broadcasts and programme carrying signals the South African Broadcasting Corporation is designated as being the author; in the case of a published edition the author is the publisher of the edition.[66] The Act contemplates that the author of a work can be a juristic person.[67] It is submitted that in the case of cinematograph films and sound recordings the author of a work will often be a juristic person, i.e. the production

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66. See s 1(1) definition of *"author"*.
67. See s 3(1)(b) meaning of *"qualified person"* and **Fichtel and Sachs AG v. Laco Parts (Pty) Ltd & Another**, *supra*.

company which operates through its servants and agents collectively.

3. INITIAL OWNERSHIP OF COPYRIGHT

With a few exceptions, the author is the initial owner of the copyright in the case of all the various types of works covered by the Act.[68] The exceptions, i.e. cases where the author, although being the maker of the work, is not the first owner of the copyright in such work are the following:

(a) Where the author is employed by a newspaper, magazine or similar periodical and a literary or artistic work is made by him during the course of his employment and is made for the purpose of publication in a newspaper, magazine or similar periodical, the employer is the owner of the copyright in the work insofar as the copyright relates to its publication in a newspaper, magazine or similar periodical, but the author is the owner of the balance of the copyright in the work.[69]

(b) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a sound recording or the making of a cinematograph film and pays or agrees to pay for it in money or in money's worth, and the work is made in pursuance of that commission, the person who commissions the work is the owner of the copyright in such work. It should be noted that this provision relates

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68. Section 21(1)(a).
69. Section 21(1)(b).

only to the commissioning of certain specified works and not to all works.[70]

(c) Where, in a case not falling within paragraph (a) and (b) above, a work is made by the author during the course of his employment by another person under a contract of service or apprenticeship, that other person is the owner of the copyright in the work in question.[71]

(d) Where a work is made under the direction or control of the State or a prescribed international organization, the State or such international organization is the owner of the copyright in such work and not the author.[72]

The exceptions to the general rule set out in paragraphs (a), (b) and (c) above are variable by written agreement between the author and the other party.[73] In other words, for instance, where an author is commissioned to take a photograph it can be agreed between the parties that, notwithstanding the provisions of the Act, the ownership of the copyright in the photograph will vest with the author and not with the person giving the commission.

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70. Section 21(1)(c).
71. Section 21(1)(d). See **Northern Office Micro Computers (Pty) Ltd v. Rosenstein**, *supra*; and **Econostat (Pty) Ltd v. Lambrecht & Another**, *supra*; **Trewhella Bros. (UK) Ltd v. Deton Engineering (Pty) Ltd**, an unreported decision of the Appellate Division.
72. Section 5(2) read together with s 21(2). The Government Printer has been designated by the State President in terms of s 5(6) as the person in whom State owned copyright vests for administrative purposes. See Proc. R24, 1979 in GG dated 19 February 1979.
73. Section 21(1)(e).

It must be noted that the aforementioned provisions do not alter the identity of the author of the work but rather they divorce the position of author and initial owner. The subsistence of copyright in the work will still be determined by the status of the author (i.e. is he a qualified person?) and will not be determined by the status of the initial owner.

The original text of the Copyright Act, 1978, prior to its amendment in May 1980, did not contain the exceptions described in paragraphs (a), (b) and (c) above. These exceptions were reintroduced by the Copyright Amendment Act, 1980.[74] The amendment was not, however, retrospective with the result that for the period January 1, 1979 until May 23, 1980,[75] the author of any work, except where the work was made by or under the direction or control of the State or a prescribed international organization, was the owner of the copyright in the work which he created notwithstanding the fact that he might have created such work during the scope of his employment by another person or pursuant to a commission given to him by another person. In other words, a different rule applies to the first ownership of certain works made during the period January 1, 1979 until May 23, 1980, to that which applies to works made either before or after that period.[76]

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74. Section 9 of the Copyright Amendment Act, 1980. The exceptions applied in the Copyright Act 1965.
75. The date on which the Copyright Amendment Act 1980 came into operation.
76. See **Northern Office Micro Computers (Pty) Ltd & Others v. Rosenstein**, *supra*; **Preformed Line Products (SA) (Pty) Ltd v. Hardware Assemblies** (Pty) Ltd, Case No. M1303/83 in the NPD - unreported.

4. DURATION OF COPYRIGHT

The period afforded to the owner of copyright in a work for controlling the use of his work and deriving remuneration from it - in other words, the duration of the copyright - is a very generous one.[77]

Besides works of this type made under the direction or control of the State or of a prescribed international organization, in the case of literary, musical and artistic works (except photographs), the copyright endures for a period of 50 years after the death of the author. If, however, before the death of the author none of the following acts have been done in respect of a work of this nature or an adaptation thereof, namely:

(i) the publication thereof;
(ii) the performance thereof in public;
(iii) the offer for sale to the public of records thereof;
(iv) the broadcasting thereof;

the term of copyright continues to subsist for a period of 50 years from the end of the year in which the first of any of these acts is done. If none of these acts is ever done in relation to a work of this nature, the duration of the copyright is perpetual.[78]

In the case of cinematograph films and photographs the copyright expires 50 years after the work is first lawfully

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77. The equivalent periods under the Patents Act, and the Designs Act, 1977 are 20 years and a total of 15 years, respectively, from the date of registration.
78. Section 3(2)(a).

made available to the public or if the work is not lawfully made available to the public within 50 years of its making, then the copyright expires 50 years after the making of the work.[79] Sound recordings and published editions enjoy copyright for a period of 50 years from the date on which they are first published[80] and broadcasts and programme carrying signals enjoy copyright for 50 years after they are made.[81]

The copyright in anonymous or pseudonymous literary, musical or artistic works subsists for a period of 50 years from the end of the year in which the work is lawfully made available to the public or from the end of the year in which it is reasonable to presume that the author died, whichever is the shorter term. In the event of the identity of the author of an anonymous or pseudonymous work becoming known before the expiration of the aforementioned period, the duration of the copyright is determined in accordance with the normal provisions referred to above relating to known authors.[82]

In the case of a work of joint authorship, the death of the author is deemed to be the death of the author who dies last even though that person might not have been a qualified person.[83]

The term of copyright in a literary, musical or artistic work (except a photograph) made under the direction or control of the State or a prescribed international organization

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79. Section 3(2)(b).
80. Section 3(2)(c) and (f).
81. Section 3(2)(d) and (e).
82. Section 3(3).
83. Section 3(4).

subsists for fifty years from the end of the year in which the work is first published, while the terms of copyright in all other types of works (i.e. photographs, cinematograph films, sound recordings, broadcasts and published editions) made in these circumstances are the same as for non-governmental works.[84]

5. NATURE AND SCOPE OF COPYRIGHT

In essence, copyright is the right to do or to authorize others to do, or to prevent others from doing, the acts which are designated in respect of each of the different types or categories of works which are eligible for copyright, as the monopoly of the copyright owner. In respect of each of the types or categories of works the Act details a list of acts or dealings with the work which are the monopoly of the copyright owner. The lists of restricted acts differ from one category of work to another but in essence they amount to copying the work in one form or another and/or exploiting the work commercially.[85]

The acts restricted by copyright are:

(1) Literary or musical works:[86]

(a) Reproducing the work in any manner or form;[87]
(b) publishing the work;

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84. Section 5(3) and (4).
85. See ss 6 to 11A.
86. Section 6.
87. See footnote 91 *infra*.

(c) performing the work in public;[88]

(d) broadcasting the work;

(e) causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast including the work, and is operated by the original broadcaster;

(f) making an adaptation of the work;[89]

(g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) inclusive.

(2) Artistic works:[90]

(a) Reproducing the work in any manner or form;[91]

(b) publishing the work;

(c) including the work in a cinematograph film or a television broadcast;

(d) causing a television or other programme, which includes the work, to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the work, and is operated by the original broadcaster;

(e) making an adaptation of the work;[92]

(f) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (d) inclusive.

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88. See **Southern African Music Rights Organisation Ltd v. Svenmill Fabrics (Pty) Ltd**, 1983(1) SA 608 (C) for the meaning of "in public".
89. See **Bosal Afrika (Pty) Ltd v. Grapnel (Pty) Ltd & Another**, *supra*.
90. Section 7.
91. See **Laubscher v. Vos & Others**, Case No. 278/74 in the WLD. - unreported, in regard to "reproducing"; and **Tolima (Pty) Ltd v. Cugacius Motor Accessories (Pty) Ltd**, 1983(3) SA 504 (W), in regard to "any manner or form". See also **Klep Valves (Pty) Ltd v. Saunders Valve Co. Ltd**, *supra*.
92. See **Cavendish Textiles Ltd v. Manmark (Pty) Ltd**, supra

(3) Cinematograph films:[93]

(a) Reproducing the film in any manner or form;
(b) causing the film, insofar as it consists of images, to be seen in public, or, insofar as it consists of sounds, to be heard in public;
(c) broadcasting the film;
(d) causing the film to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the film, and is operated by the original broadcaster;
(e) making an adaptation of the film;
(f) doing, in relation to an adaptation of the film, any of the acts specified in relation to the film in paragraphs (a) to (d) inclusive.
(g) importing (other than importing for the private and domestic use of the importer), selling, letting, offering or exposing for sale or hire by way of trade, or distributing, directly or indirectly, a reproduction or an adaptation of the film.

(4) Sound Recordings:[94]

(a) Making, directly or indirectly, a record embodying the sound recording;
(b) importing (other than for the private and domestic use of the importer), selling, letting, offering or exposing for sale or hire by way of trade, or distributing, directly or indirectly, a reproduction of the sound recording.

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93. Section 8.
94. Section 9.

(This provision was introduced by the 1984 Amendment and is a variation of the earlier provision. The aforegoing version of the provision will only come into operation on April 1, 1989 and the original provision is thus operative until that date.[95] The original provision reads "*importing records embodying the sound recording and distributing them, directly or indirectly, to the general public or any section thereof*").

(5) Broadcasts:[96]

(a) Reproducing, directly or indirectly, the broadcast in any manner or form, including, in the case of a television broadcast, making a still photograph of an individual image;
(b) rebroadcasting the broadcast;
(c) causing the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster.

(6) Programme-carrying signals:[97]

Undertaking or authorizing the direct or indirect distribution of programme-carrying signals by any distributor to the general public or any section thereof in the Republic, or from the Republic.

(7) Published editions:[98]

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95. See Proc 108 of 1985 in GG 9830 dated 5 July 1985.
96. Section 10.
97. Section 11.
98. Section 11A.

> Making or authorizing the making of a reproduction of the edition in any manner.

Some of the terms mentioned above are defined in the Act. The definitions of *"reproduction"* and *"adaptation"* are discussed below in paragraph 7.[99]

"Diffusion service" is defined as:

> *"a telecommunication service of transmissions consisting of sounds, images, signs or signals, which takes place over wires or other paths provided by material substance and intended for reception by specific members of the public; and diffusion shall not be deemed to constitute a performance or a broadcast or as causing sounds, images, signs or signals to be seen or heard; and where sounds, images, signs or signals are displayed or emitted by any receiving apparatus to which they are conveyed by diffusion in such manner as to constitute a performance or a causing of sounds, images, signs or signals to be seen or heard in public, this shall be deemed to be effected by the operation of the receiving apparatus".*[100]

"Distribution" in relation to -

(a) a sound recording, means any act by which records embodying the sound recording are offered, directly or indirectly, to the general public or any section thereof;

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99. See pp 46 and 48 *infra*.
100. Section 1(1) definition of *"diffusion service"*.

(b) programme-carrying signals, means any operation by which a distributor transmits derived signals to the general public or any section thereof.[101]

"*Performance*" is defined so as to include:

> "*any mode of visual or acoustic presentation of a work, including any such presentation by the operation of a loudspeaker, a radio, television or diffusion receiver or by the exhibition of a cinematograph film or by the use of a record or by any other means, and in relation to lectures, addresses, speeches and sermons, includes delivery thereof; and references to 'perform' in relation to a work or an adaptation of a work shall be construed accordingly: Provided that 'performance' shall not include broadcasting or rebroadcasting or transmitting a work in a diffusion service*".[102]

6. INFRINGEMENT OF COPYRIGHT

There are two forms of civil law copyright infringement, namely, so-called direct (or primary) infringement and indirect (or secondary) infringement. In certain instances infringement of copyright constitutes a criminal offence. These topics will be discussed separately.

A. DIRECT OR PRIMARY INFRINGEMENT:

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101. Section 1(1) definition of "*distribution*".
102. Section 1(1) definition "*performance*".

A direct or primary infringement of the copyright in a work takes place when a person, without the authority of the copyright owner, does or causes someone else to do any of the acts which are in respect of that work designated as restricted acts (i.e. the acts detailed in respect of each type of work in paragraph 5 above) and therefore are within the monopoly of the copyright owner.[103] As said earlier when dealing with the scope of copyright, this in very general terms amounts to the unauthorized copying of the work and/or commercial exploitation of it.[104] Copyright is not only infringed by misusing or misappropriating the whole of the work but also by misusing or misappropriating a substantial part of the work.[105] The concept "substantial part" relates primarily to quality, not quantity. Thus the copying of a small but essential part of a work constitutes copyright infringement.[106]

In practical terms, in many instances the question of whether or not a substantial part of a work has been taken amounts to the degree of similarity between the original work and the alleged infringing copy.[107] The corresponding tests under the Trade Marks Act, 1963, and the Designs Act, 1967, are, respectively, whether one trade mark so nearly resembles another trade mark as to be likely to deceive or cause confusion (confusing similarity), and whether an

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103. Section 23(1).
104. See p 37 *supra*.
105. Section 1(2A).
106. **Ehrenberg Engineering (Pty) Ltd v. Topka t/a Topring Manufacturing and Engineering**, Case No. I 8652/77 in the TPD - unreported, at p 25 of the typewritten judgement.
107. **Ehrenberg Engineering (Pty) Ltd v. Topka t/a Topring Manufacturing and Engineering**, *supra*; **Laubscher v. Vos & others**, *supra*; **Cavendish Textiles Ltd v. Manmark (Pty) Ltd**, *supra*; **Erasmus v. Galago Publishers (Pty) Ltd & Another**, *supra*.

alleged infringing design is substantially different to a registered design. The degree of similarity between a copyrighted work and an alleged infringing copy must also be assessed against the background of what it is about the copyrighted work which is original.[108] As explained, a work can be partially original. The court must determine wherein lies the originality of the copyrighted work and then view the alleged infringing copy from this perspective. Put differently, the court must take account of the prior art when making the comparison between the two works.[109] For instance, where B makes a painting, utilizing unusual shading and perspective, of A's statue, and C, using B's painting, produces a statue which is an exact likeness of A's statue, B cannot sustain a claim of infringement by C of the copyright in his painting because the form or configuration of the sculpture, while being depicted in his painting, was not "original" to him but to A. The originality of B's painting lies in the particular manner of depiction of the sculpture and C has not misappropriated this contribution. Viewed against the background of the prior art, C has not reproduced a substantial part of B's painting (i.e. a substantial part of that which is original about B's painting). C's statue will, of course, be an indirect reproduction of a substantial part of A's statue.

It is essential to appreciate that copyright in a work is only infringed if there is copying. This means that the

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108. **Ehrenberg Engineering (Pty) Ltd v. Topka t/a Topring Manufacturing and Engineering**, *supra*; **Laubscher v. Vos & Others**, *supra*; **Klep Valves (Pty) Ltd v. Saunders Valve Co. Ltd**, *supra*.

109. See **Bosal Afrika (Pty) Ltd. v Grapnel (Pty) Ltd & Another**, *supra*; **Preformed Line Products 8SA)(Pty) Ltd v Hardware Assemblies (Pty) Ltd**, *supra*; **Kambrook Distributing v Haz Products & Others (Pty) Ltd**, *supra*; **Insamcor (Pty) Ltd Machinenfabriek Sidler Stalder AG t/a Sistag & Another**, *supra*.

making of a work which is very similar to or even identical to another work will not constitute an infringement of that other work if the creator produced the second work independently and without reference to the other work. Copyright therefore prevents the copying of a work or even of a part of a work but does not prevent the creation of an identical work without copying.[110]

In order to establish that infringement by reproduction has taken place a plaintiff must show that the defendant has copied a substantial part of his work. The courts have rationalized the assessment of this issue into a two-stage process consisting of, firstly, an objective comparison as to whether the two works are substantially similar followed by an analysis of whether a causal connection exists between the plaintiff's work and the defendant's alleged infringing copy; if either of these tests is not met, i.e if there is no objective similarity between the two articles, or if so, a causal connection between them cannot be established, then no copying of a substantial part of the copyrighted work has taken place and there has been no infringement.[111] The onus of proving that copying of a substantial part of a work has taken place rests squarely on the plaintiff and it is not sufficient for him merely to show that there is a similarity between two articles and that the defendant had access to the plaintiff's work; an inference must be drawn from all the facts of a particular case.[112] Due attention must be given to whether the similarity between two items is

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110. See Laddie, Prescott and Vitoria, *op cit* para 2.75 and Bosal Afrika (Pty) Ltd v. Grapnel (Pty) Ltd & Another, *supra*.
111. See Laubscher v Vos & Others, *supra*; Topka t/a Topring Manufacturing and Engineering v Ehrenberg Engineering (Pty) Ltd, *supra*, and Klep Valves (Pty) Ltd v Saunders Valve Co Ltd, *supra*.
112. Kambrook Distributing v Haz Products & Others, supra.

attributable to common ideas or concepts embodied in them or to similarity of material expression of ideas.[113] Copyright, which is concerned with copying the outwardly perceptible form, must not be confused with the rights conferred by a patent in respect of the conception that is its subject matter. It is often difficult to decide in a particular case whether the idea or its expression has been copied and where the idea and its expression are indistinguishable the courts should be slow to find that copyright infringement has occurred as there is a danger that a monopoly can be conferred upon an idea free of the conditions and limitations imposed by patent law.[114]

The term *"reproduction"* which features prominently in the restricted acts in respect of the various categories of works, is defined in the Act as follows:[115]

"*'reproduction', in relation to-*

(a) a literary or musical work or a broadcast, includes a reproduction in the form of a record or a cinematograph film;

(b) an artistic work, includes a version produced by converting the work into a three-dimensional form or, if it is in three dimensions, by converting it into a two-dimensional form;

(c) any work, includes a reproduction made from a reproduction of that work;

and references to 'reproduce' and 'reproducing' shall be construed accordingly;"

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113. **Bosal Afrika (Pty) Ltd v Grapnel (Pty) Ltd & Another**, *supra*; **Kambrook Distributing v Haz Products & Others**, *supra*; **Erasmus v Galago Publishers (Pty) Ltd & Another**, *supra*.
114. **Kambrook Distributing v Haz Products & Others**, *supra*.
115. Section 1(1) definition of *"reproduction"*.

Paragraph (c) of the above definition was added to the definition by Section 1(d) of the Copyright Amendment Act, 1983. This amendment clarified and confirmed the position as it had existed in the case law, particularly the British case law.[116] This form of reproduction, i.e. making a reproduction from a reproduction of a copyrighted work, is commonly known as "indirect copying".

Paragraphs (b) and (c) of the definition of *"reproduction"* are of particular importance in connection with the infringement of artistic works, more particularly drawings of a technical nature. Our courts, following the example of the British courts, have held in a number of cases that the copyright in a technical drawing can be infringed by copying an article which is made from the technical drawing.[117] For instance, where a tooth for a mechanical shovel is made from a technical drawing and that tooth is copied by a competitor who makes an identical tooth, the competitor's tooth is an infringing copy of the basic technical drawing.[118] The logic is that a tooth made from a technical drawing is a version of the drawing converted into a three-dimensional form (paragraph (b) of the definition of *"reproduction"*) and where the competitor copies the tooth he is indirectly copying the technical drawing or is making a reproduction from a

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116. See, inter alia, **Scaw Metals Ltd v. Apex Foundry (Pty) Ltd & Another**, 1982 (2) SA 377 (D); **Tolima (Pty) Ltd v. Cugacius Motor Accessories (Pty) Ltd**, *supra*; **J.K. Fulton (Pty) Ltd v. Logic Engineering Enterprises (Pty) Ltd & Others**, 1983(1) SA 735 (W); and **Topka t/a Topring Manufacturing and Engineering v. Ehrenberg Engineering (Pty) Ltd**, *supra*; **Klep Valves (Pty) Ltd v. Saunders Valve Co. Ltd**, *supra*. For a digest of British cases see **British Leyland Motor Corporation Limited & Others v. Armstrong Patents Company Ltd & Others** - 1986 FSR 221, per Lord Griffiths.

117. See the cases listed in footnote 116.

118. Scaw Metals Ltd v Apex Foundry (Pty) Ltd, supra.

reproduction of the technical drawing (paragraph (c) of the definition of *"reproduction"*).

Closely analogous to this form of copyright infringement is the reproduction by a competitor of an article of manufacture which is derived from a prototype or a work of artistic craftsmanship of a technical nature, for instance, the hull of a boat or a silencer system.[119]

The term *"adaptation"* which also features commonly in the restricted acts in respect of the various types of works is defined as follows:[120]

"*'adaptation', in relation to -*

(a) a literary work, includes -

(i) in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work;

(ii) in the case of a dramatic work, a version of the work in which it is converted into a non-dramatic work;

(iii) a translation of the work; or

(iv) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical;

(b) a musical work, includes any arrangement or transcription of the work, if such arrangement or transcription has an original creative character;

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119. See **Butt v. Schultz & Another**, *supra*; **Schultz v. Butt**, *supra*; and **Bosal Afrika (Pty) Ltd v. Grapnel (Pty) Ltd & Another**, *supra*.
120. Section 1(1) definition of *"adaptation"*.

(c) an artistic work, includes a transformation of the work in such a manner that the original or substantial features thereof remain recognizable;"[121]

Infringement of the copyright in an artistic work by making an adaptation of the work can produce the same or similar results to infringement of the copyright in drawings by making three-dimensional indirect copies. It could be argued that a three-dimensional indirect copy of a drawing (for instance a technical drawing), is likewise an adaptation of that drawing.

Where a three-dimensional article primarily has a utilitarian purpose and is made by an industrial process, the right to control the reproduction of that article in three-dimensional form (i.e. indirect copying of a technical drawing by copying a three-dimensional version of it, or the copying of a prototype or work of artistic craftsmanship of a technical nature or of a replica of the same) falls away once authorized three-dimensional versions of the work are distributed to the public anywhere in the world. This limitation was brought about by the Copyright Amendment Act 1988.[122] Prior to this amendment and subsequent to 1983 (i.e. an earlier amendment made by the Copyright Amendment Act 1983) this limitation came into operation ten years after the end of the year in which authorized three-dimensional reproductions of the work had been distributed

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121. In regard to the interpretation of "*adaptation*" see **Cavendish Textiles Ltd v. Manmark (Pty) Ltd**, *supra*; and **Bosal Afrika (Pty) Ltd v. Grapnel (Pty) Ltd & Another**, *supra*.

122. Section 15(3A). The limitation was introduced with retrospective effect until 25 September 1987 - Section 2(2) of the Copyright Amendment Act 1988.

to the public anywhere in the world, or at the end of 1993, whichever was the later. This question will be reverted to below.

Depending upon the circumstances, doing a restricted act in respect of an article without appropriate authority can infringe the copyright in more than one work. For instance, a person who makes an unauthorized video tape of a cinematograph film in principle reproduces a cinematograph film, a literary work (being the script of the film) and a musical work (being the musical score of the film). The authorization of the reproduction by the copyright owner in respect of one of these works will not necessarily include the authorization of the owners of the copyright in the other works involved. To avoid copyright infringement in this situation it will be necessary to obtain the authorizations of the owners of the copyright in all three types of work.

In terms of Section 23(4) of the Act, where the subject matter of the soundtrack of a cinematograph film (considered to be part of the film) is also embodied in a separate record, the copyright in the film is not infringed by any use made of that separate record.

Knowledge of the infringing nature of an act performed is not a component of direct copyright infringement. A person can infringe the copyright in a work by performing one of the restricted acts in relation to that work without the authority of the copyright owner even though he may be in perfectly good faith.[123]

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123. See **Laddie, Prescott and Vitoria**, *op cit*, para 2.75.

B. INDIRECT OR SECONDARY INFRINGEMENT:

Indirect infringement takes place when certain acts are done without the authority of the copyright owner in connection with direct infringements of copyright. In general terms an article which is made by infringing the copyright in a work is referred to as an "infringing copy" of that work. There are basically two forms of indirect infringement of copyright:

(1) Infringement committed by

(a) importing into the Republic for a purpose other than the importer's private and domestic use;

(b) selling, letting or by way of trade offering or exposing for sale or hire; or

(c) distributing for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright is prejudicially affected, infringing copies of a protected work (or in the case of imported articles, articles the making of which would have constituted copyright infringement if the actual maker had hypothetically made them in South Africa) with the knowledge that the copies concerned are infringing copies (or the imported articles would have been infringing copies if hypothetically made in South Africa).[124]

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124. S.23(2). See **Gramophone Co. Ltd v. Music Machine (Pty) Ltd & Others**, 1973(3) SA 188 (W); **Twentieth Century Fox Film Corporation & Another v. Anthony Black Films (Pty) Ltd**, 1982(3) SA 582 (W); **Columbia Pictures Industries Inc. v. Videorent Parkmore**, 1982(1) SA 49 (W); **Video Rent (Pty) Ltd & another v. Flamingo Film Hire**, 1981(3) SA 42 (C); **Paramount Pictures Corporation v. Video Parktown North (Pty) Ltd**, 1983(2) SA 251 (T); **Universal City Studios Inc. v. Movie Time**, Case No. 5118/82 in the D & CLD - unreported; and **Fichtel and Sachs AG v. Laco Parts (Pty)**

(2) Infringement committed by permitting a place of public entertainment to be used for the public performance of a protected literary or musical work in circumstances where such public performance is itself an infringement, with the knowledge that such public performance is an infringement.[125]

It will be clear from the above that so-called "guilty knowledge" on the part of the person committing what is in principle an indirect infringement of copyright is required before the Act in question can constitute indirect copyright infringement.[126] Guilty knowledge is often in practice imparted by the copyright owner despatching a letter to the infringer in which he informs the latter of the infringing nature of the articles in question and then affords him an opportunity of verifying his claims.[127]

C. CRIMINAL OFFENCES:

The Copyright Act also provides that certain types of copyright infringement constitute criminal offences. The following acts are criminal offences when, in the case of all types of work besides cinematograph films which are registered under the Registration of Copyright in Cinematograph Films Act, a person commits them in respect of articles which the doer knows to be infringing copies of a

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Ltd & Another, *supra*. See also **"Parallel Importation - Infringement of Copyright"** by O.H. Dean, SALJ May 1983, p 258.

125. Section 23(3)

126. See the cases listed in footnote 124, in particular **Twentieth Century-Fox Film Corporation & Another v. Anthony Black Films (Pty) Ltd.**

127. See **Paramount Pictures Corporation v Video Parktown North (Pty) Ltd**, *supra*, and **"Parallel Importation - Infringement of Copyright"** by OH Dean, *supra*.

work (i.e. articles the making of which constitutes an infringement of copyright or, in the case of imported articles, would have constituted an infringement of copyright if they had hypothetically been made in South Africa by the person who actually made them in the place of manufacture),[128] and in the case of cinematograph films registered as aforementioned, commits them in respect of articles which are reproductions or adaptations of a cinematograph film:

(a) makes for sale or hire;
(b) sells or lets for hire or by way of trade offers or exposes for sale or hire;
(c) by way of trade exhibits in public;
(d) imports into the Republic otherwise than for the private domestic use of the importer;
(e) distributes for purposes of trade; or
(f) distributes for any other purpose to such an extent that the owner of the copyright is prejudicially affected.[129]

The aforegoing acts of criminal copyright infringement are in general terms comparable with the indirect or secondary acts of civil copyright infringement.

A person convicted of any of the aforegoing offences is liable, in the case of a first conviction, to a fine not exceeding R5 000 or to imprisonment for a period not exceeding three years, or to both, for each article to which the

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128. See s 1(1) definition of *"infringing copy"* and **Twentieth Century Fox Film Corporation & Another v. Anthony Black Films (Pty) Ltd**, *supra*.
129. Section 27(1). See **World Wide Film Distributors (Pty) Ltd v. Divisional Commissioner SA Police & Others**, Cape Town 1971(4) SA 312(C); and **Cine Films (Pty) Ltd & Others v. Commissioner of Police & Others**, 1972(2) SA 254 (A).

offence relates; in the case of a second or further conviction, to a fine not exceeding R10 000 or to imprisonment for a period not exceeding five years, or to both, for each article to which the offence relates. In both the aforementioned instances the total fine or the total period of imprisonment which can be imposed cannot exceed R50 000 or ten years in respect of articles comprised in the same transaction.[130] Where any of the aforementioned offences are committed in respect of the copyright in a cinematograph film the court may in its discretion, in addition to the aforementioned penalties, prohibit the doer for a period of which the commencement and duration is determined by the court from carrying on, or having any direct or indirect financial interest in, or deriving any direct or indirect financial benefit from, any business which sells, lets, offers, exposes or distributes reproductions or adaptations of cinematograph films. A person who contravenes this prohibition is guilty of an offence, and a fine not exceeding ten thousand Rand, or a term of imprisonment not exceeding five years, may be imposed.[131]

In addition, the following acts also constitute criminal copyright infringement:

(i) making or having in one's possession a plate (i.e. a mould, negative and the like) knowing that it is to be used for making infringing copies of a work.[132]

(ii) causing a literary or musical work to be performed in public knowing that copyright subsists in the

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130. Section 27(6).
131. Section 27(8).
132. Section 27(2).

work and that the performance in question constitutes an infringement of the copyright.[133]

(iii) causing a sound or television broadcast to be rebroadcast or transmitted in a diffusion service knowing that copyright subsists in the broadcast and that such rebroadcast or transmission constitutes and infringement of the copyright.[134]

(iv) causing programme carrying signals to be distributed by a distributor for whom they were not intended in the knowledge that copyright subsists in the signals in question and that such distribution constitutes an infringement of copyright.[135]

Any person convicted of any of the aforegoing offences is liable, in the case of a first conviction, to a fine not exceeding R1 000, and in any second or further conviction, to a fine not exceeding R1 000 or to imprisonment for a period not exceeding one year.[136]

7. EXEMPTIONS FROM INFRINGEMENT

The Copyright Act makes provision for a number of exemptions from copyright infringement. A perusal of these exemptions leads to the conclusion that they are all instances in which it is considered to be in the public interest that the copyright owner should not have a monopoly in the performance of particular acts in relation to his work.

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133. Section 27(3).
134. Section 27(4).
135. Section 27(5).
136. Section 27(7).

The following acts are exempted from being infringements of copyright:

(1) The copyright in a literary, musical or artistic work, or in a cinematograph film, sound recording, broadcast or published edition is not infringed if the work is used in any manner, which would normally constitute an infringement of copyright, solely and only to the extent reasonably necessary -

(a) for the purposes of research or private study by, or the personal private use of, the person using the work;

(b) for the purposes of criticism or review of that work or of another work; or

(c) for the purposes of reporting current events -

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film.

The aforegoing provision is subject to the proviso that the exemption does not cover the making of a copy of the whole or of a substantial part of the work in question, and that the items referred to in paragraphs (b) and (c)(i) only apply if the source of the material taken is mentioned as well as the name of the author of such material if it appears on the work from which the material is taken.[137]

(2) The copyright in a literary, musical or artistic work, cinematograph film, sound recording, broadcast or published edition is not infringed by using the work for

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137. Section 12(1) read together with ss 15(4), 16, 17, 18 and 19A.

the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings.[138]

(3) The copyright in a literary or musical work, cinematograph film, sound recording or broadcast which is lawfully available to the public is not infringed by taking any quotation from it, including any quotations from articles in newspapers or periodicals that are summaries of such a work; provided that the quotation must be compatible with fair practice, the extent of it must not exceed the extent justified by the purposes for which it is used and the source from which the material is taken as well as the name of the author, if same appears on the work, must be mentioned.[139]

(4) The copyright in a literary, musical or artistic work, cinematograph film, sound recording, broadcast, or published edition is not infringed by using the work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual recording for teaching provided the use in question is compatible with fair practice and the source of the material, as well as the name of the author, if it appears on the work, is mentioned.[140]

(5) The copyright in a literary, musical or artistic work, sound recording or published edition is not infringed by the reproduction of it by the SABC by means of its own facilities where the copy made is intended exclu-

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138. Section 12(2) read together with ss 15(4), 16, 17, 18 and 19A.
139. Section 12(3) read together with ss 16, 17 and 18.
140. Section 12(4) read together with ss 15(4), 16, 17, 18 and 19A.

sively for use in a lawful broadcast of the SABC and is destroyed within six months after the making of the copy or within a longer period which may be agreed upon by the owner of the copyright in the work. A copy of this nature is commonly referred to as an "ephemeral copy". Where the ephemeral copy is of an exceptional documentary nature it may be preserved in the archives of the SABC but it may not be used for broadcasting or for any other purpose without the consent of the copyright owner save insofar its use falls within any of the exemptions from copyright infringement, including this exemption.[141]

(6) The copyright in a literary work such as a lecture, address or similar work which is delivered in public is not infringed by reproducing the work in the press or by broadcasting it if the reproduction or broadcast is for informatory purposes. The right of making a collection of the lectures, addresses or other works of an author is, however, exclusive to the author or his successor in title.[142]

(7) The copyright in an article published in a newspaper or periodical, or in an article in a broadcast, on any current economic, political or religious topic is not infringed by reproducing the article in the press or broadcasting it provided that the right of reproduction or broadcasting the work in question has not expressly been reserved by the copyright owner and the source of the material reproduced or broadcast in terms of this exemption is clearly mentioned.[143]

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141. Section 12(5) read together with ss 15(4), 17 and 19A.
142. Section 12(6).
143. Section 12(7).

(8) Official texts of a legislative, administrative or legal nature, or translations of such texts, or speeches of a political nature, or speeches delivered in the course of legal proceedings, or news of the day in the form of items of press information, are not the subject matter of copyright, provided that the right of making collections of any speeches of the aforementioned nature is exclusive to the author or maker of such speeches.[144]

(9) The copyright in a literary, musical or artistic work, cinematograph film, sound recording, broadcast or published edition is not infringed by the use of such works by a licensed dealer in radio or television receivers or in any type of recording equipment making a demonstration of the operations of such items of equipment to a specific client or customer.[145]

(10) The copyright in a musical work is not infringed by making a sound recording or a copy of the work, or of an adaptation thereof, if copies of the work or of a similar adaptation were previously made in or imported into South Africa for the purposes of retail sale by or with the licence of the copyright owner and certain requirements set out in Section 14 of the Act are met.[146]

(11) The copyright in an artistic work is not infringed by its inclusion in a cinematograph film or in a televi-

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144. Section 12(8).
145. Section 12(12) read together with ss 15(4), 16, 17, 18 and 19A.
146. Section 14 read together with Chapter 2 of R2530 published in GG 6252 dated 22 December 1978.

sion broadcast or transmission in a diffusion service if such inclusion is merely by way of background or incidental to the principal matters represented in the film, broadcast or transmission.[147]

(12) The copyright in a work of architecture or in drawings from which a work of architecture is derived, both being artistic works, is not infringed by the reconstruction of a building on the same site and in the same style as the original building.[148]

(13) The copyright in an artistic work is not infringed by its reproduction or its inclusion in a cinematograph film, a television broadcast, or a transmission in a diffusion service, if that work is permanently situated in a street, square or similar public place.[149]

(14) The copyright in an artistic work of which three-dimensional reproductions have been made available to the public, whether inside or outside South Africa, by or with the consent of the copyright owner (which reproductions are referred to for present purposes as "authorized reproductions") is not infringed if someone, without the consent of the copyright owner, makes or makes available to the public three-dimensional reproductions or adaptations of the authorized reproductions, provided the authorized reproductions primarily have a utilitarian purpose and are made by an industrial process.[150] A variation and forerunner of

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147. Section 15(1).
148. Section 15(2).
149. Section 15(3). See **Argus Printing and Publishing Co. Ltd v. Die Perskorporasie van Suid-Afrika Bpk**, 1975(4) SA 814 (A).
150. Section 15(3A).

this exemption was introduced by the Copyright Amendment Act, 1983, but the present form of the exemption was introduced in the Copyright Amendment Act, 1988.[151] The rights of copyright owners of artistic works of this nature which originate from certain foreign countries are further circumscribed. This question will be discussed further below.

Until three-dimensional utilitarian industrially produced derivatives of an artistic work have been issued to the public the work enjoys full copyright, including the right to restrain making three-dimensional reproductions of the work. Even after three-dimensional utilitarian industrially produced derivatives of the work have been issued to the public the copyright owner can still restrain the making of three-dimensional articles from the drawing itself or two-dimensional reproductions of it. This flows from the use of the words "*makes ... three-dimensional reproductions of the* **authorized reproductions**" (emphasis added) i.e. the three-dimensional derivative articles. All that is excised from the copyright or is "forfeited" is the right to restrain the making of three-dimensional reproductions or adaptations by indirect copying from an authorized reproduction. For the rest the copyright remains intact.

Before the aforementioned "forfeiture" of protection takes place the authorized reproductions, i.e. the derivative articles, must primarily have a utilitarian

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151. Section 2(1) of the Copyright Amendment Act 1988. The introduction of the measure was, however, made retrospective until 25 September 1987 [see s 2(2)].

purpose and must have been made by an industrial process. The latter concept has a reasonably clear meaning but the meaning of the former concept is more problematical. Would, for instance, a spoon or other item of cutlery made of silver and having an aesthetic shape primarily have a utilitarian purpose? The concept of an article primarily having a utilitarian purpose warrants closer examination.

It is submitted that, upon an historical analysis, the ratio of the provision is to prevent copyright from operating in relation to industrial articles and thus from trespassing on the terrain of registered designs and patents and the intention is not unduly to deprive authors of protection. On this premise it is submitted that the question should be approached as follows: The term "utilitarian" should be contrasted with "artistic" or "aesthetic" and should be viewed against an industrial background. In practical terms the derivative article must be a useful thing in an industrial context. On this basis an article such as a toy would not primarily have a utilitarian purpose. Items of machinery on the other hand would obviously have such a purpose. In cases of doubt the motivation of the average purchaser in purchasing the article should be considered. Would he buy the particular article to use it to achieve a useful practical result or would he buy it for some other purpose such as ornamentation or deriving pleasure (e.g. a replica of an early gun which has ornamental value and could be hung on a wall)? This approach accords basically with the approach adopted in comparable circumstances in the law of

designs.[152] If the latter motivation is dominant then the article primarily has an artistic purpose and not primarily a utilitarian purpose. In this case the "forfeiture" of protection will not occur. In the former case the article primarily has a utilitarian purpose even if it might have an artistic character and have strong aesthetic appeal and the "forfeiture" of protection will occur. It should be noted that it is the **purpose** of the article and not the **article** itself which must be primarily utilitarian for the "forfeiture" to occur.

(15) The copyright in programme carrying signals is not infringed by the distribution of short excerpts of the programme carried by the signals where such excerpts consist of reports of current events or are compatible with fair practice, and are only used to the extent justified by the informatory purpose of such excerpts. This exemption does not, however, apply to programme carrying signals carrying a programme representing a sporting event.[153]

(16) The copyright in any work is not infringed by reproducing that work if such reproduction is permitted by regulations made under Section 13 of the Copyright Act and is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the

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152. See LAWSA vol 8 : "**Designs**" by TD Burrell para 83 p 125. It must be appreciated that in design law the enquiry goes to the nature of features of design whereas s 15(3A) is concerned with the nature of the purpose of articles. This is an important distinction and could lead to different results in the two areas of law in a given instance.
153. Section 19.

legitimate interests of the copyright owner.[154] To date, the Minister of Economic Affairs has, in terms of Section 13 of the Act, issued regulations dealing with circumstances in which reproductions of works may be made generally and in particular by libraries or archives and for use in educational institutions.[155]

(17) The copyright in a literary, musical or artistic work or in a sound recording or broadcast is not infringed if the Copyright Tribunal for which provision is made in Chapter 3 of the Copyright Act (Sections 29 to 36 of the Act) grants a compulsory licence to do an act in relation to any such work and the act is done pursuant to such a compulsory licence. The Copyright Tribunal is empowered to grant the following types of licences:[156]

(a) In the case of a literary or musical work, a licence to publish the work in a material form or to perform the work or an adaptation thereof in public or to broadcast it or to record it or to cause it to be transmitted in a diffusion service;

(b) In the case of an artistic work, a licence to include it or an adaptation thereof in a

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154. Section 13.
155. Chapter I of Reg 2530 in GG 6252 dated 22 December 1978, as amended by Reg R1211 in GG 9755 dated 7 June 1985.
156. Section 1(1) definition of *"licence"*. Although the definition is not limited to Chapter 3, the corresponding definition in the Copyright Act, 1965, was limited in this way. This limited definition of *"licence"* can obviously not apply to the broad concept of licensing under copyright law and our courts have given a broad meaning to licence under the Act. See **J.K. Fulton (Pty) Ltd v. Logic Engineering Enterprises (Pty) Ltd and Others**, *supra*, and **Video Parktown North (Pty) Ltd v. Paramount Pictures Corporation**, 1986 (2) 623 (T). Consequently it is clear that the definition of *"licence"* in s 1 refers to those licences which may be granted by the Copyright Tribunal.

cinematograph film or in a pre-recorded or live television broadcast or to cause the work or an adaptation thereof to be transmitted in a diffusion service;

(c) In the case of a sound recording, a licence to make a record embodying it; and

(d) In the case of a broadcast, a licence to re-broadcast it, to record it or to cause it to be transmitted in a diffusion service.

The Copyright Tribunal is empowered to grant the aforementioned types of licences in basically two types of situations, namely, firstly, where a licence is sought in terms of a licence scheme operated by a licensing body, either by an individual or by an organization claiming to be representative of a group of persons to which the scheme relates,[157] or, secondly, where a person claims that he requires a licence in a case not covered by a licence scheme.[158] The powers and procedures of the Copyright Tribunal and the circumstances relating to applications for compulsory licences made to it are set out in the aforementioned provisions of the Copyright Act and the Regulations relating to the Copyright Tribunal.[159]

(18) While Section 8 of the Act deals with the scope of copyright in a cinematograph film, sub-section (2) in effect creates an exemption applicable to all types of works capable of being incorporated in a cinematograph

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157. Section 30.
158. Section 33(3). See **The Johannesburg Operatic and Dramatic Society v. Music Theatre International & Others**, *supra*.
159. Chapter 4 of Reg 2530 in GG 6252 dated 22 December 1978.

film, save for musical works. In terms of the subsection where authority is granted to utilize a work (besides a musical work) in the making of a film, or a work (besides a musical work) is made for incorporation in a film, that work may be broadcast during the broadcasting of the film unless a contrary stipulation is made by the owner of the copyright in that work.

8. INFRINGEMENT OF AN AUTHOR'S RESIDUARY OR MORAL RIGHTS

The Copyright Act confers upon the author the right to claim authorship of his work, being a literary, musical or artistic work, or a cinematograph film, and to object to any distortion, mutilation or other modification of that work where such action is or would be prejudicial to his honour or reputation.[160] This right, which the Act calls the author's *"residuary right"*, is more commonly known in copyright law as the author's "moral right". The right granted to the author in this respect by the Act is enforceable in the same way as copyright and any encroachment on that right is treated by the Act as an infringement of the copyright.[161] The author's moral right endures for the duration of the term of copyright in the work and, it is submitted, is a right which always attaches to the author or his heir, notwithstanding the fact that the author might have assigned the copyright in his work to someone else. This would seem to follow from the personal nature of the right which is comparable to the author's reputation.

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160. Section 20(1).
161. Section 20(2).

In the case of an author who authorizes the use of his work in a cinematograph film or a television broadcast, the author's moral right is limited to a certain extent in that he does not have the right to oppose modifications which are absolutely necessary on technical grounds or for the purposes of the commercial exploitation of the work.[162]

9. COURT PROCEEDINGS RELATING TO COPYRIGHT INFRINGEMENT

A. CIVIL REMEDIES:

Infringements of copyright are actionable at the suit of the owner of the copyright[163] or an exclusive licensee (including an exclusive sub-licensee)[164] and such person can claim an interdict restraining the performance of the infringing act, damages or an account of profits, and delivery up of infringing copies of the work in question and plates (i.e. moulds, negatives and the like) used or intended to be used for making infringing copies.[165] If a defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work concerned, the copyright owner is not entitled to recover damages although he is entitled to an account of profits.[166] On the other hand,

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162. See the proviso to s 20(1).
163. Section 24(1).
164. Section 25. See **Video Parktown North (Pty) Ltd v. Paramount Pictures Corporation**, *supra*, and **Kinekor Films (Pty) Ltd. v. Dial-a-Movie**, 1977(1) SA 450 (A); **Klep Valves (Pty) Ltd v. Saunders Valve Co. Ltd**, *supra*.
165. Section 24(1).
166. Section 24(2). In regard to the remedies of an Account of Profits, Conversion and Detention see "**Account of Profits in South African Copyright Law**" by O.H. Dean SALJ February 1986 p 103. The remedies of Conversion and Detention which existed under the earlier legislation were done away with in the 1978 Act.

if the infringement is flagrant, the court is, in certain circumstances, empowered to award such additional damages as it may consider appropriate, by way of a penalty (so-called "penal damages").[167]

Our courts have granted so-called "Anton Piller Orders" in copyright infringement matters. An Anton Piller Order as approved by the Appellate Division is primarily a procedural remedy whereby the Deputy Sheriff is directed to enter the premises of the respondent and to take possession of and retain in his custody pending the hearing of the matter all relevant evidence relating to the applicant's cause of action. The order is granted without notice to the respondent and is usually sought in camera in order to preserve secrecy which is of the essence of the matter because the rationale behind the granting of the order is that the respondent is in possession of material evidence which he is likely to destroy or otherwise place beyond the reach of the applicant if he becomes aware that proceedings are being instituted against him. Interim interdicts are often sought and granted in conjunction with Anton Piller Orders.[168]

B. PRESUMPTIONS RELATING TO ONUS OF PROOF

Section 26 of the Copyright Act contains a number of presumptions which alter the general principle that it is encumbent upon the copyright owner (or exclusive licen-

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167. Section 24(3). See **Priority Records (Pty) Ltd & Another v Ban-Nab Radio and TV**, 1988 (2) SA 281 (D); **CCP Record Co. (Pty) Ltd v Avalon Record Centre**, Case No 11490/86 in the CPD - unreported.
168. See **Universal City Studios Inc & Others v Network Video (Pty) Ltd** 1986 (2) SA 734 (A); **Warner Bros Inc & Others v Melotronics**, Cases Nos 4607-15/86 in the CPD - unreported.

see),in any court proceedings relating to civil copyright infringement, or the State in any court proceedings relating to criminal copyright infringement, to prove all the facts necessary to establish the subsistence of copyright, the plaintiff's or the complainant's title to that copyright and that infringing acts have been committed. The existence of these presumptions is of substantial importance. These presumptions are set out below:

(1) Where in the case of a literary, musical or artistic work, a name purporting to be that of the author or of a co-author appeared on copies of the work as published, or in the case of an artistic work, appeared on the work when it was made, the person whose name appears in this manner is presumed, in any civil proceedings, unless the contrary is proved, to be the author of the work, or one of such authors, provided the name in question was his true name or the name by which he was commonly known.[169]

(2) Where in civil proceedings in respect of a literary, musical or artistic work of which the authorship is anonymous or pseudonymous, it is established that the work was first published in South Africa, in the United States of America or in a Berne Convention country during the 50 years preceding the beginning of the year in which the proceedings were brought and that a name purporting to be that of the publisher of the work appeared on copies of the work as first published, it is presumed until the contrary is shown that copyright subsists in the work and that the person named as the

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169. Section 26(1) and (2).

publisher was the owner of the copyright at the time of publication of the work. This provision does not, however, apply if the actual name of the author of a pseudonymous work is commonly known.[170]

(3) In civil proceedings relating to a literary, musical or artistic work, where it is established that the author of the work was dead at the time of the bringing of the proceedings, the work is presumed to be an original work unless the contrary is proved.[171] Similarly, where a work has been published and the author was anonymous or is claimed to be pseudonymous and it is not shown that the work was ever published under the true name of the author or under a name by which he was commonly known, or that it is possible for a person without previous knowledge of the facts to ascertain the identity of the author by reasonable enquiry, the work is presumed to be original unless the contrary is proved.[172]

(4) If it is proved in civil proceedings relating to the copyright in a cinematograph film that a name purporting to be the name of the author of that film appears on it in the prescribed manner, it is presumed that the named person is the author of that film unless the contrary is shown.[173]

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170. Section 26(3).
171. Section 26(4). See **Saunders Valve Co. Ltd v Klep Valves (Pty) Ltd**, *supra*; **Klep Valves (Pty) Ltd v Saunders Valve Co. Ltd**, *supra*.
172. Section 26(5).
173. Section 26(6). See Chapter 3 of Reg 2530 in GG 6252 dated 22 December 1978, for the prescribed manner. See also **Video Rent (Pty) Ltd & Another v. Flamingo Film Hire**, *supra*.

(5) In civil proceedings relating to the copyright in a sound recording, if it is proved that records embodying the sound recording or a part of it have been issued to the public bearing a label or other mark comprising certain particulars, then the label or mark in question is sufficient evidence of the facts so stated save to the extent that the contrary is proved. The particulars referred to above are that a person named on the label or mark was the author of the sound recording, that the recording was first published in a year specified on the label or mark, or that the recording was first published in a country specified on the label or mark.[174]

(6) In civil or criminal proceedings relating to the infringement of the copyright in a cinematograph film which has been registered in terms of the Registration of Copyright in Cinematograph Films Act, 1977, it is presumed that every party to those proceedings had knowledge of the particulars entered in the Register of Copyright in respect of that film from the date of the lodging of an application to record those particulars,[175] and it is presumed that the defendant or accused who is alleged to have done an act which infringes the copyright in that film did that act without appropriate authority unless the contrary is proved.[176] The first mentioned presumption is irrebuttable, while the latter presumption is, as indicated, rebuttable.

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174. Section 26(7).
175. Section 26(9)(a).
176. Section 26(9)(b).

(7) In any civil or criminal proceedings relating to the infringement of the copyright in a cinematograph film, it is presumed, unless the contrary is shown, that any person who trades in the selling, letting or distribution of copies of cinematograph films and who is found in possession of a reproduction or adaptation of a cinematograph film, in fact sold or let for hire, or by way of trade offered or exposed for sale or hire, the reproduction or adaptation of the films in question.[177]

10. TRANSMISSION OF COPYRIGHT

Copyright in respect of any particular work comprises in effect a monopolistic right to a number of different acts. The sum total of all these rights constitutes a whole copyright.[178] The scope of the copyright in the different types of work varies from class to class (e.g. see Section 6 in regard to what rights are comprised in the copyright in a literary or musical work).

Copyright, or a portion thereof, may be transmitted or transferred to another person. Copyright may be apportioned in the following ways or a combination of two or more of these ways:

(i) As to the nature of or manner of dealing in the work, for instance the right to publish the work, the right to broadcast it, the right to translate it.

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177. Section 26(10).
178. See **Video Parktown North (Pty) Ltd v. Paramount Picture Corporation**, *supra*, at 632.

(ii) As to the country or geographical area in respect of which the copyright subsists.

(iii) As to the duration or term of the right granted.[179]

It follows therefore that in the case of, for instance, a literary work, the owner of the copyright can assign to one person the right to publish the work in book form in the Republic, to another the right to publish it in book form in the United States and to others such rights as dramatization, filming, translation or publication in serial form; or he may assign certain of these rights and license others and he may set a time limit on the granting of any of these rights.

It is a maxim of our Roman-Dutch common law that "*nemo plus juris transferre potest quam ipse habet*" (No-one can transfer greater rights than he himself has).[180] This principle is particularly pertinent to copyright law with its principle of compartmentalization of rights. A person who owns or holds merely some of the rights comprised in the copyright in a work cannot transmit greater rights to another than those which he holds himself. For instance, someone who has taken assignment of the right to publish a literary work in English cannot grant to another the right to publish the work in Afrikaans as he does not hold that right.

Copyright can be assigned, licensed, and transmitted by testamentary disposition or by operation of law as movable

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179. Section 22(2).

180. See **Roman Private Law**, 2nd Ed by Max Kaser, translated by R. Dannenbring, para 24 I 2, and Silberberg and Schoeman, **The Law of Property**, 2nd Ed, para 2.3 on p 73. The authors of the latter work describe this principle as the "golden rule" of the law of property.

property.[181] Assignments and licences of copyright will be discussed below.

A. ASSIGNMENT:

The author, as the first owner of the copyright in the work, or any subsequent owner, can transfer all or some of his rights under the copyright to another person. Where a transfer of rights or assignment has taken place, the assignor divests himself entirely of the right or rights concerned and these become the property of the assignee. The assignor thereafter no longer has any claim to such rights and is in fact no longer able to perform the acts covered by those rights himself without the authority of the assignee.[182] Consequently, an author who has assigned all the rights under the copyright in his work to, for instance, a publisher, no longer has any rights in that work - these rights have become the property of the publisher. If he should thereafter reproduce his own work without the publisher's permission he will infringe the copyright in that work.

The Act provides that no assignment of copyright, whether total or partial, will be effective unless it is in writing, and signed by or on behalf of the assignor.[183] There must, however, be an agreement to assign or cede, i.e. there must be a mutual intention to transfer rights by offer and acceptance.[184] A verbal or tacit agreement purporting to assign copyright will be ineffective and invalid. An agree-

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181. Section 22(1).
182. See **Kinekor Films (Pty) Ltd v Drive-In Home Movies**, 1976(2) SA 87 (O) at p 90; **Erasmus v Galago Publishers (Pty) Ltd & Another**, *supra*.
183. Section 22(3).
184. See **Preformed Line Products (SA)(Pty) Ltd v Hardware Assemblies (Pty) Ltd**, *supra*.

ment can effect an assignment of copyright even though no specific mention of copyright is made in it.[185]

It is possible for a prospective owner of copyright to assign any future copyright wholly or partially to another person and, on the copyright coming into existence, it will vest in that other person.[186] For example, an artist can assign the copyright in a painting which he is about to undertake to another person and, upon the work being completed, that other person will become the owner of the copyright.

The transfer of the ownership of a physical article embodying a work which is the subject of copyright must be distinguished from the assignment of the copyright in the work in question. The article embodying a work which is the subject of copyright is an item of tangible property, whereas the copyright in the work is an item of intellectual property. The two items of property are the subjects of separate rights which can have separate owners. The transfer of the ownership of an item of tangible property does not, per se, transfer the ownership of the copyright. This can only be done by assignment of the copyright.[187] For instance, when an original oil painting is sold the ownership of the physical article is transferred to the purchaser. However, unless the artist enters into a Deed of Assignment of copyright with the purchaser of the painting, or signs a document which can be construed as an assignment, the copyright remains vested in the artist. The owner of the physical

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185. **Klep Valves (Pty) Ltd v Saunders Valve Co. Ltd**, *supra*.
186. Section 22(5).
187. See **Boshoff v. Art Metal and Electroplating Works (Pty) Ltd**, *supra*.

article can enjoy the fruits of his ownership save to the extent that his dealings in the article infringe the copyright in the artistic work. He cannot therefore, for instance, reproduce the painting which he owns unless he obtains the permission of the copyright owner. An exception to the general rule that the passing of ownership in a physical article does not affect the ownership of the copyright in intellectual property embodied in the physical article is, however, provided for in Section 22(6) of the Act. In terms of this section a testamentary disposition of the material on which a work is first written or otherwise recorded effects the disposition of any copyright in the work which is vested in the deceased at the time of his death.

An assignment or cession of copyright must be distinguished from a cession by the copyright owner of his right of action arising from an infringement of his copyright. In the latter instance the copyright owner simply cedes a claim but retains ownership of the copyright the infringement of which gives rise to his claim against a third party.[188]

B. LICENCES:

A copyright licence is tantamount to an undertaking by the copyright owner not to sue the licensee, or his sub-licensee, for infringement and, except in the case of an exclusive licensee, confers no rights as against third parties.[189] In other words, the copyright owner remains the

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188. See **Video Parktown North (Pty) Ltd v Paramount Pictures Corporation**, *supra*.
189. **Video Parktown North (Pty) Ltd v Paramount Pictures Corporation**, *supra*; **Kinemas Ltd v African Theatres Ltd**, 1927 TPD 100; **Klep Valves (Pty) Ltd v Saunders Valve Co. Ltd**, *supra*.

owner of the right and merely allows the licensee to exercise that right. As he does not own the right, the licensee cannot enforce it against third parties. A licence can be contrasted with an assignment, and whereas by assigning the whole or part of his copyright, an owner divests himself of all rights therein, in the case of a licence, the copyright owner retains the ownership of the rights concerned even though he might have undertaken not to exercise the particular rights himself during the currency of the licence. Upon the termination of the licence the full rights revert to the copyright owner.

A non-exclusive licence under the copyright in a work may be written or may even be inferred from conduct. It can be revoked at any time but if granted by a contract cannot be revoked by the grantor or his successor except in accordance with the contract or as provided in a further contract.[190]

A licensee can grant sub-licences which fall within the scope of his own licence and acts performed by the sub-licensee are deemed to have been done with the authority of the copyright owner.[191]

An exclusive licence is a licence in writing signed by or on behalf of the grantor (i.e. the copyright owner or sub-licensor)[192] authorizing the licensee, to the exclusion of all other persons, including the grantor himself, to exercise acts which fall within the scope of the copyright.[193] The exclusion of all other persons need not

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190. Section 22(4).
191. Section 22(8).
192. **Kinekor Films (Pty) Ltd v Dial-a-Movie**, *supra*.
193. Section 1(1) definition of *"exclusive licence"*.

be explicit but can be inferred.[194] An exclusive licensee, unlike an ordinary licensee, is specifically given the right in terms of the Act, to take action against third parties for copyright infringement, in his own name. The rights of action of an exclusive licensee exist concurrently with the right of action of the copyright owner. An exclusive sub-licensee is in the same position as an exclusive licensee and his right of action is concurrent with the copyright owner and the exclusive sub-licensor.[195] An exclusive copyright licence can be inferred from an agreement even though no specific mention is made of copyright.[196]

A sub-licence must be distinguished from the cession of a licence. If A grants a licence to B and B then grants a licence to C or allows C to exercise the rights granted to him by A, the relationship between B and C is that of sub-licensor and sub-licensee. A contractual *nexus* remains between A and B and there is no contractual *nexus* between A and C. C is entirely reliant for the existence of his rights on B. If, however, B does not simply allow C to exercise the rights granted to him by A, but transfers or cedes the rights which he derives from the licence with A to C, B will no longer remain A's Licensee or C's sub-licensor; B will fall out of the picture altogether and C's licence will derive directly from A. If there are obligations flowing out of the licence in favour of A, A would have to be a party to

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194. **Kinekor Films (Pty) Ltd v Dial-a-Movie**, *supra*.
195. Section 25. See **Paramount Pictures Corporation v Video Parktown North (Pty) Ltd**, *supra*; **Video Parktown North (Pty) Ltd v Paramount Pictures Corporation**, *supra*; and **Kinekor Films (Pty) Ltd v Dial-a-Movie**, *supra*; **Klep Valves (Pty) Ltd v Saunders Valve Co. Ltd**, *supra*.
196. **J.K. Fulton (Pty) Ltd v Logic Engineering Enterprises (Pty) Ltd & Others**, *supra*. On the other hand, see also **Preformed Line Products (SA)(Pty) Ltd v Hardware Assemblies (Pty) Ltd**, *supra*.

the substitution of C for B as his licensee. This distinction between a sub-licence and a cession of a licence is of particular importance where B is an exclusive licensee. If B simply grants a sub-licence, even an exclusive sub-licence he will retain his independent right of action for infringement and C will also acquire a right of action if he is an exclusive sub-licensee. If, however, B has ceded his exclusive licence to C, then B will not have any right of action for infringement.

A licence granted by a copyright owner is binding upon his successor in title except upon a purchaser of the copyright in good faith who has no notice, actual or constructive, of the licence, or upon a person deriving title from such a purchaser.[197]

11. INTERNATIONAL COPYRIGHT

In dealing with the ambit of the works which it protects, the Copyright Act refers specifically only to works first published in South Africa or works made by qualified persons, being persons who are citizens of, or are resident or domiciled in, South Africa, in the case of individuals, or bodies corporate organized and existing under the laws of South Africa, in the case of juristic persons.[198] However, the Minister of Economic Affairs has, in regulations made in terms of Section 37 of the Act,[199] made provisions whereby the Act applies also to works of foreign origin. More particularly, the Minister has provided the following:

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197. Section 22(7).
198. Sections 3(1) and 4(1).
199. Notice 704 of 1987 in GG 10947 dated 25 September 1987.

(a) In relation to literary, musical or artistic works, cinematograph films, sound recordings and published editions first published in scheduled countries (i.e. countries listed in a schedule to the Regulations), the Act will apply in the same way as it applies to those types of works first published in South Africa.[200]

(b) The Act will apply to persons who are citizens of, or are domiciled or resident, in a scheduled country in the same way as it applies to persons who are citizens of or domiciled or resident in South Africa.[201]

(c) The Act will apply to bodies incorporated under the laws of a scheduled country as they apply in relation to bodies incorporated under the laws of South Africa.[202]

This effectively means that works emanating from scheduled countries are protected in exactly the same way under the Copyright Act as are works emanating from South Africa. The protection granted in terms of the regulations to foreign sound recordings, published editions and those artistic works referred to in s 15(3A) of the Act is, however, subject to the qualification that works of this nature originating from a foreign country will only enjoy protection in South Africa to the extent that protection in the nature of, or related to copyright is granted in that country to such works first published in South Africa or made by a qualified person referred to in s 3(1) of the Act and such works do not enjoy any wider protection in South Africa than is enjoyed in their country of origin by South African works of

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200. Regulation 2(a) of GN 704 (See footnote 199).
201. Regulation 2(b) and (c) of GN 704 (See footnote 199).
202. Regulation 2(d) of GN 704 (See footnote 199).

the same description.[203] In consequence the right to enforce a particular restricted act only exists if the law of the country of origin provides for that restricted act, e.g. the right to control hiring out of a record embodying a sound recording - many countries do not recognize this right.

(a) Conventions and Treaties

There are two major international copyright conventions in operation. The first is the Berne Convention which dates originally from 1886 but which has been revised several times since that date and there are numerous texts of the convention in existence which differ from one another.[204] The Berne Convention lays down certain minimum standards of protection which must be granted to works under copyright in the member countries. The underlying principle of the Berne Convention is that each member country must afford protection to the works of other member countries on exactly

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203. See the proviso to Reg 2 of GN 704 (See footnote 199). Sound recordings are not covered by the Berne Convention, but are dealt with in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (Rome Convention) and the Convention for Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (Geneva Convention). South Africa has not to date acceded to the Rome Convention. It can thus not be taken for granted that South African sound recordings enjoy protection in foreign counries, and therefore that foreign sound recordings are protected in South Africa. Published editions are not covered by any international convention with the result that only in exceptional circumstances are South African published editions protected in other countries (e.g. Britain) In regard to artistic works of a technical nature dealt with in s 15(3A) of the Act) see p 86 *infra*.

204. The Berne Convention was supplemented at Paris in 1896; thereafter it was revised at Berlin in 1908 and completed in Berne in 1914; it was revised subsequently at Rome in 1928, Brussels in 1948, Stockholm in 1967 and Paris in 1971 and amended in 1979. See the publication entitled **Copyright**, January 1988, published by the World Intellectual Property Organisation (WIPO) at p 6.

the same basis and to the same extent as protection is afforded to that country's own works.[205] It is not a requirement or principle of the Berne Convention that member countries must grant to foreign works the same protection which they enjoy in their own countries (i.e. foreign countries)[206] although, since member countries are supposed to meet minimum standards of protection for works,[207] it follows that the protection granted in the various countries which are signatories of the Convention should be basically the same.

South Africa is a signatory of the Berne Convention, having become an independent contracting party to it on 3 October 1928, and has subscribed to the Brussels text of that Convention, which dates from 1948 (South Africa acceded to this text on 1 August 1951), as far as substantive law is concerned, and the Paris text, dating from 1971 (South Africa acceded partially to this text on 24 March 1975), as far as administrative provisions (Articles 22 - 38) are concerned.[208]

The countries which are listed in the schedule to the aforementioned regulations are countries which are signatories of the Berne Convention.[209] The regulations do not extend the protection of the Copyright Act to countries simply because they are signatories of the Berne Convention, but because, being signatories of that Convention, they are

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205. Article 5(1) and (3) of the Berne Convention (Brussels Version).
206. Article 5(2) of the Berne Convention (Brussels Version).
207. See the preamble to the Berne Convention read together with the Convention as a whole and articles 1 and 2(6) in particular (Brussels Version).
208. See **Copyright** - January 1988.
209. Schedule to GN 704/1987 (see footnote 199).

listed in the schedule. Should it transpire that the list of Berne Convention countries in the schedule is not complete, it would mean that there are certain members of the Berne Convention to the works of which the Copyright Act has not been extended. The signatories of the Berne Convention include the major Western countries and South Africa's principal trading partners, with the notable exception of the United States of America.[210]

The other major international copyright convention is the Universal Copyright Convention which dates from 1952 and was revised in 1971.[211] South Africa is not a signatory of this convention. The United States of America is, however, a signatory of the Universal Convention. This means that South Africa and United States of America do not have common membership of any international convention on copyright.

(b) **Reciprocal Arrangement with the United States of America**

In order to compensate for their lack of common membership of an international convention, the United States of America and South Africa have entered into a bilateral arrangement in terms of which the two countries grant each other reciprocal copyright recognition and United States works are protected in South Africa and vice versa. This arrangement dates from 1924 and as far as the protection of United States works in South Africa is concerned, has been effected by proclamations dated July 1, 1924,[212] 5 October 1973[213]

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210. For a list of the current signatories of the Berne Convention see **Copyright** - January 1988, p 6.
211. See **Copyright** - January 1988, p 6.
212. Proclamation 118/1924 published in GG dated 13 June 1924.
213. Proclamation R231/1973 published in GG 1850 dated 5 October 1973.

and 13 March 1981.[212] The latter two proclamations each repealed its predecessor.

The effect of the current proclamation is that it provides in effect that the United States of America is a scheduled country under the 1987 regulations. In practice, the United States of America is deemed to be an "honorary member" of the Berne Convention for purposes of South African copyright law. There is, however, one proviso to the protection of United States works and that is that, in contrast to Berne Convention works which are protected on exactly the same basis as South African works (as required by the Berne Convention), American works are only protected under South African copyright law for a term which does not exceed the term of copyright enjoyed by the type of work in question under the laws of the United States of America. This flows from the proviso to the 1981 Proclamation. In determining the duration of the copyright in a particular American work, say a literary work, in South Africa, one has regard not to the duration of the copyright in that particular work in the United States of America but to the term of copyright granted to literary works in general, or, put differently, to the term for which a literary work is capable of being protected, under United States copyright law. This flows from the reference to the term of copyright enjoyed by "that *type* of work" (emphasis added) in the 1981 Proclamation. Section 3(2) of the Copyright Act deals with the term of copyright granted to various *types* of works and the intention of the

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212. Proclamation R566/1981 published in GG 7486 dated 13 March 1981. Although this Proclamation makes specific reference to GN R2565 of 22 December 1978, which Notice has been repealed and superseded by Notice 704 of 1987, this Proclamation must be interpreted to refer to the latter Notice in view of the provisions of s 12 of the Interpretation Act, 1957.

proclamation is that the duration of the copyright enjoyed by these *types* of work must be compared with the duration of copyright of the same *types* of work under United States law.[215]

(c) Broadcasts and Programme Carrying Signals

Although the Minister is empowered to make the provisions of the Act applicable to broadcasts and programme carrying signals emanating from other countries, and, indeed to broadcasts and programme carrying signals made by other persons besides the South African Broadcasting Corporation,[216] he has not to date given effect to his powers in any of these regards with the result that the only broadcasts and programme carrying signals afforded copyright protection in South Africa are those made by the SABC.

The probable reason for this is that the Minister's powers in general to make the provisions of the Copyright Act applicable to works emanating from other countries are subject to the restriction that he may not extend the operation of the Act to works emanating from a particular country unless he is satisfied that such other country protects or will in due course protect equivalent South African works.[217] Broadcasts and programme carrying signals are not covered by the Berne Convention and although there are international conventions dealing with protection of these types of works,[218] South Africa is not at present a sig-

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215. See **Barber-Greene Company & Others v. Crushquip (Pty) Ltd**, *supra*.
216. See Section 38.
217. Section 37(3).
218. Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; Geneva Convention of 1971 for Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms; and Brussels Convention of 1974 relating to the distribution of programme carrying signals transmitted by satellite.

natory of those conventions.

(d) Technical Artistic Works

The introduction of the principle of reciprocity into the protection afforded to artistic works of a technical nature in GN 704 is an unusual measure as it appears to be out of step with the underlying principle of the Berne Convention that member countries must grant to foreign works the same protection as they grant to their own works. Artistic works of a technical nature are covered by the Berne Convention. They are referred to in the Berne Convention as *"works of applied art"*. The reciprocity measure can probably be justified, however, by the provisions of article 2(5) of the Berne Convention (Brussels text). In terms of this article member countries may determine the extent to which they protect works of applied art, industrial designs and models under their copyright law and works which are protected in a country of origin solely as designs and models are only entitled to protection in other countries in the way in which designs and models are protected in those countries.

In the final analysis foreign artistic works of a technical nature may, depending on the circumstances, have very limited protection, if any. In terms of s 15(3A) of the Act once three-dimensional reproductions of an artistic work, being versions of the work which primarily have a utilitarian purpose and being made by an industrial process, are made available to the public anywhere in the world, the copyright owner will not be able to restrain the making of three-dimensional indirect copies of that work, i.e. copies made from a derivative three-dimensional article. In principle, however, and subject to what is said below, the balance of the copyright in the artistic work remains enforceable, e.g. the right to restrain the making of two-dimensional

reproductions or adaptations, or three-dimensional reproductions directly from the original drawing or from a two-dimensional reproduction of it.

The application of the proviso to s 2 of GN 704/1987 to the question of the protection enjoyed by artistic works of a technical nature is a complicated issue. Immediately after three-dimensional utilitarian industrially-produced derivative articles of such works are issued to the public anywhere in the world, the aforementioned proviso comes into operation, but not until that moment; prior to that moment the proviso does not operate and reciprocity is not a factor. The proviso only comes into operation at that moment because only then does the work become "*an artistic work, such as is referred to in s 15(3A) of the Act*". Once the proviso comes into operation the protection of the original work becomes subject to the reciprocity principle. When that stage is reached, if the country of origin of a foreign work does not grant any copyright at all in that work or does not grant the balance of the copyright granted in South Africa to that type of work, then the foreign work will no longer enjoy any protection in South Africa. For instance, let us take the example of the Federal Republic of Germany. In order to qualify for copyright under German law an artistic work must embody a degree of artistic (in the strict sense) creativity. The work must have artistic quality or merit and this criterion would seem to disqualify technical drawings of purely functional articles from enjoying any copyright.[219]

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219. See Christine Felner **The Future of Legal Protection for Industrial Design** at p 133 (published by ESC Publishing Limited, Oxford, England).

Accordingly, a German drawing embodying the design of a motor car silencer or a tooth for earth moving equipment would not enjoy any copyright at all in Germany. A South African drawing under German law would be in the same position. In terms of the proviso to Section 2 of GN 704/1987 a German drawing of a motor car silencer (being a silencer which has been mass produced and marketed) would thus not be invested with any copyright in South Africa once such proviso became operative even though an equivalent drawing of South African origin would continue to enjoy the balance of the copyright in these circumstances. Ironically if the German drawing has not yet given rise to three-dimensional utilitarian industrially-produced derivative articles which have been sold somewhere in the world and the conditions in respect of the proviso to Section 2 of GN 704/1987 will not yet have been met and the proviso will thus not have come into play, such drawing will enjoy full copyright in South Africa notwithstanding the position in Germany. The application of the principle of reciprocity to foreign artistic works of a technical nature is therefore only partial. In other words, while a German work of this nature remains so to say "unpublished" it enjoys full copyright in South Africa; once it is "published" it ceases to enjoy any copyright at all. In the same circumstances a "published" South African work will only forfeit a part of its protection and the balance will be unaffected. If, however, the law of the country of origin grants the balance of protection or a part of it then the "published" foreign work will continue to enjoy commensurate protection in South Africa. Britain would be an example of such a country.

In short if three-dimensional utilitarian industrially-produced derivative articles of an artistic work are distributed anywhere in the world so-called "reverse engineer-

ing" of those articles does not constitute copyright infringement irrespective of the country of origin of the work. In the case of unauthorized reverse engineering of articles which do not have primarily a utilitarian purpose or are not made by an industrial process, copyright infringement does occur irrespective of the country of origin of the original works. Where a derivative article primarily has a utilitarian purpose and is made by an industrial process whether the foreign original work enjoys the balance of the copyright in South Africa will depend on the law of the country of origin of the work. That part of the balance of copyright enjoyed in the country of origin will be enjoyed in South Africa.

(e) Proof of Foreign Law

In litigation with respect to the enforcement of the copyright in a sound recording, published edition or artistic work of a technical nature of foreign origin in South Africa the South African courts may have to determine whether the law of the country of origin grants in respect of the work in question the rights which are sought to be enforced in such litigation. This could involve the South African courts in adjudicating upon complex issues of foreign copyright law. It is submitted, however, that in terms of the well-recognized presumption that the law of a foreign country is the same as South African law unless the contrary is shown, an onus of proof of the non-existence of the right in question under the law of the country of origin would lie on the defendant; the plaintiff would not bear the onus of proving the existence of the right in question in the country of origin.

(f) Extended Scope of International Regulations

The schedule to GN 704/1987 comprises countries which did not appear in the schedule to its predecessor. South African copyright has thus now been extended to works originating from those countries, no matter when they were made.

The term *"country"* is defined in Section 1(1) of the Act to include any colony, protectorate or territory subject to the authority or under the suzerainty of any other country, and any territory over which trusteeship is exercised. The countries listed in the schedule to GN 704/1987 should be viewed against this background. For instance, although Hong Kong is not specifically listed in the schedule, it is submitted that the reference to the United Kingdom in such schedule includes Hong Kong in view of its status as a colony of the United Kingdom.

12. POSITION OF THE STATE

The Act binds the State and the general question of copyright in relation to the State is set out in Section 5 of the Act. The Government printer has been designated by the State President by Proclamation in the Government Gazette as the person in whom copyright belonging to the State vests for administrative purposes.[220]

13. POWER OF THE MINISTER TO ABROGATE COPYRIGHT IN CERTAIN INSTANCES

Section 45 of the Act empowers the Minister of Industries, Commerce and Tourism to make regulations empowering any

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220. See Proc R24 1979 in GG 6299 dated 9 February 1979.

specified person to prohibit the circulation, presentation or exhibition of any work or production, or conversely, to authorize the circulation, presentation or exhibition of any work or production subject to conditions which may be specified in the Regulations. Any circulation, presentation or exhibition of any work or production pursuant to an authority granted in terms of such regulations will not constitute an infringement of copyright in such work or production but the copyright owner shall be entitled to a reasonable remuneration which can be determined by arbitration in the event that the amount thereof cannot be agreed upon by the parties.[221] The counter-part of this Section in the 1965 Act was commonly referred to as the "piracy clause" as it entitled the Minister to override the wishes of a copyright owner and thereby empowered him to authorize "piracy" of a work. The appellation is equally applicable to Section 45 of the 1978 Act. Section 45, however, like its predecessor, Section 50 of the Copyright Act, 1965, has not been brought into operation. This section is, however, not contrary to the provisions of the Berne Convention (See Article 17 of the Brussels version), and its being brought into operation ought not to place South Africa's standing in the Berne Union created by the Convention in jeopardy. Nevertheless, it is perhaps understandable that there is a reluctance on the part of the legislature to bring it into operation. It is intended as an emergency provision to be utilized in extreme circumstances such as may be occasioned by cultural or other boycotts of South Africa.

Ironically, Section 45 of the Act, although it has not been brought into operation, has been amended. This has been

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221. Section 45.

brought about by Section 4 of the Copyright Amendment Act, 1983. The main thrust of the amendment has been to replace references to the *"circulation"* and *"presentation"* of a work with references to the *"distribution"* and *"performance"* of a work. Section 4 of the Copyright Amendment Act, 1983, has also not yet been brought into operation with the result that for the time being Section 45 of the Copyright Act, 1978, remains unaltered.

At the same time the Copyright Amendment Act, 1983, in Section 5, introduced a new section 45A. This new section is very similar in principle and effect to Section 45 and it empowers the Minister to make regulations empowering a specified person to authorize the reproduction or adaptation or the making available to the public of reproductions or adaptations of any artistic works subject to conditions specified in such Regulations. The carrying out of any act authorized in terms of such Regulations will not constitute an infringement of the copyright in any artistic work but the copyright owner is not to be deprived of any right which he may have had to obtain reasonable remuneration, the amount of which will be determined by arbitration in the event that the parties cannot agree thereon. Section 5 of the Copyright Act, 1983, has also not been brought into operation with the result that although the new section has been adopted by the legislature it does not at the present time form part of the Copyright Act, 1978.

In the light of the right of the owner of the copyright in an artistic work to restrict the making of three-dimensional reproductions of such work, in particular the making of spare parts by means of reproduction of the original parts, the reason why the legislature considers it necessary for the Minister to be able to override the effects of any eco-

nomic or military boycott brought about by means of enforcement of copyright, is self-evident.

14. RESTRICTING IMPORTATION OF INFRINGING COPIES

Section 28 of the Act makes provision for the owner of, or exclusive licensee under, the copyright in any published literary or musical work, any published cinematograph film, or any sound recording or published edition to enter into an arrangement with the Commissioner of Customs and Excise whereby the latter prohibits the importation into South Africa of infringing copies (including copies which would have been infringing copies if hypothetically made in South Africa by the actual maker) of his work for a specified period. The period cannot exceed the duration of the copyright in the work. The Commissioner can require the copyright owner or exclusive licensee, as the case may be, to furnish an indemnity and security against any expenses which he may incur in giving effect to the arrangement. In practice, arrangements of this nature are seldom entered into or, if entered into, are very rarely, if ever, put into effect.

15. RETROSPECTIVITY AND SAVINGS PROVISIONS

(a) Retrospective Operation of the Act

In applying the Copyright Act, 1978, to works made prior to 1 January 1979, the date on which the Copyright Act, 1978, came into operation, one must, depending upon the circumstances, have regard to certain of the provisions of the Copyright Act, 1965, and the Patents, Trade Marks, Designs and Copyright Act, 1916. This thesis examines to which of

the provisions of the aforementioned two statutes one must have regard in connection with pre-1979 works and in what circumstances they are applicable under the present law. The key to the whole question is Sections 43 and 41 of the Act.

In terms of Section 43 the Copyright Act, 1978, is retrospective in effect and it applies to works made before its commencement in the same way as it applies to works made thereafter.[222] This provision, save for certain exceptions, which will be dealt with below, is subject to two qualifications, namely, the following:

(a) The Act does not affect the ownership, duration or validity of any copyright which subsists under the Copyright Act, 1965 (Act No. 63 of 1965); and

(b) The Act does not create any copyright which did not subsist prior to September 11, 1965, the date upon which the Copyright Act, 1965, came into operation.[223]

Section 41(1) of the Copyright Act, 1978, provides that nothing in the Act will affect any right or privilege of the State subsisting otherwise than by virtue of a statute, or any right or privilege of the State or of any other person under any law not expressly repealed, amended or modified by this Act. The interpretation of Section 41 will be considered first.

(b) Interpretation of Section 41

Section 41(1) of the Act reads as follows:

> *"Nothing in this Act shall affect any* **right** *or* **privilege** *of the state subsisting otherwise than by*

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222. Section 43.
223. Section 43(a).

virtue of any **law**, *or any* **right or privilege** *of the state or of any other person under any* **law** *not expressly repealed, amended or modified by this Act"* (emphasis added).

The sub-section is susceptible of two interpretations i.e. firstly, that the words "*not expressly repealed, amended or modified by this Act*" refer to "*any law*", or, secondly, that the aforegoing words refer to "*any right or privilege*". It is submitted that the latter interpretation is to be preferred because the successively used terms "*repealed, amended or modified*" (the Afrikaans text reads "*herroep, gewysig of verander*") are more easily reconcilable as referring to a right or privilege than to a law. (How does one "*modify*" , as distinct from "*amend*" or "*repeal*", a law?) By contrast this terminology could be appropriate to a privilege or right, particularly the former. Furthermore, as will be shown below, the Patents, Trade Marks, Designs and Copyright Act, 1916, expressly granted vested rights, which rights were recognized and retained in the Copyright Act, 1965, and the 1965 Act itself created vested rights. There is no reason to suppose that the legislature did not intend to perpetuate those rights under the present Act. The first mentioned alternative interpretation of Section 41(1) would have the effect of abrogating such rights as were provided for in "*the law*" (the Copyright Act, 1965) which was "*expressly repealed*" by the 1978 Act.

The sub-section is derived from Section 44(1) of the 1965 Act, which it repeats verbatim save that the comma which appears roughly in the middle of the sub-section after the word "*law*" did not appear in the 1965 version. The comma which appears in the 1978 version has the effect of suggesting that the expression "*expressly repealed, amended or modified by this Act*" does not refer to the first half of

the sub-section and thus the *"right or privilege"* of the State or alternatively the *"law"* dealt with in that portion. By contrast the 1965 version is capable of the interpretation that the aforementioned expression applies to *"right or privilege"*, alternatively *"law"* dealt with in both halves of the sub-section. Indeed, it is submitted that the sub-section ought to be interpreted as though commas appeared after the terms *"any law"* in both the first half and the second half of the sub-section.

The Afrikaans text of Section 41(1) of the Act (the Afrikaans text is the signed text) reads as follows:

> *"Geen bepaling van hierdie Wet raak 'n* **reg of privilegie** *van die staat wat andersins as uit hoofde van 'n wet bestaan nie, of 'n* **reg of privilegie** *van die staat of iemand anders ingevolge 'n* **wetsbepaling** *wat nie uitdruklik deur hierdie Wet herroep, gewysig of verander word nie."* (emphasis added).

This sub-section, like its English counterpart, is also capable of the two interpretations referred to above.

Section 44(1) of the 1965 Act was derived from Section 46(2) of the British Copyright Act of 1956. This sub-section reads as follows:

> *"Nothing in this Act shall affect the right of the Crown or subsisting otherwise than by virtue of an enactment; and nothing in this Act shall affect any right or privilege of the Crown or of any other person under any enactment (including any enactment of the Parliament of Northern Ireland), except in so far as that enactment is expressly repealed, amended or modified by this Act."*

The word *"law"* is not used in the British sub-section; the equivalent term utilized in the British sub-section is *"enactment"*. The latter portion of the British sub-section goes to pains to make it clear that the words *"expressly repealed, amended or modified by this Act"* relate to the word *"enactment"*. If the South African legislature intended the aforementioned expression to relate to the word *"law"* it could and should have followed the British model more closely. The use of the semi-colon after the word *"enactment"* at the end of the first portion of the sub-section has the effect of clearly denoting that the aforementioned expression does not apply to the first portion of the sub-section. In the 1965 South African Act the legislature not only did away with the demarcation between the two portions of the sub-section but it also changed the very clear indication that the aforementioned expression was intended to relate to *"enactment"* and not *"right or privilege"*. It is submitted that this change of approach on the part of the South African legislature is indicative of an intention to adapt the wording of the sub-section to suit South African circumstances. It would appear that the South African legislature decided to change the emphasis of the sub-section away from having the expression relate to *"enactment"* or *"law"* but rather to *"right or privilege"*.

The rights or privileges of the Crown subsisting otherwise than by virtue of an enactment under British law are analyzed in Sterling and Carpenter **Copyright Law in the United Kingdom.**[224] They deal mainly with the Crown's prerogative right to print and vend certain books, namely Acts of Parliament, Orders-in-Council, Royal Proclamations; Statutory

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224. Para 105.

Rules and Orders, Statutory instruments, Parliamentary papers, Hansard, Papers of government departments, Ministry of Defence maps and Ordinance Survey Publications and the Bible, the Book of Common Prayer and certain other documents concerning the Church of England. Neither the learned authors nor any of the other British textbook writers deal with the rights or privileges of the Crown or any other person under any enactment and it is thus not clear what these encompass under British law. Recourse to the British Act and the British authorities thus does not shed much light on the interpretation of the South African sub-section.

The alternate interpretation of Section 41(1) of the Act to that propounded above, namely that the phrase *"not expressly repealed, amended or modified by the Act"* relates to the word *"law"* in the sub-section seems to be anomalous. It is difficult to contemplate that the Copyright Act of 1978 could, without specific reference to any other Act, affect any right or privilege granted to the State or any other person in such an Act. For instance, were it not for Section 41(1) (assuming the second alternative interpretation is accepted) could it be argued that the 1978 Act affected any rights or privileges of the State or of any other person under the Designs Act, 1968? Surely the Copyright Act could not affect any rights existing under the Designs Act without making specific reference in it to such rights. If this is so, then one asks why Section 41(1), in particular the latter half thereof, is necessary at all (if it is to have the second alternative interpretation). The legislature must not be assumed to have enacted a purposeless sub-section.

To sum up, if the interpretation of Section 41(1) which has been propounded above is accepted the sub-section is meaningful and purposeful because it would serve to preserve

and perpetuate vested rights which were granted and subsisted under previous Copyright Acts. In the absence of Section 41(1) being interpreted in this way there is nothing in the 1978 Act which would serve to perpetuate such vested rights. There is no good reason why the legislature should have decided to revoke such vested rights. On the contrary, the whole pattern of the transitional provisions of the 1978 Act is to preserve the status quo which existed on 31 December 1978. By contrast, if the alternative interpretation is accepted, it is submitted that the sub-section has no useful purpose. It would purport to rectify a situation which would not in any event arise in the normal course and it would have the effect of revoking vested rights held by non-copyright holders and potential infringers, some of which rights have been in existence for many years. While there may conceivably have been good reason for the British Act to make provision for an interpretation which corresponds with the second alternative interpretation, there appears to be no such reason or justification for the South African legislature to make such a provision and this may explain why the South African legislature chose to depart from the wording utilized by the British legislature in Section 46(2) of the British Act of 1956.

It is submitted that the "*right*" or "*privilege*" referred to in the section is a right under copyright or in the nature of copyright. This would not only be in keeping with the nature and purpose of the section, and indeed of the Act as a whole, but it is also consistent with the provisions of Section 41(4) of the Act which provides that subject, inter alia, to sub-section (1), no copyright or right in the nature of copyright shall subsist otherwise than by virtue of the Act of some other enactment in that behalf.

(c) Court's Interpretation of Section 43 - Saunders Valve and Topka Cases

The interpretation of Section 43 of the 1978 Act has received attention in a number of cases.[225] The principle to be distilled from the initial batch of these cases is stated most positively in **Saunders Valve Co. Ltd v. Klep Valves (Pty) Ltd.**[226] In dealing with the question of the subsistence of copyright in engineering drawings made between the years 1938 and 1958, O'Donovan, J. said the following, referring to Section 43 of the 1978 Act read together with Section 1 of the Third Schedule to the 1916 Act:

> *"The effect of the aforegoing provisions, for the present purposes, is that the remedies available to the owner of copyright are now governed by the 1978 Act, but that the subsistence of copyright in the drawings upon which the applicant relies as at the date when the 1978 Act came into force is to be determined in accordance with the 1916 Act, and therefore by the 1911 British Copyright Act".*[227]

This same principle was accepted by the Appellate Division of the Supreme Court, without really going into the question, in the case of **Topka t/a Topring Manufacturing & Engineering v Ehrenberg Engineering (Pty) Ltd.**[228] In that

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225. See **Scaw Metals Ltd v. Apex Foundry (Pty) Ltd & Another**, *supra*; **Tolima (Pty) Ltd v. Cugacius Motor Accessories (Pty) Ltd**, *supra*; **Topka t/a Topring Manufacturing and Engineering v. Ehrenberg Engineering (Pty) Ltd**, *supra*; **Butt v. Schultz & Another**, *supra*; **Schultz v. Butt**, *supra*; **Barber-Greene Company & Others v. Crushquip (Pty) Ltd**, *supra*; **Saunders Valve Co. Ltd v. Klep Valves (Pty) Ltd**, *supra*; **Baker and Nelson (Pty) Ltd v. Procast Holdings (Pty) Ltd & Another**, *supra*; **Klep Valves (Pty) Ltd v. Saunders Valve Co Ltd**, *supra*.
226. *Supra*.
227. At page 648 line E.
228. *Supra*.

case, Galgut, AJA. said the following in connection with drawings which were made in 1972:

> *"It was common cause that the provisions of the 1965 Act are relevant to the question of the subsistence of copyright and its ownership; to the questions of infringement and relief available to the owner of copyright up to 31 December 1978; but the provisions of the 1978 Act are relevant to the question of infringement and the relief available from 1 January 1979."*[229]

The position as set out in the **Saunders Valve** and **Topka** cases is, it is submitted, a sound and logical interpretation of Section 43 of the 1978 Act and is, subject to one qualification which will be discussed below, correct. In the case of a work made prior to 11 September 1965 the subsistence of copyright and its ownership and duration must be determined in accordance with the provisions of the 1965 Act, in particular the Sixth Schedule thereto (alternatively the 1916 Act, in particular the Third Schedule thereto - this point will be elaborated on below). In the case of a work made between 11 September 1965 and 31 December 1978, the subsistence, ownership and duration of the copyright must be determined in accordance with the 1965 Act. The scope of the copyright subsisting in pre-1979 works and the remedies available to the copyright owner in the case of current infringements must, however, be determined in accordance with the 1978 Act. In this regard Galgut, AJA in the **Topka** case refers to "*the question of infringement and the relief available*" being matters which must be determined by the 1978 Act in regard to current infringements.

(d) <u>Courts' Interpretation of Section 43 - Klep Valves Case</u>

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229. At page 8 of the typewritten judgement.

The position as accepted in the **Topka** case, a decision of the Appellate Division, has, however, been clouded by what would appear to be a conflicting *dictum* of that same division of the court in the subsequent case of **Klep Valves (Pty) Ltd v Saunders Valve Co. Ltd.**[230] This case was an appeal against the decision of O'Donovan, J. in **Saunders Valve Co. Ltd. v. Klep Valves (Pty) Ltd** and thus dealt with engineering drawings made prior to 11 September 1965.

In the **Klep Valves** case (i.e. the case in the Appellate Division) Grosskopf, JA said the following:

> "*The effect of Section 43 of the 1978 Act accordingly is to render earlier legislation applicable to the question whether copyright subsists in works made prior to the commencement of the 1978 Act, whereas the 1978 Act governs the remedies for infringement of copyright and the procedures relating thereto.*"[231]

This formulation of the relevant principle differs slightly from the formulations made by O'Donovan, J in the **Saunders Valve** case (i.e. in the court of first instance - the Transvaal Provincial Division) and by Galgut, AJA in the **Topka** case. Galgut, AJA in the **Topka** case, when referring to what must be determined in accordance with the 1978 Act, used the terminology "**questions of infringement and relief** *available to the owner of copyright*", (emphasis added) while Grosskopf, JA uses the terminology "**the remedies for infringement** *of copyright and the* **procedures** *relating thereto*" (emphasis added). Grosskopf, JA in applying the principle as formulated by him, then went on to say, with reference to Section 23(1) of the 1978 Act, that copyright

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230. *Supra.*
231. At page 18.

is infringed by the unauthorized doing of any act which the owner of the copyright may authorize. He then said the following:

> *"The enquiry is therefore directed towards what the owner of copyright is entitled to authorize. That depends on the ambit of his right. And, as I have already indicated, Section 43 of the 1978 Act disavows any intention of creating copyright which did not exist prior to the commencement of the 1965 Act. It follows that in the present case one must look at the 1916 Act (incorporating the 1911 British Act) to ascertain what the ambit of the respondent's copyright was so that one can determine whether the acts which the appellant did were acts which the respondent might authorize."*[232]

Based on this assumption, Grosskopf, JA concluded that the 1911 British Act granted to a copyright owner in respect of a technical drawing the right to authorize, or restrain, indirect three-dimensional copying of his work, i.e. making a three-dimensional reproduction of a drawing by copying an intermediate three-dimensional version of the drawing, and that the respondent (applicant in the court a *quo*) was entitled to an interdict restraining infringement of its copyright. I have no argument with the learned judge's conclusion but, with the greatest respect, it is submitted that his assumption that the scope of the copyright owner's infringement action for purposes of current infringements must be determined in accordance with the 1911 British Act, and not the 1978 Act, is incorrect and is at variance with the principle which had earlier been accepted by Galgut, AJA, in the **Topka** case.

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232. At page 33.

In making his assumption, Grosskopf, JA considered that, in terms of Section 43(a)(ii) of the 1978 Act, care must be taken to avoid "*creating any copyright which did not subsist prior to 11 September 1965*". He clearly reasoned that, if the scope of the protection granted to an artistic work under the 1978 Act exceeded the scope of protection granted to an equivalent work under the British 1911 Act, to afford a copyright owner the broader scope of protection would amount to creating copyright which did not previously exist. For this reason he considered it to be necessary to determine the scope of the copyright in the relevant drawings in terms of the British 1911 Act. The word "*copyright*" where it appears in Section 43(a) of the 1978 Act, and in particular in the context of "*creating any copyright*" in Section 43(a)(ii), is capable of two interpretations, namely "rights under copyright" (i.e. competences), or alternatively, to use terminology commonly used in American copyright law, "a copyright". It is implicit in Grosskopf, JA's judgment that he gave the word "*copyright*" in this context the first-mentioned interpretation; it is submitted, however, for the reasons advanced below that it ought to be given the second interpretation.

(e) Criticism of Klep Valves Approach

Both the 1965 Act and the 1978 Act created new categories or types of work eligible for copyright which did not exist under the preceding Act. For instance, the 1965 Act created "television broadcasts and sound broadcasts" while the 1978 Act created "programme-carrying signals" and "works of craftsmanship of a technical nature" which had not been recognized in the earlier statutes. Section 43(a)(ii) is intended to obviate that a new class of copyrightable work created by the 1965 Act or the 1978 Act (e.g. a television broadcast or a programme-carrying signal) should affect

works which were made prior to 1965 and which did not enjoy any protection at the time of creation nor on 31 December 1978, and that protection should be granted to such works. Granting retrospective protection of this nature would entail creating "a copyright" which did not subsist prior to 11 September 1965.

There is another way in which Section 43(a)(ii) operates to prevent "a copyright" being created in a work made prior to 11 September 1965. To illustrate the point use will be made of an example. In terms of the 1916 Act (incorporating the British 1911 Act), for a published artistic work to have enjoyed copyright in South Africa it must have been first published in South Africa or in a country to the works of which the protection of the 1916 Act had been extended (hereafter referred to as a "recognized country").[233] Under the 1965 Act, a published artistic work enjoyed protection if the first publication took place in South Africa or in a recognized country or, alternatively, the author was a qualified person at the time of first publication, or if he had died prior to publication, was a qualified person immediately prior to his death.[234] The basis for enjoying protection was thus broadened by comparison with the 1916 Act. However, the 1965 Act did not retrospectively grant copyright to a pre-1965 published artistic work which had not enjoyed copyright under the 1916 Act because, although made by a qualified person, it had not been published in South Africa or in a recognized country.[235] The 1978 Act

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233. Section 1(1) of the Third Schedule to the 1916 Act.
234. Section 4(2) of the 1965 Act. In regard to the meaning of *"qualified person"* see p 25.
235. See Section 4(2) of the 1965 Act read together with Section 1 of Part I of the Sixth Schedule.

confers copyright on an artistic work where the work was first published in South Africa or a recognized country or where the author was a qualified person at the time that the work was made. Accordingly, in the case of an artistic work first published in 1950 elsewhere than in South Africa or a recognized country, but made by a qualified person, were it not for Section 43(a)(ii), the 1978 Act would have retrospectively created "a copyright" in that work which did not exist in 1950 under the 1916 Act or, indeed on 31 December 1978, under the 1965 Act. As in the case of the new type or category of work, the legislature considered it undesirable that copyright should be created *ex post facto* in this situation where none had existed before. In particular, the legislature considered it undesirable to grant retrospective protection to a work which antedated the 1965 Act where that Act had not granted retrospective protection to it.

In many instances the scope of the copyright granted to a type of work under the 1965 Act is broader than the scope of copyright granted to that type of work under the 1916 Act. For instance, to take the example of an artistic work, the relevant section of Schedule Three to the 1916 Act, i.e. Section 1(2), does not include within the scope of the protection granted to an artistic work the right to include that work in a television broadcast. This right is, however, conferred upon an artistic work in Section 4(4) of the 1965 Act. If one applies the transitional provisions of the 1965 Act to an artistic work made in say 1950, it is clear that the 1965 Act granted that work the broader protection afforded by the 1965 Act.[236] This means that the right to

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236. Section 48(1) of the 1965 Act read together with Part I of the Sixth Schedule, in particular, Sections 4 - 9.

include an artistic work made in 1950 in a television broadcast is a right which at 31 December 1978 was a right under copyright which subsisted under the Copyright Act, 1965. Thus, even if the word "*copyright*" in the context in which it appears in Section 43(a) of the 1978 Act is to be given the interpretation of "rights under copyright" rather than "a copyright", it would still be incorrect to assess the scope of the copyright in a work made prior to 11 September 1965 for purposes of current infringements in terms of the 1916 Act (i.e. the British 1911 Act) because one is at least required by Section 43(a)(i) to grant the broader scope of protection afforded by the 1965 Act rather than the narrower scope of protection afforded by the 1916 Act.

The policy and effect of the 1965 Act was clearly to regulate the subsistence of copyright in pre-1965 works in accordance with the provisions of the 1916 Act, but to regulate the scope or content of that copyright and the manner of its enforcement under the 1965 Act. It is submitted that the 1978 Act has a similar policy and this is what Section 43(a) seeks to attain. It would be incongruous for the 1965 and 1978 Acts to have different policies in this regard. Moreover, a difference in policy would mean that the owner of the copyright in a 1950 work would in December 1978 have been able to have recourse to the broader protection granted by the 1965 Act, but in January 1979 would have had to be content with the narrower protection granted by the 1916 Act when the 1978 Act regulating the position itself grants at least as broad protection as the 1965 Act. If the term "*copyright*" in Section 43(a) of the 1978 Act is given the meaning of "a copyright" harmony of approach between the 1965 and 1978 Acts is achieved. The principle as formulated and accepted by Galgut, AJA in the **Topka** case is consistent

with the interpretation of the term "*copyright*" in Section 43(a) for which I contend.

Copyright is frequently referred to as "a bundle of rights".[237] This description is consistent with Sections 6 to 11A of the 1978 Act which specify the so-called "restricted acts" which are comprised within the copyright of the various categories of works which are eligible for copyright. In copyright legislation and case law the term "copyright" is generally used to denote the complete bundle of rights as a whole and not to denote a component right of the bundle or a competence. This approach is highlighted in Section 23(1) of the 1978 Act. In the aforementioned sub-section it is stated that "*copyright shall be infringed by any person ... who ... does ... any act which the owner of the copyright may authorize*". Here the copyright as a whole is distinguished from a component right. It is submitted that the primary meaning of the term "copyright" as used in the 1978 Act is that of the bundle of rights or "a copyright". The legislature uses alternate terminology to refer to a component right. This is further illustrated by Section 22(2) of the 1978 Act which provides that "*an assignment ... of copyright may be limited so as to apply to some only of the acts which the owner of the copyright has exclusive right to control ...*". Sub-sections (3) and (4) of Section 22 refer to a component right of the bundle of rights as "*an act which is subject to copyright*". Consequently, it is submitted that interpreting the meaning of

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237. See **Video Parktown North (Pty) Ltd v. Paramount Picture Corporation**, *supra* at p 632C. See also **J.K. Fulton Ltd v. Logic Engineering Enterprises**, *supra*, at 739B where it is said that the restricted acts in respect of an artistic work "*are separate acts, all comprehended within copyright*".

the word *"copyright"* as used in Section 43(a) of the 1978 Act according to the ordinary rules of interpretation of statutes leads to the conclusion that what is meant by the use of the term is the bundle of rights constituting copyright, or "a copyright", and not "rights under copyright" or competences, i.e. an act which is subject to copyright. In other words, Section 43(a)(ii) precludes creating any bundle of rights where no bundle of rights existed prior to 11 September 1965. The paragraph is not concerned with creating or modifying component rights within the bundle which constitutes a copyright.

The point at issue in the **Klep Valves** case to which Grosskopf, JA's above-quoted *dicta* are relevant was the following: Does reproducing a drawing in a three-dimensional form by copying an intermediate three-dimensional version of the drawing constitute "reproduction" of that drawing for purposes of copyright infringement? The Appellate Division had in the **Topka case** settled the question that the copyright in a technical drawing is infringed by the unauthorized reproduction of that drawing in a three-dimensional form, where direct copying takes place, i.e. the three-dimensional article is made from the copyrighted drawing itself. However, the Appellate Division had not yet given attention to three-dimensional reproduction of a technical drawing where the three-dimensional version is produced by indirect copying, i.e. copying an intermediate three-dimensional version of the copyrighted drawing. This question has been dealt with in the same way in the law as applied under all three South African copyright statutes, i.e. the 1916 Act, the 1965 Act and the 1978 Act (prior to its amendment in 1983 by Act 66 of 1983). It would have made no difference whatsoever to the determination of this issue in the case if the court would have considered it under the

1978 Act instead of under the 1916 Act. The *dictum* of Grosskopf, AJA amounts in effect to an assumption during the course of his reasoning at arriving at, and setting out, the critical issue to be decided, which critical issue could equally have been arrived at via a different route taking in the 1978 Act. The subject of his assumption was not argued or canvassed by either party before the court. It is therefore submitted that the *dicta* are *obiter* in regard to the issue of under which Act the scope of the copyright in an artistic work made prior to 11 September 1965 is to be determined for purposes of current infringements.

In the final analysis it is submitted with the greatest respect (and I accept and propound) that Grosskopf JA's assumption that the scope of copyright in a work made prior to 11 September 1965 must for purposes of current infringements be determined by the provisions of the British 1911 Act is incorrect and is not binding on future courts. In the first place, his views are *obiter*, and, in the second place, they conflict with the principle accepted by Galgut, AJA (correctly, so it is submitted) in the **Topka** case in the Appellate Division. It is submitted that the normal rule that where there are conflicting decisions of the Appellate Division, another court may follow the one which it considers to be correct will apply and that the **Topka** decision should be followed on the relevant point and not the **Klep Valve** decision.[238]

(f) Unexploited Works and Cinematograph Films

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238. See L van Winsen, J Ekstein & A Cilliers, **Herbstein & Van Winsen - The Civil Practice of the Superior Courts in South Africa**, 3rd Edition, p.56.

Early unexploited literary, musical and artistic works (except photographs), and cinematograph films made prior to 1965 are dealt with specifically in Section 43 but a discussion of these topics will be postponed until Chapter VII below.

(g) Reference to Subsequent Statutes in Regard to Early Works

It is submitted that the principle regarding the application of the repealed copyright statutes to works made prior to 1 January 1979 as accepted in the **Topka** case is correct except to the extent that it might suggest that there are no circumstances in which one must look to one of the subsequent statutes when evaluating whether a work made at a particular time enjoys copyright. There are indeed instances where a type of work which did not enjoy copyright in terms of the statute which was in operation at the time that it was made was retrospectively granted protection by the next following statute. For instance, published editions did not enjoy protection under the 1916 Act; however, the 1965 Act retrospectively granted protection to published editions made prior to 1965.[239] Similarly, the 1978 Act, as amended, grants protection to works of craftsmanship of a technical nature, and works of this type made before such protection was introduced by the Copyright Amendment Act, 1983, and after 11 September, 1965, are protected.[240]

The principle that the subsistence of copyright in a work and the ownership of that copyright must be determined in

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239. Section 16 of the Copyright Act, 1965, read together with the provisions of the Sixth Schedule and in particular paragraph 41(1) thereof.
240. See Section 43 of the Copyright Act, 1978, and **Butt v. Schultz & Another**, *supra*, and **Schultz v. Butt**, *supra*.

accordance with the statute which prevailed at the time of the making of the work must be broadened to some extent. In the case of a pre-1965 work one must, in terms of Section 43(a)(ii) assess, whether the work was capable of enjoying copyright under the 1916 Act. If it was, then it can enjoy the measure of protection conferred upon that type of work in the 1978 Act. The ownership of the copyright and the duration of the term of the copyright must, however, be determined in accordance with the 1965 Act. This point will be amplified below. Even if, at the time when the work was made prior to 1965, it was not capable of enjoying copyright under the 1916 Act, one must have regard to the 1965 Act and its transitional provisions to see whether copyright was retrospectively created in that work, as in the case of published editions. If it was, then that copyright subsists and is enforceable under the 1978 Act as Section 43(a)(i) specifically states that nothing in the 1978 Act affects the ownership, duration and validity of any copyright which subsists under the 1965 Act, and such copyright did indeed subsist under that Act. In this respect, Section 43(a)(i) appears to contradict Section 43(a)(ii) but it is submitted that the intention of the legislature in enacting Section 43 of the 1978 Act was to preserve the status quo of the subsistence of copyright as of 31 December 1978, and this would not be achieved if Section 43(a)(ii) was to override Section 43(a)(i). If the alternative interpretation to that which I have advanced is adopted then it would mean that, for instance, published editions dating from earlier than 1965, which on 1 December 1978, enjoyed copyright, would overnight cease to enjoy such protection in direct contradiction of Section 43(a)(i).

In the case of a work made between 11 September 1965, and 31 December 1978, in assessing whether that work enjoys copy-

right enforceable in terms of the 1978 Act, one must in the first instance have regard to the provisions of the 1965 Act. If the work in question was capable of enjoying copyright under that Act then, in terms of Section 43(a)(i) of the 1978 Act, that copyright will continue to subsist and the ownership and duration of such copyright will be determined in accordance with the 1965 Act. If, however, the work was not capable of enjoying copyright under the 1965 Act, one must still have regard to the provisions of the 1978 Act in order to see whether protection in that type of work was created retrospectively. Examples of instances where this happens are works of craftsmanship of a technical nature and programme carrying signals, at least theoretically. Neither of these categories of works were protected by the 1965 Act. Works of this nature made before 11 September, 1965, will not, however, enjoy copyright in view of the provisions of Section 43(a)(ii) of the 1978 Act.

(h) Attempted Simplification in the 1978 Act

It will be apparent from the aforegoing that questions of crucial importance are: exactly what works enjoyed copyright under the 1916 and 1965 Acts, who owned such copyright in terms of those Acts and what is the term of such copyright under those Acts? The answers to these questions are exceedingly complex matters and will be dealt with below. It is perhaps ironical that one of the objectives of the 1978 Act was to simplify the law of copyright. The 1965 Act suffered from an excess of detail, particularly as far as its transitional provisions were concerned. If one compares the 1978 Act with the 1965 Act, there is far less detail in the first mentioned Act. At first blush, therefore, it may seem that the objective of simplifying our law of copyright has been achieved. However, as far as the transitional provisions of our current law of copyright are concerned, quite

the opposite effect has been achieved and a proper understanding and interpretation of our law of copyright now requires access to, and a good understanding of, the 1916 Act (and even its predecessors) as well as the 1965 Act.

In the ensuing chapters I will deal *seriatim* with the subsistence, ownership and duration of copyright under the Acts of 1916 and 1965, as well as with vested rights in favour of third parties deriving from such acts, which vested rights are, in my submission, recognized and protected in terms of Section 41 of the 1978 Act. My consideration of the subsistence, ownership and duration of copyright under the 1916 Act will include an analysis of the subsistence, ownership and duration of copyright under pre-1911 British legislation, under the so-called "Provincial Copyright Acts" which applied in South Africa prior to 1916 and under the common law as rights conferred by this legislation will in certain circumstances have been perpetuated under the 1916 Act. The scope or enforcement of the copyright which subsisted under the 1916 and 1965 Acts will not be dealt with as this is no longer relevant in the light of the provisions of Section 43 of the 1978 Act as interpreted, inter alia, in the **Saunders Valve** and **Topka** cases. As explained above, this viewpoint has been adopted despite the assumption to the contrary made in the **Klep Valves** case. Indeed, even the **Klep Valves** case seems to envisage that the repealed legislation governs current infringements only in the case of pre-1965 works.

(i) Effect of the Transitional Provisions

Copyright having the scope and remedies provided for in the Copyright Act can, depending upon the circumstances, exist and have full force and effect in works made as early as during the 19th Century let alone during the currency of the 1916 and 1965 Acts. As will be shown, for works made during

the 19th Century and in the early years of the 20th Century to continue to enjoy copyright an early form of copyright must have subsisted on 31 December 1916. Such copyright could have been derived from British law, from the so-called South African Provincial Copyright Acts or from the common law and must have been perpetuated by the Act of 1916. Generally speaking 19th Century and early 20th Century copyright was of relatively short duration (save for common law copyright) and this factor limits the number of works made during that period which will have been recognized and perpetuated by the Act of 1916. A further limiting factor is the categories of works which were protected at that time. In the ensuing chapters the works which were granted substituted copyright under the Act of 1916 (on the basis of pre-existing rights in British and South African law) and the ownership of such rights will be examined.

In short, the effect of the transitional provisions of the Copyright Act cannot be fully appreciated and implemented without a thorough knowledge and understanding of British and South African copyright during the 19th Century and early 20th Century and South African copyright since 1916 as embodied in three successive copyright statutes.

As will be shown, 19th Century and early 20th Century South African Copyright law was to some extent supplementary to the British law and it is therefore necessary to commence the examination of earlier copyright legislation which granted rights recognized and enforced in the current Copyright Act with an examination of early British copyright law.

CHAPTER III

COPYRIGHT UNDER BRITISH LAW PRIOR TO 1917

The British Copyright Act 1911 came into operation on 1 July 1912.[1] Section 24(1) of this Act provided that where any person was entitled to copyright or a right under copyright immediately before the commencement of the Act he would as from that date be entitled to a substituted right set out in the First Schedule to the Act. It was further provided that the substituted right would subsist for the term for which it would have subsisted if the Act of 1911 had been in force at the date when the work was made and had been entitled to copyright under the Act. Existing rights under copyright on 1 July 1912 were as it were "traded in" for new rights as provided for in the 1911 Act. The "new" rights were generally referred to as "substituted rights".

Section 147 of the South African Patents, Designs, Trade Marks and Copyright Act, 1916, provided that where copyright subsisted in the United Kingdom in respect of any musical, dramatic or artistic work before 1 January 1917 the copyright would be deemed to have subsisted in South Africa as from the date of the commencement of the copyright in that work in the United Kingdom and to the same extent as was conferred upon the work by United Kingdom law. On 1 January 1917 the British Copyright Act, 1911, had already been in force for more than four years and the rights thus granted under Section 147(1) of the Act of 1916 included the substituted rights which had been granted afresh in pre-1912

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1. Section 37(2)(a).

works in the United Kingdom, with effect from 1 July 1912. For this reason, and because as it will be shown below, in certain instances Imperial British law conferred copyright in South Africa, it is necessary to examine what rights were granted under British copyright law prior to 1912 and were subsisting on 1 July 1912, and what rights were granted under that Act.

1. HISTORY OF THE DEVELOPMENT OF BRITISH COPYRIGHT LAW IN THE 18TH AND 19TH CENTURIES

The evolution of copyright up to the time of the Statute of Anne (the Copyright Act 1709) has been described in Chapter I. The Statute of Anne gave authors of books which had been printed the sole right of printing them for a period of 21 years commencing on 10 April 1710; in the case of books which at that stage had not yet been printed the Act gave the sole right of printing for fourteen years provided that after expiration of this term the sole rights of printing and distributing copies of the book should revert to authors thereof for a further period of fourteen years if the authors were still alive.

The emergence and development of a form of statutory copyright law was paralleled by the recognition of a form of copyright by the common law. The dangers of unauthorized copying of literary works once the printing industry had become established gave rise to a form of property right in literary works under the common law. The precise scope of the common law right was unclear and the subject of considerable debate. However, by 1769 the House of Lords recognized that there existed a right on the part of authors to

prevent others from publishing unpublished works.[2] It was held that the common law right was not terminated by the Statute of Anne and that it continued to be enforceable after the expiry of the statutory copyright provided for in the Statute of Anne. In 1774 in the case of **Donaldson v Beckett**[3] the House of Lords decided in essence that an author's rights in his published works expired at the end of the term of statutory copyright and that common law copyright only applied to unpublished works in respect of which its duration was perpetual.

In 1734 the Engraving Copyright Act, which conferred copyright on engravings made by the designers thereof, for a term of fourteen years, was passed. A further Engraving Copyright Act followed in 1767 which conferred protection on an engraving derived from a work made by another. The term of protection was extended to twenty-eight years by this Act. The Prints Copyright Act of 1777 expanded the scope of protection conferred upon engravings.

In the meantime the universities, which had been disturbed by the effect of the decision of the House of Lords in **Donaldson v Beckett**, were instrumental in the passing of the Copyright Act of 1775 which granted a special right to them in respect of all copies which they had acquired in the past and which they might acquire in the future. In 1814 an Act was passed "*to afford encouragement to literature*" which changed the term of copyright enjoyed by literary works to a term of twenty-eight years from the first publication and if the author was still alive at the expiration of this term then the copyright endured for the rest of his lifetime.

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2. **Millar v Taylor** (1769) 4 Burr 2303.
3. (1774) 4 Burr 2408.

The next works to be protected were works of sculpture, copyright in which was created by the Sculpture Copyright Act of 1814. This Act granted a term of protection of fourteen years and if the author was still living at the end of that period, a further term of fourteen years.

The early Copyright Act relating to literary works protected musical and dramatic compositions as "*books*". These Acts, however, granted no performing rights. In the Dramatic Literary Property Act of 1833, which is commonly known as "Bulwer Lytton's Act", an exclusive right of public performance was conferred. This right endured for twenty-eight years but if the author was still living at the time of the expiration of that term the copyright was perpetuated for the rest of his life, provided the work was printed and published. The position of works not printed or published was uncertain. The Lectures Copyright Act of 1835 conferred in certain circumstances and under certain conditions the exclusive right of printing and publishing a lecture even where the lecture was delivered orally without any manuscript. The term of copyright was twenty-eight years from the printing and publishing of the lecture.

All the earlier Acts relating to literary works were repealed by the Copyright Act, 1842. This Act, which remained the statute regulating literary copyright until the passing of the Copyright Act, 1911, extended the term of protection to the lifetime of the author and seven years after his death, or a period of forty-two years, whichever was the longer. It also conferred performing rights in both musical and dramatic works, which performing right had the aforementioned duration. The Act covered "*books*" including

pamphlets, music sheets, maps and plans. It operated throughout the British dominions.

Paintings, drawings and photographs were first protected under the Fine Arts Copyright Act, 1862. The Act conferred protection on works made by authors who were British subjects or were resident in the British dominions. The term of copyright was the life of the author and seven years after his death. Copyright was lost if a work was sold and the copyright was not expressly reserved in writing.

The Copyright (Musical Compositions) Act of 1882 required that reservation of rights of public performances of musical works must be printed on the title page of every published copy thereof.

International Copyright Acts were passed in 1844 and 1852. During this period Orders-in-Council were made under these Acts granting protection to the works of certain European countries pursuant to bilateral arrangements. Upon the adoption of the Berne Convention in 1886, the International Copyright Act 1886 was passed in order to ratify the Berne Convention and to incorporate its provisions in the domestic law. The International Copyright Act, 1886, operated throughout the British dominions. The Berne Convention was modified by the additional Act of Paris of 1896 and effect was given to this amendment by means of an Order-in-Council in 1898.

The effect of the International Copyright Act 1886 was basically to grant protection to both published and unpublished works originating from a member country on the same basis as domestic works provided that the term of protection did not exceed the term of protection of the country of origin and

that any formalities prescribed by the country of origin were complied with.

Musical copyright owners suffered severe prejudice as a result of the practice of street hawkers selling pirated copies of songs and music. This practice made it difficult to discern any substantial person against whom infringement proceedings could be conducted. This problem gave rise to the Musical (Summary Proceedings) Act, 1902, and the Musical Copyright Act, 1906, which provided summary forms of procedure in terms of which action could be taken against infringers of musical copyright.

Substantial modifications were made to the Berne Convention in 1908. These amendments made it necessary for British copyright law to be amended to comply with the provisions of the revised Convention. This development ultimately gave rise to the Copyright Act, 1911. The 1911 Act repealed all previous statutes relating to copyright with the exception of the Musical Copyright Acts of 1902 and 1906 and one section of the Fine Arts Copyright Act 1862. It embodied the minimum requirements for protection contained in the Berne Convention as modified in 1908.[4]

2. COMMON LAW COPYRIGHT PRIOR TO 1912

As described previously, the British common law of the 19th and early 20th Century granted copyright in unpublished

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4. In regard to the aforegoing see FE Skone James, **Copinger & Skone James on the Law of Copyright**, 8th Edition, pp 5-14; Whale & Phillips, **Whale on Copyright**, 3rd Edition, pp 1-15; Laddie Prescott & Vitoria, **The Modern Law of Copyright**, pp 193-204; and Sterling & Carpenter, **Copyright Law in the United Kingdom**, pp 126-159.

works. There is, however, some uncertainty as to the precise details of common law copyright.

(1) Classes of Works Protected

Laddie, Prescott and Vitoria states that common law copyright subsisted in books, lectures, engravings, paintings and works of literature, art and science in general, including musical and dramatic works.[5]

(2) Conditions for Subsistence of Common Law Copyright

The work must have been unpublished. Publication meant making copies available to the public or communicating the work to the public generally without discriminating or restricting the nature of the group of persons to whom the exposure took place. A restriction of the classes of persons to whom a work was exposed was readily implied and was contrasted with a dedication to the public of the right to print copies. To remain unpublished a work was not required to be secret in any way as a relatively limited exposure of the work to the public such as delivering a lecture to university students or the exhibition of a painting in an art gallery subject to the restraint that no copying was allowed did not destroy the unpublished nature of the work.[6]

The question of whether the works of a foreign author enjoyed common law copyright is an issue in relation to which there is no consensus amongst the text book writers. **Laddie, Prescott and Vitoria** and **Copinger & Skone James** contend that common law copyright was conferred upon non-resident authors[7] while **Sterling & Carpenter** contends that

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5. *Op cit*, Page 194.
6. **Laddie, Prescott and Vitoria**, *op cit*, p 194.
7. **Laddie, Prescott and Vitoria**, *op cit*, p 195 and **Copinger & Skone James**, *op cit*, p 253.

the works of non-resident authors did not enjoy common law copyright unless they were resident in one of the British dominions or in countries to which the Berne Convention and the Treaty which Britain entered into with the Austro-Hungarian Empire applied.[8] It is, however, common cause amongst the writers that common law copyright was conferred upon foreigners resident in the British dominions. It is submitted that the views of **Laddie, Prescott and Vitoria** and **Copinger & Skone James** are to be preferred over those of **Sterling & Carpenter**. This means that unpublished works of the abovementioned nature no matter where and by whom they were made enjoyed common law copyright in Britain during the relevant period.

(3) Nature and Scope of Copyright

Common law copyright conferred upon the maker of the work the right to prevent unauthorized reproduction of his work. **Whale & Phillips** describes the right thus:

> "*Traditionally it was identified as that right which booksellers purported to acquire from the author and which constituted their copyright - that is the printing and publishing right*".[9]

The British courts have not yet determined whether common law copyright conferred a performing right. **Laddie, Prescott and Vitoria** contends that there was such a right and that it was also conferred upon the works of non-resident foreigners.[10] The learned author makes the point that the 1911 Act appears to contemplate the existence of this right in that the notes to the First Schedule to the Act explain that the terms "*copyright*" and "*performing right*" include

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8. **Sterling & Carpenter**, *op cit*, p 136.
9. **Whale & Phillips**, *op cit*, p 11.
10. **Laddie, Prescott and Vitoria**, *op cit*, footnote 5 on p 196.

the common law rights to restrain publication and public performance, respectively. It is submitted that the learned authors are correct in this respect. **Laddie, Prescott and Vitoria**'s aforementioned view is shared by **Sterling & Carpenter.**[11]

(4) Duration of Rights

Common law copyright endured from the time that form was given to the work and in principle continued indefinitely. It expired, however, upon the authorized unrestricted publication of the work. The performing right expired on the unauthorized unrestricted public presentation or publication of the work.[12] The expiry of common law copyright did not necessarily mean that the work was no longer protected; on the contrary in most instances this protection or continued protection was conferred upon the work by statutory copyright.

3. STATUTORY COPYRIGHT PRIOR TO 1912

Copyright conferred by statute prior to 1912 is a complicated and confused question. The position is summed up as follows by the report of the Gorell Committee, 1909:

> *"The first observation which a study of the existing law suggests is that its form, as distinguished from its substance, seems to us bad. The law is wholly destitute of any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study, it is in many parts so ill-expressed that no-one*

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11. **Sterling & Carpenter**, *op cit*, p 132.
12. **Sterling & Carpenter**, *op cit*, p 132.

> *who does not give such study to it can expect to understand it. The common law principles which lie at the root of the law have never been settled. The well-known cases of* **Millar v Taylor, Donaldson v Beckett,** and **Jefferys v Boosey** *(sic), ended in a difference of opinion amongst many of the most eminent judges who have ever sat upon the Bench. The 14 Acts of Parliament which deal with the subject were passed at different times between 1735 and 1875 (Several other statutes have been passed since 1875). They are drawn in different styles, and some are drawn so as to be hardly intelligible. Obscurity of style, however, is only one of the defects of these Acts. Their arrangement is often worse than their style. Of this the Copyright Act of 1842 is a conspicuous instance."*

The early copyright statutes tended to confer copyright of relatively short duration. As will appear more fully below, early British copyright which no longer subsisted on 1 July 1912 (or on 1 January 1917 in the case of literary works for purposes of South Africa) is of no relevance today and the analysis set out below is thus concerned with types of works in respect of which the copyright could still have been in subsistence at the aforementioned date.

As different considerations apply to the different classes of works the analysis of pre-1912 statutory copyright will be done on the basis of each of the various categories of works eligible for copyright being dealt with separately.

A. LITERARY WORKS ("BOOKS")

Copyright in "*books*" was regulated by the Copyright Act 1842.

(1) Types of Works Protected

The term *"book"* meant any volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart or plan which was separately published. There was no definition of *"literary work"* in the Act but Daisy L.J. in **Hollinrake v Truswell**[13] ventured the following definition:

> *"A literary work is intended to afford either information and instruction, or pleasure, in the form of literary enjoyment".*

Dramatic works were dealt with in separate legislation but if such a work was printed and published it was considered to be a book for purposes of the 1842 Act. Maps, charts and plans were in addition capable of enjoying protection under other copyright legislation.

(2) Conditions for Subsistence of Copyright

Copyright was created by the act of first publication. This had to occur in Britain (or in a territory which was recognized by the International Copyright Acts). The works of foreign authors first published in the United Kingdom could enjoy protection and such authors could be resident in the United Kingdom, the British dominions or elsewhere.[14]

The Act required that copies of books must be delivered to Stationer's Hall for registration, the British Museum and certain libraries and other institutions but failure to meet this requirement did not affect the subsistence of copyright; the major implication of lack of registration at Stationer's Hall was that no infringement proceedings could be instituted until such registration had taken place.

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13. (1894) 3 Ch. 420
14. **Laddie, Prescott and Vitoria**, *op cit*, p 197.

It was not required that a work should be original in order to enjoy copyright. On the other hand something which was a mere copy of a previous book was not entitled to protection.[15]

(3) Authorship and Initial Ownership

The author of the work was the initial copyright owner except in the case of a contribution to a collective work. In the case of collective works the ownership of the copyright vested in the proprietor of the collective works in certain circumstances. In particular the proprietor of the collective work was required to establish that he employed the writer to compose the article; that the articles were composed subject to the condition that the copyright would belong to the proprietor; and that the proprietor paid for the article. Where the collective work was a periodical, after twenty-eight years had elapsed from the date of publication the author was entitled to publish his articles in a separate form; during the twenty-eight year period the proprietor of the collective work could not publish the articles "owned" by him separately or singly without the author's consent.[16]

Where a work was published posthumously the copyright in the work vested in the owner of the manuscript from which the published version of the book was taken.[17]

(4) Duration of Copyright

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15. **Walter v Lane** (1900) A.C. 539.
16. **Copinger & Skone James**, *op cit*, p 16.
17. **Copinger & Skone James**, *op cit*, p 16.

Copyright endured for a period commencing with the date of publication and lasting for the lifetime of the author and seven years thereafter, or for forty-two years from first publication, whichever period was the longer. In the case of posthumous works the term of copyright was forty-two years from first publication.

(5) Transmission of Copyright

Copyright in a work could be assigned in a written document. If the work had been registered at Stationer's Hall, assignment could be affected by an entry in the Register.

(6) Lectures

"Lectures" were dealt with separately from the 1842 Act but for the sake of convenience they will be dealt with as a species of "literary work". Protection of the creative efforts of lecturers was regulated in the Lecturer's Copyright Act, 1835. This Act dealt with orally delivered lectures and "works" of this nature were protected against unauthorized printing and publishing. Protection only arose, however, provided two days prior notice of the forthcoming delivery of a lecture was given to two magistrates living within five miles of the place of delivery. No protection was given to lectures given at universities, public schools, colleges, on any public foundation or in accordance with any gift, endowment or foundation. The term of protection conferred upon a lecture by the Act was twenty-eight years.

If a lecture was reduced to a material form and published as a "book" it enjoyed literary copyright as set out above.

(7) Universities

Following on the decision of **Donaldson v Beckett**[18] the Copyright Act, 1775, granted to the universities of Oxford and Cambridge, the four universities of Scotland and the colleges of Eton, Westminster and Winchester copyright in perpetuity in books given or bequeathed to them for the advancement of useful learning and other purposes of education. This right was granted both in respect of books obtained in this manner prior to 1775 and thereafter. This right only encompassed the institution's own books for as long as they were printed for them and for their sole benefit. The institutions were entitled to sell or dispose of the copyrights which they acquired in this manner but if they delegated, granted, leased or sold the copyright in any book or allowed any person to print it this special copyright or privilege was extinguished. The same copyright was granted to Trinity College in Dublin 1801. These rights were perpetuated by the Copyright Act, 1842.

B. MUSICAL AND DRAMATIC WORKS

Musical and dramatic works in "book" form were protected as "literary works" under the Literary Copyright Act, 1842. Protection of these types of works as separate works only concerns so-called "performing rights". In this respect the works enjoyed protection under the Dramatic Copyright Act, 1833 (Bulwer Lytton's Act) and Sections 20 and 21 of the Literary Copyright Act, 1842. The effect of Sections 20 and 21 of the 1842 Act was that that Act as it was took over the protection of the performing right from the 1833 Act.

(1) Types of Works Protected

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18. *Supra*.

Section 2 of the 1842 Act defined *"dramatic works"* as including *"every tragedy, comedy, play, opera, farce, or other scenic, musical or dramatic entertainment"*. In **Fuller v Blackpool Winter Gardens**[19] it was said that a *"mere common, ordinary musical song, which required neither acting nor scenery for its production"* was not a dramatic work.

While the term "musical work" was not defined in the 1842 Act, it was defined in Section 3 of the Musical (Summary Proceedings) Copyright Act, 1902, as *"any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced"*. It is submitted by **Sterling & Carpenter**[20] that this definition is an apt description of what constituted a "musical work" in the pre-1912 legislation generally.

(2) Conditions for Subsistence of Performing Rights

A work which had neither been published nor performed in public was protected by common law copyright irrespective of whether the author was a British subject or a foreigner or whether he was resident in the United Kingdom or elsewhere. In the case of a work which had been either published or publicly performed performing rights only subsisted if such first publication or performance occurred in the United Kingdom or in a country which was recognized under the International Copyright Acts. After 10 August 1882 the subsistence of a performing right in a published musical work depended upon express reservation of that right being made on the title page of each copy released to the public.[21]

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19. (1895) 2 QB 429, at p 442.
20. *Op cit*, p 131.
21. **Laddie, Prescott and Vitoria**, *op cit*, p 198.

No registration was necessary to protect performing rights.

(3) Authorship and Initial Ownership of Performing Rights

The author of a dramatic or musical work was vested with the initial ownership of the copyright.

(4) Duration of Performing Rights

Where a work had not been printed and published the performing right endured indefinitely. Where a work had been published and publicly performed the term of protection endured for the lifetime of the author and seven years, or for forty-two years, calculated from the date of first public performance, whichever was the longer. It would thus seem that the term of the performing right endured indefinitely in the case of a work which, although published, was not publicly performed. If the work had been publicly performed but not published, i.e. it existed in manuscript form only, the term of the performing right was doubtful because the legislation prescribed no term. **Copinger & Skone James**[22] opines that the term of the right was possibly perpetual but was more probably of the same duration as that of a work which had been both published and performed.

(5) Transmission of Performing Rights

It would seem that the performing right in dramatic and musical works could be assigned and presumably such assignment was required to be in writing.[23] The assignment of the

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22. *Op cit*, p 17.
23. The writers do not deal with this point specifically but there is no suggestion in the 1911 Act where it deals with assignments made prior to its coming into operation that certain types of copyright were not capable of being assigned. In general, in early British copyright legislation whenever specific reference is made to assignment of copyright it is required that such assignments must be in writing.

copyright in a dramatic or musical work, being a literary work, did not convey the performing right unless an entry to that effect was made in the Register maintained at Stationer's Hall.

C. ARTISTIC WORKS

(1) Types of Works Protected

(a) Prints.

This class included engravings and etchings and prints taken by lithography or any other mechanical process by which prints or impressions of drawings or designs were capable of being multiplied indefinitely. This class of works was protected by the Engraving Copyright Acts 1734 and 1736, the Prints Copyright Act 1776, and the Prints and Engravings Copyright (Ireland) Act, 1836, and Section 14 of the International Copyright Act 1852. According to **Laddie, Prescott & Vitoria**[24] there was some doubt as to whether prints of maps, charts or plans were covered under the Engraving Act because they could be protected as "books" by the Copyright Act, 1842; similar doubt existed as to whether a drawing on which an engraving or print was based was protected under these Acts because they could be protected under the Fine Arts Copyright Act, 1862. It was held that where engravings formed part of a book and the ownership of the copyright in the book and in the engraving vested in the same person, the pictures were considered to be part of the book and protected as such.[25]

(b) Sculptures.

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24. *Op cit*, p 199.
25. **Copinger & Skone James**, *op cit*, p 18.

This class of work was protected under the Sculpture Copyright Act, 1814.

(c) Paintings, Drawings and Photographs.

This class of works was protected under the Fine Arts Copyright Act, 1862.

(d) Industrial Designs.

A measure of protection for what today are regarded as designs was granted under the Sculpture Copyright Act, 1814. The Patents and Design Act, 1907, defined a *"design"* to exclude *"not being a design or a sculpture or other thing within the protection of the Sculpture Copyright Act, 1814"*. Section 1 of the Sculpture Copyright Act, 1814, protected

> *"any new and original sculpture, or model, or copy, or cast of the human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any ulto or basso-releivo representing any of the matters or things herein-beforementioned, or any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things herein-beforementioned, whether separate or combined".*

The earlier Engraving Copyright Acts of 1734 and 1766 extended to designs transferred to articles of manufacture.[26]

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26. **Copinger & Skone James**, *op cit*, p 18.

(2) Conditions for Subsistence of Copyright

(a) Prints.

Unpublished prints or engravings enjoyed common law protection. A published print was protected if first publication took place in the United Kingdom or in another recognized territory (under the International Copyright Acts). In regard to first publication in Great Britain it was necessary for the work to have been made in Great Britain or Ireland.[27] It was a requirement for the subsistence of copyright that the date of first publication and the name of the proprietor should be engraved on the plate and should appear on each print. No registration of the copyright was necessary.

(b) Sculptures.

The common law protected unpublished sculptures. In order to enjoy copyright a sculpture must have been new and original. Statutory copyright subsisted in a sculpture provided the *"first putting forth or publishing"* of the work took place in the United Kingdom. In addition the author must have been a British subject or resident in the British dominions at the relevant time.[28] Works of foreign origin could, however, enjoy copyright under the International Copyright Acts. *"First putting forth or publishing a work"* included exhibiting it at a gallery or other public place.[29] It was a requirement that the name of the proprietor of the copyright together with the date of first pub-

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27. **Laddie, Prescott and Vitoria**, *op cit*, p 198.
28. **Laddie, Prescott and Vitoria**, *op cit*, p 199.
29. **Turner v Robinson** (1860) 10 I Ch R 510 at 516.

lication, was placed on the work and on each copy. Registration was not required.

(c) Paintings, Drawings and Photographs.

Statutory copyright subsisted if the author was a British subject or was resident in a British dominion. Publication of the work was irrelevant to the subsistence of copyright.[30] Copyright was, however, conferred upon foreign works if the authors of such works could derive protection under the International Copyright Acts, i.e. they were subjects of a Berne Convention country or of Austria-Hungary. Registration was unnecessary for the subsistence of copyright but violations of copyright were not actionable if committed prior to registration. Copyright was forfeited if a work was sold without copyright being expressly reserved in writing. Unpublished works (as well probably as works sold without reservation of copyright) were protected by common law copyright but such common law copyright expired co-terminously with the statutory copyright.[31] It was specifically held that the Fine Arts Copyright Act did not provide for copyright to

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30. **Sterling & Carpenter**, *op cit*, p 149 *et seq* contends that first publication of a work outside the United Kingdom, the British dominions or a country with which Britain had copyright relations was divestive of copyright. The authors also contend that first publication in a Berne Convention country was investive of copyright. None of the other modern authors share these views. **Laddie, Prescott and Vitoria**, *op cit*, p 200, footnote 2, counters the first mentioned view and, with respect, **Laddie, Prescott and Vitoria's** arguments are to be preferred. The argument advanced by **Sterling & Carpenter** is at variance with the basic principle of the Berne Convention that Union works and authors are subject to certain conditions to be treated as domestic works or authors; **Sterling & Carpenter's** contention would have the effect that foreign works would have been able to acquire copyright on an additional ground over and above that on which domestic works could qualify. These views are not persuasive.

31. **Copinger & Skone James**, *op cit*, p 19.

subsist in the British dominions; the copyright was confined to the United Kingdom.[32]

(3) Authorship and Initial Ownership of Copyright

Save in the case of photographs the maker of the work was the author. Determining the authorship of a photograph was sometimes problematical. As a general rule the author was the person who took care of the arrangements of the picture and the positioning of the object.[33] Sometimes, however, the proprietor of the photographic business was held to be the author.[34]

Generally speaking the author was the first owner of the copyright. In the case of engravings, however, where a person caused or procured an engraving or print to be made from his own work that person was the initial owner provided his name and the date were placed on the engraving before publication. Similarly, in the case of a sculpture where a person caused a new and original sculpture to be made he was the initial owner provided his name and the date were placed on the sculpture before it was published. In the case of drawings, paintings and photographs, where a work was made for another person pursuant to a commission that person was the initial owner of the copyright unless the copyright was reserved to the author by a written agreement signed by the person giving the commission.

(4) Duration of Copyright

(a) Prints.

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32. **Graves v Gorrie** (1903) AC 496.
33. **Nottage v Jackson** (1883) 11 Q.B.B. 627.
34. **Melville v Mirror of Life Company** (1895) 2 Ch 531.

The copyright in prints endured for a period of twenty-eight years from the date of first publication.

(b) Sculptures.

The term of copyright was fourteen years from the date of first publication supplemented by a further period of fourteen years if the author was still living at the expiration of the initial term provided he had not divested himself of the copyright.

(c) Paintings, Drawings and Photographs.

The term of copyright was the lifetime of the author and seven years after his death.

(5) Transmission of Copyright

No specific provisions as to the assignment of copyright were made in the Engraving Act and generally speaking it was considered to be necessary that an assignment should be in writing and should be attested to by two witnesses.[35] The aforegoing was made obligatory in the Sculpture Copyright Act. In the case of paintings, drawings and photographs, copyright could be assigned by means of any note or memorandum in writing.

D. WORKS OF FOREIGN ORIGIN

As previously stated, unpublished works of foreign origin, no matter what their country of origin may have been, were afforded copyright protection of indefinite duration under the common law. As a general proposition foreign works forfeited their common law protection upon being published anywhere. In order to continue enjoying protection in Britain subsequent to being published they must have met the

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35. Copinger & Skone James, op cit, p 18.

requirements for statutory protection. Save in certain instances where works originating from the British dominions enjoyed statutory protection by virtue of individual British statutes (e.g. the Fine Arts Copyright Act, 1862), none of the statutes themselves conferred protection on works first published in foreign countries.

The aforegoing position was varied in the case of some countries by Orders in Council made under the various International Copyright Acts passed between 1844 and 1875. The effect of this legislation was to grant protection to published works of certain European countries in terms of bilateral agreements entered into between Britain and those countries. As these Orders in Council were subsequently superseded by the Berne Convention no further attention is devoted to them.

(1) Berne Convention

In 1885 a meeting of the then great Powers was held in order to secure a degree of uniformity in their copyright laws and to provide for mutual protection for each other's works. This conference gave rise to the Berne Convention of 1887 in terms of which the contracting states were *"constituted into a union*[36] *for the protection of the rights of authors over their literary and artistic works"*.[37] Britain adhered to this Convention on 28 November 1887.

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36. The following are the countries which then constituted the Berne Union : Belgium, France (including Algeria) and her colonies, Germany, Haiti, Italy, Spain and her colonies, Switzerland, Tunis, Luxembourg, Monaco, Norway, Japan, Denmark (and Faroe Islands), Sweden, Liberia, and the German Protectorates (including Tanganyika, South West Africa and Papua).

37. Berne Convention, 1887, Article 1.

In the meantime in order to enable Britain to give effect to the Berne Convention about to be made, the International Copyright Act, 1886, was passed. An Order in Council was made on 28 November 1887 which came into force on 6 December 1887. The Order in Council embodied a translation of the Berne Convention in a schedule and provided that it would apply in the domestic law and would have effect throughout the British dominions. The Berne Convention was later modified by the additional Act of Paris of 1896 and this was given effect to in Britain by an Order in Council of 7 March 1898.

The effect of this legislation was that protection to the works of the countries which were members of the union and to works first produced in British dominions was granted in Britain. In the case of works produced in the dominions the provisions were not retrospective, which meant that works first published in a colony before 25 June 1886 were not granted copyright in the United Kingdom[38] but the protection granted to works originating from members countries of the Berne Convention was retrospective in the sense that protection was granted to pre-existing works provided they had not fallen into the public domain in their country of origin. The country of origin in terms of the Berne Convention was the country to which the author belonged (i.e. probably the country of which he was a citizen or where he was domiciled or resident) in the case of an unpublished work. In the case of a published work the country of origin was the country in which the work was first published. Where a work was simultaneously published in two or more countries the country of origin was that country in which the term of

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38. See **Laddie, Prescott and Vitoria**, *op cit*, p 205.

protection was the shortest.[39] According to **Laddie, Prescott and Vitoria**[40] the terms of protection of Berne Convention countries were in general the lifetime of the author and the following terms of years; Liberia (20); Germany, Japan, Switzerland (30); other countries (50) except Italy which had a double forty (40) year term and Haiti a term depending on the longevity of the widow and children of the author. In terms of s 3(2) of the International Copyright Act, 1886, a work which was published in the United Kingdom and another union country simultaneously was treated as a foreign work.

The Berne Convention, as modified by the additional Act of Paris, provided in essence that works first published in a union country and unpublished works made by a person belonging to a union country were granted protection in the other countries of the union as though they were domestic works. There were two conditions attached to this protection, namely, a work of foreign origin was not protected for a longer term than in its country of origin and any formalities or conditions prescribed in the law of the country of origin must have been met.[41]

Special provision was made in the Convention for newspaper and magazine articles.[42] Serial stories were granted normal protection while political and news items fell into the public domain. No protection was granted to other items in newspapers and magazines besides the aforegoing unless copyright was expressly reserved on publication.

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39. Article 2 of the Berne Convention.
40. *Op cit*, p 203.
41. Articles 2 and 3 of the Berne Convention.
42. Article 7 of the Berne Convention read together with Article 1(iv) of the Additional Act of Paris.

The performing rights in published musical works was forfeited unless an express reservation was made on the title page or at the commencement of the work.[43]

In the case of posthumous works the person who was named as the author was presumed to be such. These works were otherwise protected as normal works.[44] In the case of anonymous or pseudonymous works the person who was designated as the publisher was regarded as the agent of the author and was entitled to enforce the copyright in his own name.[45]

The Berne Convention contained special provisions relating to translation rights. In terms of Article 5 a copyright owner lost the right to control the making of translations of his work ten years after the end of the calendar year in which first publication in a Union country took place. This provision was revised by the Additional Act of Paris (with effect from 7 March 1898 in the United Kingdom). In terms of the amended provisions the copyright owner could prevent the translation right in a particular language from passing into the public domain if he published an authorized translation into that language in one of the member countries within ten years from the date of publication of the original version of the work. Failing this, the translation right in any language was excised from the copyright. This position obtained in the United Kingdom in regard to all works of foreign origin. It did not, however, apply to works of British origin in the United Kingdom.

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43. Article 9 of the Berne Convention.
44. Article 1(1) of the Additional Act of Paris.
45. Article 11 of the Berne Convention.

(2) Austria-Hungary Treaty

Austria-Hungary was not a member of the Berne Convention and works emanating from this country consequently did not initially necessarily enjoy any protection in Great Britain. This was rectified by a treaty between the two countries which was entered into on 24 April 1893. Effect was given to this treaty in the United Kingdom by an Order in Council dated 30 April 1894. In terms of the treaty works first published in the dominions of one of the parties were granted the same protection in the dominions of the other party as domestic works. This protection was subject to the condition that the foreign work would not enjoy a longer term of copyright than that enjoyed in its country of origin.[46] The Treaty also provided that the works of authors who were subjects of or who resided in the dominions of the one party would enjoy the same protection as the works of domestic authors.[47] This granted protection to unpublished works. The enjoyment of protection of unpublished works was not however subject to the reciprocity principle regarding term of protection. The Treaty had retrospective effect and applied to works already in existence. Vested rights to use works protected retrospectively were however preserved.[48]

(3) Colonial Works

Only two of the British Acts conferring copyright on specific classes of works granted protection to works made in the British Colonies. The Literary Copyright Act of 1842 granted copyright to works made in the British dominions provided first publication took place in the United Kingdom.

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46. Article 1 para 2 of the Treaty.
47. Article 1 para 3 of the Treaty.
48. Article 2 of the Treaty.

In **Routledge v Low**[49] it was held that the Literary Copyright Act did not confer copyright in the United Kingdom on works first published in the colonies. The Fine Arts Copyright Act 1862, on the other hand, gave copyright in all works made in the British dominions and first publication in the United Kingdom was not a requirement since this Act did not confer copyright on the basis of first publication.

The International Copyright Acts, 1844 to 1886, did not confer any copyright on works made or first published in the dominions over and above the rights granted by the individual Copyright Acts themselves. This position was changed in the International Copyright Act, 1886. Section 8 of this Act provided, subject to certain conditions, that the various specific Copyright Acts would apply to literary or artistic works first produced in a British dominion in the same manner as they applied to works first produced in the United Kingdom. The conditions subject to which this protection was granted were that any provisions in the individual Copyright Acts relating to registration of copyright would not apply if a particular British dominion maintained its own copyright registry and that, in the case of books, provisions of the individual Copyright Acts relating to the delivery of copies of the book to libraries and the like would not apply. If a particular dominion did not have its own registration system then the provisions of the individual Copyright Acts relating to registration and delivery of copies in the United Kingdom were required to be complied with.

According to **Laddie, Prescott and Vitoria** Section 8 of the International Copyright Act, 1886, was not retrospective and

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49. (1868), L.R.3H.L.100.

the Act conferred copyright on works produced in the British dominions only after 25 June 1886.[50] Works produced prior to that date therefore could only derive protection under the common law and the Fine Arts Copyright Act, 1862, or to the limited extent provided for in the Literary Copyright Act, 1842.

E. WORKS NOT PROTECTED

The following types of works eligible for copyright under the South African Copyright Act, 1978, would not have enjoyed protection under pre-1912 British copyright legislation:

(a) Works of artistic craftsmanship and works of craftsmanship of a technical nature, unless they qualified as sculptures.
(b) Works of architecture, being buildings or models for buildings.
(c) Drawings which had no artistic merit or aesthetic qualities (save for maps, charts and plans). It would seem, however, that a very low level of artistic merit was required.[51]
(d) Stories reduced to a material form in a cinematograph film or music reduced to a material form in a gramophone record or other mechanical contrivance. **Laddie** expresses the view that works of this nature would, however, probably have enjoyed the performing right.[52]
(e) Sound recordings.

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50. *Op cit*, p 205.
51. **See Kenrick & Co v Lawrence & Co** (1890) 25 QBD 99.
52. **Laddie, Prescott and Vitoria**, *op cit*, p 201.

(f) Cinematograph Films.
(g) Broadcasts.
(h) Programme-carrying signals.

4. RIGHTS UNDER THE ACT OF 1911

A. THE "1912 GATEWAY"

The British Copyright Act, 1911, in a sense codified British copyright law. As mentioned previously, it embodied the provisions of the Berlin Text of the Berne Convention dating from 1908. It repealed all the existing British copyright legislation save for some minor exceptions which are not material for the present purposes.[53] It abrogated all common law copyright while not in any way affecting the right derived from the law of equity to restrain a breach of trust or confidence.[54]

The Act was retrospective in effect and works made prior to 1 July 1912 could only enjoy protection to the extent conferred upon them by the Act. The copyright in existing works was dealt with in an unusual way. The Act provided for a system whereby existing rights under copyright on 1 July 1912 could as it were be "traded in" for, or be substituted by, "new" rights conferred by it. This was achieved in Section 24(1) read together with the First Schedule to the Act. The First Schedule to the Act read as follows:

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53. Section 24(1) read together with the First Schedule.
54. Section 31.

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FIRST SCHEDULE
Existing Rights

Existing Right	*Substituted Right*
(a) In the case of works other than Dramatic and Musical Works	
Copyright.....	*Copyright as defined by this Act**
(b) In the case of Musical and Dramatic Works	
Both copyright and performing right	*Copyright as defined by this Act**
Copyright, but not performing right	*Copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public.*
Performing right, but not copyright	*The sole right to perform the work in public, but none of the other rights comprised in copyright as defined by this Act.*

For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings:

'Copyright', in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealings with the work;

'Performing right', in the case of a work which has not been performed in public before the commencement of this Act, includes the right at common law (if any) to restrain the performance thereof in public.

** In the case of an essay, article, or portion forming part of and first published in a review, magazine or other periodical or work of a like nature, the right shall be subject to any right of publishing the essay, article, or portion in a separate form to which the author is entitled at the commencement of this Act, or would, if this Act had not been passed, have become entitled under section eighteen of the Copyright Act, 1842.*

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The position with regard to literary and artistic works was straightforward. An existing copyright was substituted by the copyright conferred by the 1911 Act on the type of work in question. The position with regard to musical and dramatic works was, however, more complicated. A distinction was drawn between so-called "copyright", i.e. the right to restrain reproduction and publication, and the "performing right", i.e. the right to perform the work in public. Where a work enjoyed "copyright", full copyright under the 1911 Act, save for the public performance right, was conferred on the work. Where a person merely held the performing right the 1911 Act conferred upon him only the right to perform the work in public. It could happen that the "copyright" and the performing right were held by different persons under the pre-1912 legislation with the result that there could be a splitting of the ownership of the copyright conferred by the 1911 Act in respect of these types of works.

Laddie, Prescott and Vitoria refers to the system of granting substituted rights in lieu of existing rights as the "1912 Gateway".[55] This description commends itself and will be used below.

The effect of the transitional provisions of the 1911 Act embodied in Section 24 was that if existing rights passed through the 1912 Gateway they were transformed into "new" or substituted rights and were generally speaking treated in the same way as rights conferred by the 1911 Act in works made thereafter. If, on the other hand, existing rights did not pass through the 1912 Gateway they were extinguished. A

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55. *Op cit*, p 191.

work made prior to 1 July 1912 could only enjoy copyright under the 1911 Act to the extent that substituted rights were conferred upon it. Generally speaking this meant that if the pre-1912 legislation did not grant protection to a type of work that work was not protected under the 1911 Act and if rights in a work had fallen into the public domain under the pre-1912 legislation whether through the effluxion of time, the lack of compliance with formalities or for whatever cause, those works were granted no protection under the 1911 Act. As will be shown below there were, however, some instances where the 1911 Act conferred copyright on works which had not previously enjoyed copyright under the pre-1912 legislation or the common law.

Save in the case of foreign works, which will be dealt with below, the term of copyright enjoyed by works which passed through the 1912 Gateway was that granted to that type of work by the 1911 Act. In general terms the substituted rights granted by the 1911 Act were equivalent to rights granted under that Act to works made after 1 July 1912. In many instances this meant that the term of a copyright existing under the pre-1912 legislation was extended or given a new lease of life.

B. COPYRIGHTS OF BRITISH ORIGIN WHICH PASSED THROUGH THE 1912 GATEWAY

In the ensuing paragraphs the copyrights in works of British origin which passed through the 1912 Gateway will be examined. Firstly, common law copyright in unpublished and unperformed works, and thereafter statutory copyright, which regulated copyright in all published works, will be dealt with. Generally all formalities under the early law must have been complied with to make a work eligible for a substituted right.

(1) Unpublished Works

Unpublished works were protected by the common law and, save in the case of paintings, drawings and photographs, which will be dealt with below, the copyright in all unpublished works as at 1 July 1912 would have passed through the 1912 Gateway and were superseded by substituted rights. Unpublished works enjoyed common law copyright irrespective of the nationality and residence of the author.

(2) Literary Works ("Books")

This category, which includes literary rights in musical and dramatic works, enjoyed protection for the lifetime of the author and for a period of seven years after his death, or forty-two years from publication, whichever was the longer. Accordingly any work published after 1 July 1870 or any work the author of which died on or after 1 July 1905 enjoyed copyright on 1 July 1912. Such copyright passed through the 1912 Gateway and was superseded by a substituted right.

(3) Performing Rights in Dramatic or Musical Works

For works published in manuscript form the term of the performing right was the life of the author and seven years after his death, or a period of forty-two years from the date of the first performance of the work, whichever was the longer.[56] Accordingly, performing rights in works first performed publicly after 1 July 1870 or the author of which died on or after 1 July 1905 were protected on 1 July 1912 and, having passed through the 1912 Gateway, were superseded by substituted rights, i.e. performing rights under the

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56. In regard to unpublished or unperformed dramatic and musical works see p 131 *supra*.

copyright conferred by the 1911 Act. In the case of musical works, however, a notice reserving the performing rights of every work published after 1882 had to be printed on the title page. Consequently no musical work published after 1882 which did not have the required notice enjoyed performing rights in 1912 and no substituted rights could be granted in respect of such works.

(4) Engravings (Prints)

These works enjoyed copyright for a period of twenty-eight years from the date of first publication, provided the name of the author and the date of first publication was printed on each copy. In order to pass through the 1912 Gateway engravings must have been published after 30 June 1884 and have had the name of the author and date of first publication printed on every copy. All engravings which met these requirements enjoyed copyright on 1 July 1912 and that copyright was superseded by the substituted rights.

(5) Sculptures

The term of copyright in respect of these works was fourteen years after first publication and a further period of fourteen years if the author was alive at the expiration of the initial period and had not assigned his copyright; provided that the author's name and the date of first publication had appeared on the work. Accordingly, the following types of sculptures enjoyed copyright which passed through the 1912 Gateway:

(a) All works published after 1 July 1898;

(b) Any work of which the author was still alive on 1 July 1898 and had not assigned his copyright, provided the first publication took place after 1 July 1884.

(6) Paintings, Drawings and Photographs

The statutory term of copyright in these works was the lifetime of the author and seven years after his death. The work was protected from the time of its making and this applied irrespective of whether the work was published or unpublished. In the event that the work was unpublished, common law copyright operated in tandem with statutory copyright. According to **Copinger & Skone James**[57] the common law copyright terminated at the same time as the statutory copyright. The other British textbook writers do not appear to share this view but after 1 July 1912 it was of no consequence whether it was correct because in any event the common law right in a painting, drawing or photograph did not pass through the 1912 Gateway in view of the definition of the term "copyright" given in the First Schedule to the 1911 Act. In terms of those provisions common law rights only passed through the 1912 Gateway if the pre-1912 statutory rights in the type of work in question depended upon publication and this was not the case with paintings, drawings and photographs.

Save for works made pursuant to a commission, copyright in a painting, drawing or photograph was extinguished upon the first sale of the work unless the author reserved the copyright to himself in writing.

Copyright in a painting, drawing or photograph passed through the 1912 Gateway in the event that the author was alive on or after 1 July 1905 and, if the work was sold or disposed of after 29 July 1862 and before 1 July 1912 and was not a work made pursuant to a commission, the copyright was expressly reserved by the author at the time of first sale of the work.

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57. *Op cit*, p 251.

C. PRE- AND POST-1912 GATEWAY FOREIGN WORKS

(1) Foreign Works

Generally speaking the term of statutory copyright granted under the laws of the various countries of the Berne Union and under the law of Austria-Hungary was the lifetime of the author and a specified number of years.[58] It will be recalled that in terms of the International Copyright Act, 1886, foreign works were protected in Britain on the same basis as domestic works provided the term of copyright granted to a foreign work did not exceed the term of copyright granted under the law of the country of origin and provided further that any formalities prescribed by the country of origin were complied with. Accordingly, subject to compliance with foreign formalities, foreign published works passed through the 1912 Gateway on the same basis as British works. In some instances foreign countries prescribed fixed terms of years as in the case where the author was a body corporate or the work had been anonymously or pseudonymously published. Accordingly in assessing whether the copyright in a published foreign work passed through the 1912 Gateway regard should be had to the duration of the copyright in that work and the prescribed formalities in the country of origin. As far as unpublished and unperformed works are concerned, protection was granted in Britain under British common law and these works passed through the 1912 Gateway on the same basis as British works notwithstanding non-compliance with formalities in the country of origin. However, common law copyright in paintings, drawings and

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58. See pp 140 and 142 *supra*.

photographs did not pass through the 1912 Gateway and foreign works of this nature could thus not be vested with substituted rights. Unpublished paintings, drawings and photographs originating from foreign countries could thus only be vested with substituted rights if the statutory copyright still subsisted on 1 July 1912.

In terms of the 1911 Act and the Orders in Council issued thereunder, where a foreign work had been published before 1 July 1912 the term of substituted or new copyright granted to that work was limited to the term granted under the law of the country of origin.[59] Accordingly it is possible that in the case of some foreign works the term of substituted copyright conferred on them by the British Act of 1911 expired prior to the expiry of the normal term of copyright granted under that Act to British works. This point may be of some significance to the question of which works passed through the equivalent South African 1917 Gateway which will be dealt with below.[60]

The position of a foreign work which was unpublished on 1 July 1912 and upon which substituted rights were conferred by the Act of 1912, but which was thereafter first published in a non-Berne Convention country was somewhat complex. Publication in such a country prior to 1 July 1912 would have extinguished the copyright[61] but it is not clear what the position would have been under the 1911 Act. There is no doubt that publication in these circumstances of a work which was made after 1 July 1912 would have extinguished the

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59. S.R. & O. 1912 No. 913, Article 2, proviso (ii). See also **Laddie, Prescott and Vitoria**, *op cit*, p 206.
60. See p 359 *infra*.
61. International Copyright Act, 1844, s 19.

copyright. According to **Laddie Prescott and Vitoria**[62] there are two alternative points of view. Firstly, it can be contended that once the copyright in a work had passed through the 1912 Gateway it could only lose copyright by the expiry of the term provided for in the Act and first publication of the work in a non-Berne Convention country was of no consequence. The alternative view is that Section 24(1) required the term of substituted rights to be treated as though the 1911 Act had been in force when the work in question was made and on that premise copyright would be extinguished by first publication in a non-Berne Convention country because such publication was a factor which influenced the term of the copyright. The learned authors do not indicate any preference for either of these points of view. The first point of view is to be preferred because publication in a non-Berne Convention country is a factor which influences the **subsistence** (or rather continued subsistence) of copyright and not strictly speaking the **term** of copyright. There is a difference in principle between these two concepts and it is felt that the term of copyright relates to a number of years and not to the conditions which must be met for copyright to subsist at all, leaving aside the duration of that copyright if it is found to subsist. On this premise the place of first publication of a work which had passed through the 1912 Gateway is of no consequence to the term of copyright. The place of first publication of a work **made after** 1 July 1912 is, however, of relevance to the continued subsistence of copyright in a hitherto unpublished work and insofar as that first publication may have taken place prior to 1 January 1917 it may have relevance to substituted rights under the South African Act of 1916 as will

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62. *Op cit*, p 207.

be shown below.[63]

Prior to the outbreak of the First World War in 1914 works originating from Germany and from Austria-Hungary were granted copyright in Britain by virtue of the international provisions of the 1911 Act. The Trading with the Enemy Acts, 1914 to 1918 provided that the copyright in works made or first published prior to the outbreak of the war and belonging to an enemy became vested in the Custodian of Enemy Property. In regard to works made or first published after the outbreak of the war and belonging to an enemy the Trading with the Enemy (Copyright) Act, 1916, similarly provided that such copyright should vest in the Custodian of Enemy Property. According to **Copinger & Skone James**[64] a large number of enemy copyrights were vested in the Custodian during the war and licences were granted to use such works. The Treaties of Peace caused the copyrights to be revested in their former owners subject to certain conditions which as far as Germany and Austria were concerned were set out in an Order in Council dated 9 November 1920. However, such revesting took place after 1 January 1917, the operative date of the South African, 1917 Gateway. The subsequent reversion of copyright accordingly did not affect rights which had passed through the South African 1917 Gateway.

The United States of America was not a party to the Berne Convention and prior to 1915 no special arrangements as to copyright were made between Britain and the United States of America. Prior to 1915, therefore, American works enjoyed no copyright in Britain save to the extent that prior to 1912

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63. See p 359 *infra*.
64. *Op cit*, p 293.

they enjoyed common law copyright while unpublished and statutory copyright where the vesting thereof was brought about by first publication or first public performance in the United Kingdom. By an Order in Council dated 3 February 1915 made under Section 29 of the 1911 Act, copyright was extended in Britain to unpublished works of which the author was at the date of the making of the work a United States subject or citizen or was resident in the United States. No copyright was, however, granted to works first published in the United States of America. These works only came to enjoy protection in the United Kingdom in 1920 but as this was after the time of the South African 1917 Gateway the question is of no relevance.

Works originating from the British Colonies were in a different category to foreign works and the aforegoing is not applicable to them. This question will be dealt with separately below.

(2) Colonial Works

Works originating from the British Colonies, in the sense that their authors belonged to a British Colony or the works were first published or performed in a British Colony, in which copyright subsisted on 1 July 1912 were treated in the same way as British works. However, no such works besides paintings, drawings and photographs made prior to 1886 enjoyed statutory copyright, as distinct from common law copyright in view of the fact that the International Copyright Act of that year was not retrospective in respect of such works. The rules set out above regarding copyright in British works which passed through the 1912 Gateway must therefore be qualified in the case of colonial works to the extent that, save for paintings, drawings and photographs, they must have been first published (or first publicly per-

formed in the case of musical and dramatic works) or first made, as the case may be, after 25 June 1886 apart from the normal requirements which had to be met.

In regard to the 1911 Act it is necessary to divide the then existing British possessions into two broad categories, namely, firstly, the self-governing colonies, i.e. Canada, Australia, New Zealand, South Africa and Newfoundland, and secondly, the possessions other than the self-governing colonies, the protectorates and Cyprus.[65] The 1911 Act extended *ab initio* to the second category of territories but empowered such territories to make variations thereto applicable only to works of local origin. In broad terms, however, and subject to any local variations, works originating from this category of dominions were treated in Britain in the same way as works originating from the motherland. A different position obtained in the case of the first category of territories.

Section 24(1) of the 1911 Act provided that the Act did not extend to a self-governing dominion unless the legislature of that dominion declared it to be in force either with or without modifications and subject to any modification which may be enacted by such a dominion legislature. Newfoundland adopted the Act without any modifications while Australia and South Africa adopted it with certain modifications. Canada and New Zealand, on the other hand, did not adopt the Act as such but passed independent Acts along similar lines.

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65. The second category comprised Cyprus, Bechuanaland Protectorate, East Africa Protectorate, Gambia Protectorate, Gilbert and Ellice Islands Protectorate, Northern Nigeria Protectorate, Northern Territories of the Gold Coast, Nyasaland Protectorate, Northern Rhodesia, Southern Rhodesia, Sierra Leone Protectorate, Somaliland Protectorate, Southern Nigeria Protectorate, Solomon Islands Protectorate, Swaziland and Uganda Protectorate.

The effect of a self-governing dominion adopting the British 1911 Act, with or without modifications, was that works originating from those dominions were treated in the same way as if they were works originating from the motherland and such works thus enjoyed full copyright in the United Kingdom. Both Australia and Newfoundland adopted the 1911 Act in 1912 and thus from the outset works originating from these dominions enjoyed copyright in the United Kingdom.

Section 25(2) of the 1911 Act provided that if the Secretary of State certified by notice published in the London Gazette that any self-governing dominion had passed legislation under which the works of authors from the United Kingdom or other parts of the British dominions enjoyed substantially the same protection conferred upon such works by the Act of 1911, works emanating from that Dominion then enjoyed the full benefit of the 1911 Act and were granted copyright in the United Kingdom as if they were works emanating from the motherland itself. New Zealand passed its Independent Act in 1913 and works originating from New Zealand were granted the aforementioned recognition on 27 March 1914. Canada, however, only passed its Independent Act in 1923 and works originating from Canada were granted the aforementioned recognition in the same year. This means that as at 1 January 1917 no Canadian works enjoyed copyright in the United Kingdom save those which had been granted substituted rights through having passed through the 1912 Gateway.

South Africa adopted the 1911 Act with variations in 1916 and brought it into operation on 1 January 1917. Works originating from South Africa were thus treated in the United Kingdom in the same way as works originating from the motherland with effect from 1 January 1917. The effect of

the adoption of the 1911 Act by South Africa in 1917 was that South African works enjoyed copyright in the United Kingdom as if they were works emanating from the motherland from 1 July 1912. This applies equally to Newfoundland, Australia and New Zealand.[66] The Irish Free State was deemed to be a self-governing dominion for the purposes of the 1911 Act in 1930, but for the purposes of the South African 1917 Gateway works originating from this country were in the same category as Canada and its post-1912 works were not protected in the United Kingdom as of 1917.

D. WORKS PROTECTED IN THE 1911 ACT

(1) Summary of Works Protected

This subject will be dealt with in detail in Chapter V and for the present a brief summary will be given.

The 1911 Act conferred copyright on original, literary, dramatic, musical and artistic works. Certain cinematograph films were treated as a *species* of the *genus* "dramatic works" and sound recordings were protected as if they were musical works. In order to enjoy copyright the aforementioned categories of works must have, if published, been first published in the United Kingdom or a territory to which the operation of the Act had been extended, or if unpublished, the author must have been a British subject or a resident or the subject or resident of a territory to which the operation of the Acts had been extended. The term

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66. See Section 1(1) read together with Section 25 of the 1911 Act. Once the dominion had adopted the 1911 Act or a certificate in terms of Section 25(2) had been issued the works in question fell within the provisions of Section 1(i)(a) and (b) and Section 1(i) had retrospective effect in the sense that it covered all works made after 1 July 1912.

of copyright was generally speaking, the lifetime of the author of the work and a period of fifty years after his death.

In conferring copyright on sound recordings and cinematograph films, albeit somewhat indirectly, the 1911 Act created two new categories of works eligible for copyright. As will be shown later this may have had a significant effect on the approach in the South African legislature in 1916.

In general terms, the scope of copyright granted under the 1911 Act was broader than the scope of copyright granted under the pre-1912 legislation. Works which passed through the 1912 Gateway enjoyed the broadened scope of copyright as well as the longer term of copyright granted in the 1911 Act. This created certain problems which will be adverted to below.

Save with one exception, the 1911 Act did not grant copyright retrospectively in works made prior to 1912; it granted substituted rights for existing copyrights which passed through the 1912 Gateway. The exception was in the case of sound recordings which were considered to be "musical works". Section 19(8) of the 1911 Act provided that, where a record, perforated roll or other contrivance by means of which sounds may be mechanically produced was made prior to 1912, copyright would subsist in such article as if the new legislation had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived. The person who was the owner of the original plate was designated as the first owner of the copyright in the "sound recording". No copyright was, however, granted to a contrivance if the making of that con-

trivance would have amounted to infringement of the copyright in another contrivance assuming that such contrivance had been protected by copyright at the time of such making.

(2) Inferior Substituted Rights

In some instances the 1911 Act in conferring substituted rights on works made prior to 1 July 1912 derogated from rights conferred by the pre-1912 law and certain authors were worse off under it than they had been under the earlier law. Under the old law a photograph enjoyed copyright during the lifetime of the author and for seven years after his death. Under the 1911 Act, however, the term of copyright in a photograph was fifty years from the making of the negative. On 1 July 1912 a photograph which had been taken more than fifty years earlier lost its copyright even though the author may still have been alive or might have died less than seven years earlier.

The 1911 Act made provision for the granting of certain compulsory licences thirty years after the author's death. Under the old law an author's copyright was unqualified for its entire duration whereas under the 1911 Act it became a qualified one thirty years after his death.

Under the old law a foreign author who was not resident in a country to which the operation of the statutory law had been extended could obtain common law copyright which was perpetual while the work remained unpublished but was extinguished once publication took place. Under the 1911 Act, however, the works of such a person made after 1912 would enjoy no copyright until he published his work and then only if publication took place in the United Kingdom or

a country to which the operation of the Act had been extended.

Under the old law the foreign author of a dramatic work could acquire statutory copyright in the United Kingdom by first performing the work in that country. Under the 1911 Act, however, performance was not considered to be publication and was therefore not an act which caused the investing of copyright. The performing rights in a dramatic work of foreign origin first performed in the United Kingdom **prior** to 1 July 1912 were, however, perpetuated in terms of Section 24(1)(i) of the 1911 Act.

E. PROTECTION OF VESTED INTERESTS IN THE 1911 ACT

As explained above, the scope of the substituted rights conferred upon works whereof the earlier copyright had passed through the 1912 Gateway was in certain instances greater than the scope of the old copyright and this had the effect of making Acts unlawful after 1 July 1912 which had been lawful prior to that date. This problem was catered for in proviso (b) to Section 24(1) of the 1911 Act. In terms of this provision where a person prior to 26 July 1910 (the date when the Bill which gave rise to the 1911 Act was first introduced into Parliament) had taken any action whereby he incurred any expenditure or liability in connection with the reproduction or performance of any work in any manner which was at the time lawful, or had taken any lawful preparatory action to making such reproduction or performance, the new legislation could not prejudice any rights or interest arising from such action which were subsisting and valuable at the specified date, unless the person who became the owner of the rights in question paid compensation in an agreed

amount, or failing agreement, as determined by arbitration. A vested right was thus created in favour of such a person.

A substantially similar provision was contained in the International Copyright Act, 1886. **Copinger & Skone James**[67] discusses a number of cases dealing with the questions which were decided under the International Copyright Act, 1886. On the strength of these cases the term "rights" meant, for instance, the right of the maker of an original translation to restrain others from copying his translation, while the term "interest" meant, for instance, the interest of a publisher who had invested capital in the production of a published copy of a work and depended upon sales of the published copy to obtain a return on his investment. The interest must, however, have had a commercial value of some substance at the time of the doing of the act which would in principle have been an infringement of the copyright embodied in the substituted right.

The First Schedule to the 1911 Act provided that in the case of an essay, article or portion forming part of and first published in a review, magazine or other periodical or work of a like nature, the substituted right conferred by the 1911 Act was subject to any right of publishing the essay, article or portion in a separate form to which the author was entitled at the commencement of the Act or would have been entitled in terms of Section 18 of the Copyright Act, 1842, if the 1911 Act had not been passed.

F. ASSIGNMENTS OF PRE-1912 WORKS

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67. *Op cit*, p 254, *et seq*.

Where a substituted right was granted under the 1911 Act in the case of a work which existed prior to 1 July 1912 it could happen, as explained above, that the term of the substituted right exceeded the term of the old right. Where the copyright in a pre-1912 work had been assigned prior to 1 July 1912 the substituted right was conferred upon the assignee and in principle therefore the assignee enjoyed the benefit of the increased term of copyright. However, proviso (a) to Section 24(1) of the 1911 Act altered this situation. In terms of this provision the ownership of the substituted right reverted to the author of the work upon the expiry of the term which would have been applicable if the right which had existed prior to 1 July 1912 had continued to be in operation. If the author of the work was no longer living then the rights reverted to his heirs. This situation could, however, be amended by agreement by the parties.

Upon the reversion of the rights to the author of the work, the interest of the person who held the rights immediately prior to their reversion was terminated. Where such a person was, however, the owner of the right in question immediately prior to the reversion he was granted the right, after giving appropriate notice, to take assignment of the right or to be granted a similar interest in the work for the remainder of the term of the substituted copyright - a consideration was payable to the owner of the reversionary right and if the amount of this compensation could not be agreed upon, it could be determined by arbitration; alternatively, such person could continue to reproduce or perform the work as he had in the past, subject to payment, if so demanded by the author within three years after the date at which the existing right would have expired, of royalties to the author - the amount of the royalties could be agreed upon, or failing such agreement, could be determined by

arbitration. Where the work in question was incorporated in a collective work and the reversionary owner was the owner of the copyright in that collective work, no compensation was payable.

The aforementioned provisions thus created vested rights in favour of a person other than the copyright owner.

The assignee's vested rights as aforementioned only applied where the assignment was for the full term of copyright. If the assignment had been for a specified term which was less than the full term of the old copyright, the author enjoyed the full benefit of the extended term of the new copyright unqualified by any vested rights in favour of the assignee.

The reversion did not occur where the "assignee" had acquired the old copyright by a means other than the actual execution of a Deed of Assignment by the author, for instance, where the author had made the work pursuant to a commission and the person giving the commission was the initial copyright owner from the outset.

In terms of Section 24(1)(a) the extended copyright did not revert to the author if there was an express agreement to the contrary between the author and the assignee. In the **"Redwood case"**[68] the meaning of this provision was analyzed and determined. It was held by the House of Lords, agreeing with the Court of Appeal, that *"an 'express agreement' in this context is an agreement which refers to the substituted*

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68. A series of cases in the Chancery Division, the Court of Appeal and culminating in the House of Lords as **Chappell & Company Limited & Others v Redwood Music Limited; Redwood Music Limited v Francis Day & Hunter Limited & Another** (1981) RPC 337.

rights in terms ... clearly identifying the right by naming it ...".[69] It had been held in the court of first instance that an express agreement did not mean an agreement which explicitly referred to the new copyright as such but rather an agreement which uses express terms wide enough to include the new copyright. This view was refuted by the House of Lords which held that *"there must be an agreement which expressly states that this* (i.e. the non-reversion of copyright) *is not to happen and that can be made clear beyond all doubt. Wide general words will not, in my view, suffice".*[70] (Words in parenthesis added)

Proviso (a) to Section 24(1) also provided that where an individual work is incorporated in a collective work and the copyright in such individual work was assigned before the commencement of the Act, and the assignee is the owner of the copyright in respect of the collective work, the assignee could continue to reproduce the work without payment to the author during the extended term of the copyright. This provision was not applicable to the situation where an individual work was created in such circumstances that someone else besides the author was the initial owner of the copyright; for instance, where the author was employed by another person to write works.

In the light of the aforegoing it is clear that the term *"collective work"* has a special significance. One of the major issues in the **Redwood** case was the question of what constituted a *"collective work"* under the 1911 Act. The term was defined in Section 35(1) as follows:

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69. At p 343.
70. Per Viscount Dilhorne at p 344.

"*(a) an encyclopaedia, dictionary, year book or similar work;*

(b) a newspaper, review, magazine, or similar periodical; and

(c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated;"

The case related to the copyright in songs comprising both lyrics and music. It was contended that a song fell within paragraph (c) of the definition of *"collective work"* and therefore constituted a collective work. The court held that the music and lyrics of a song each had their own separate copyrights and there was no third separate copyright in the actual song; a song is thus not a collective work. Lord Russell of Killowen motivated the point thus

> *"... when the Act speaks of a 'collective work', in my opinion it refers to a totality in which copyright exists in addition to and apart from any copyright which exist in its constituent parts. This is, in my opinion, so in the word 'work' in paragraph (c) of the definition of 'collective work' where that work first appears ... the collective work is something which by original collocation or arrangement has a copyright of its own and it is the assignment of that copyright which is excepted from the proviso ... There being, in the case of the song in question, no third and separate copyright in the combination of the words and music the song is not, in my opinion, a collective work".*[71]

Although the point is nowhere mentioned in any of the judgements in the Redwood case it is submitted that the rationale applicable to when two or more individual works make up a

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71. At p 348-9.

collective work is that the works in question must all be of the same category, i.e. two or more literary works, two or more musical works, two or more artistic works, etc. A musical work and a literary work cannot constitute a collective work (as in a song) and similarly a literary work and an artistic work cannot constitute a collective work. This is logical because copyright law both prior to 1912 and thereafter prescribed different conditions for the subsistence of the different categories of works and granted exclusive rights in respect of different restricted acts. If a song were to be a collective work, which conditions for the subsistence of copyright would have to be met and which restricted acts would apply to the collective work, those of a literary work or of an artistic work?

G. GOVERNMENT PUBLICATIONS AND UNIVERSITY COPYRIGHT

In terms of Section 18 of the 1911 Act where any work has, whether before or after the commencement of the Act, been prepared or published by or under the direction or control of the sovereign or any government department, the copyright in the work vested in the sovereign unless otherwise provided in an agreement with the author. The term of copyright in such works was a period of fifty years from the date of first publication of the work. Where a work had been made by a private individual and it was subsequently published by or under the control of the crown or any government department the copyright was transferred to the Crown unless there was an express agreement to the contrary.[72]

The Act preserved the copyright enjoyed by universities and colleges in terms of the Copyright Act, 1775.

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72. See **Copinger & Skone James**, *op cit*, p 245.

H. WORKS MADE DURING THE CURRENCY OF THE 1911 ACT

Further and indepth discussions of provisions of the 1911 Act dealing with or relating to the subsistence of copyright and the ownership and duration of such copyright takes place in Chapter V below.

CHAPTER IV

COPYRIGHT IN SOUTH AFRICA PRIOR TO 1917

1. INTRODUCTION

Prior to the coming into operation of the Patents, Designs, Trade Marks and Copyright Act, 1916, on 1 January 1917, copyright law in South Africa was in a very confused and disjointed state. Its existence and development was greatly influenced and determined by constitutional events and developments and it is necessary to give a brief outline of such developments.

The 1916 Act, like the British Act of 1911, which it incorporated, provided for a "gateway" through which existing copyrights in South Africa must have passed, whereupon substituted rights were conferred upon the works in question by the 1916 Act. Save in exceptional circumstances and in the case of certain works which enjoyed copyright in Britain in 1916, a work which did not enjoy copyright in South Africa on 1 January 1917, for whatever reason - whether its copyright had expired by that date or whether it had never qualified for copyright prior to that date - was in the public domain. As in the case of British works made prior to 1912, it is necessary to ascertain which works enjoyed copyright in South Africa prior to 1917, the identity of the owner of any such copyright and the duration of such copyright.

Prior to 1917 works could derive copyright from domestic law or from pre-1911 British copyright law which operated in

South Africa. Furthermore, British copyright in any musical, dramatic or artistic work subsisting by virtue of the British Act of 1911 and existing in the United Kingdom on 1 January 1917 was conferred in South Africa to the same extent as such copyright subsisted in the United Kingdom.[1] In this Chapter each of the aforegoing sources of copyright which gave rise to post-1917 gateway copyright in South Africa will be examined.

In order to trace the origins of South African copyright in domestic law prior to 1917 it is necessary briefly to examine the Roman-Dutch common law and as a prelude to this the constitutional development of the Cape during the time when it was a Dutch possession.

As was shown in Chapter III, to a certain extent whether works originating from South Africa prior to 1912 enjoyed copyright in Britain and by virtue of British copyright law enjoyed copyright in South Africa, depended upon whether the maker of the work was a British subject or was resident in a British dominion. It is thus necessary to analyze which individuals residing in South Africa during the 19th Century and in the early 20th Century were British subjects or were resident in a British dominion.

2. EARLY HISTORY OF THE CAPE

(1) Settlement at the Cape

The Cape of Good Hope was first settled by Whites in 1652 with the arrival of Jan van Riebeeck and his party in April of that year. From that time until 1795 the Cape was a Dutch possession.

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1. Section 147(1) of the Act of 1916.

(2) The Republic of the United Netherlands

At that time The Netherlands was a republic which comprised a number of largely autonomous provinces. The most important of these was the Province of Holland which comprised the major cities such as Amsterdam and The Hague. The various provinces had their own governments which were called "Provincial States". The Provincial States had legislative power over their respective territories. The provinces were virtually autonomous republics.

The Republic of the United Netherlands, as the country was called, had an umbrella body called the "Estates General" which comprised representatives of the various Provincial States and which had the function of looking after the common interests of the various provinces. The Estates General had very little, if any, internal authority in the provinces. The main functions of the Estates General was to conduct foreign affairs and matters of defence. The Republic incorporated certain territories which did not have the status of provinces. These territories were known as the "Generality Territories". The Estates General held authority, including legislative authority, over these Generality Territories. The general administration of the republic as a whole was undertaken by a type of executive body called the Council of States (Raad van Staten).

(3) The Dutch East India Company

The Republic's overseas possessions fell under the jurisdiction of the Estates General. The Estates General did not itself, or through the Council of States, undertake the administration and control of the overseas possessions but rather entrusted these functions to two chartered companies, namely, the United East India Company (Vereenigde Oost-

Indische Compagnie) and the West India Company. The refreshment station established by Jan van Riebeeck at the Cape fell under the jurisdiction of the East India Company. In terms of its charter, granted in 1602, the East India Company was given the trade monopoly in the Dutch possessions in the East. The control of the East India Company was vested in an executive body called the "Heeren Sewentien". The Estates General delegated many of its powers in respect of the eastern possessions to the East India Company, including those of appointing administrative and judicial officials. The company was not, however, given any legislative powers nor any directions as to what laws the judicial officials should apply.

(4) Legislative Authority

In order to assist the East India Company with the administration of the territories under its control, which were primarily the territories which subsequently became Indonesia (the capital of which was at the time named Batavia), an executive committee known as the "Raad van Indië" or "Hoër Regeering" was constituted. In time this body exercised quasi judicial and legislative functions over the eastern territories, including the Cape. It did not, however, have any formal legislative authority over such territories.

The Estates General was the only institution which had legislative authority over the territories administered by the East India Company and thus over the Cape. None of the Provincial States, including that of Holland, had this power.

While under the control of the East India Company the Cape was administered by a Governor appointed by the Company

together with a body called the "Raad van Politie". The Governor together with the Raad had widespread powers of a localized nature dealing with matters such as local taxation, the granting of monopolies and issuing of licences and the like. In keeping with its position and functions it issued local statutes called "placaaten". The placaaten were subject to veto from higher authorities in Batavia and in The Netherlands.

(5) First British Occupation

In 1795 France assumed control of the Republic of the United Netherlands and the Batavian Republic was established in The Netherlands. In the meantime the United East India Company had gone into decline and its charter was terminated early in 1796. Britain, which was at war with France, despatched a naval task force to the Cape to forestall its being taken over by France. The British naval task force was required to take the Cape by force which was achieved at the Battle of Muizenberg. The British occupation was intended only to be of a temporary nature and very few changes were made at the Cape during this time. With the conclusion of the Peace of Amiens in Europe the Cape was returned to the Batavian Republic. This took place in February 1803.

(6) The Cape under the Batavian Republic

During the time of the East India Company the status of the Cape was simply that of a halfway station between Europe and the East. When it came under the control of the Batavian Republic its status was enhanced to that of a fully fledged colony. It came directly under the control of the Batavian government in The Netherlands and it was regarded as a province of the Batavian Republic, albeit an overseas one.

During this period the first printing press was established at the Cape. This took place in 1800. This occurrence was not without significance to the development of the law of copyright in South Africa.

(7) Second British Occupation

The Batavian Republic was in effect a satellite of France and thus inevitably became involved in the resumption of war between France and England in May 1803. Against this background it was merely a matter of time before the British would reoccupy the Cape. After the danger that Napoleon would invade England had abated a British task force was sent to the Cape and on 18 January 1806, after the Battle of Blaauwberg, the Cape was surrendered to Britain. This marked the end of direct Dutch influence on the Cape and subsequent events in Holland such as the codification of Dutch law under Napoleon had no direct bearing on the course of events at the Cape and in South Africa as a whole.[2]

3. CONSTITUTIONAL DEVELOPMENT OF SOUTH AFRICA DURING THE 19TH AND EARLY 20TH CENTURY

A. BRIEF HISTORY

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2. The aforegoing is derived from the following works: CFJ Muller, **500 Jaar Suid-Afrikaanse Geskiedenis**; JP van der Merwe, **Die Kaap Onder die Bataafse Republiek 1803 tot 1806**; GG Visagie, **Regspleging en Reg aan die Kaap van 1652 tot 1806**; DH van Zyl, **Geskiedenis van die Romeins Hollandse Reg**; HR Hahlo and Ellison Kahn, **The Union of South Africa - Development of its Laws and Constitution** (hereafter referred to as "Constitution"); HR Hahlo and Ellison Kahn, **The South African Legal System and its Background**" (hereafter referred to as "Legal System").

In 1806 the Cape was occupied by the British for the second time and it became a Crown colony entirely subject to British rule. The British authority over the Cape was finally settled or ratified by the Convention of London. At that time the colonial boundary stretched far inland to the Great Fish River in the north-east and the mountainous regions north of Graaff-Reinet.

Shortly after the British took control of the Cape the Colonial Government began to put into effect measures to emancipate Coloured slaves and labourers. This caused resentment among the colonists. In 1820 British settlers arrived at the Cape. This increased the British character of the Cape. In 1828 an Ordinance was passed which freed the indigenous Hottentots from the vagrancy laws and granted them the rights of citizenship. At the same time traditional Dutch administrative institutions were abolished and English was proclaimed the sole official language of the colony. Local administrative autonomy began to develop. In 1834 the British parliament enacted legislation freeing the slaves and thereafter the slaves also became citizens.

The Dutch or "Afrikaner" colonists became increasingly disenchanted with British rule. They felt that the British government was more concerned about the welfare of the other ethnic groups than them. Their resentment was increased by the inconsistent and vacillating policy of the British towards marauding African tribes on the eastern border. The feeling developed among Afrikaners that they should depart from the colony and free themselves from British rule; they wished to found a new state where there would be no equality between Whites and Coloureds. These sentiments gave rise to the Great Trek which commenced in 1836. The Trek brought about the occupation of the interior which was at that stage

virtually uninhabited. White communities were established in Natal, in the territory between the Orange and the Vaal Rivers and beyond the Vaal River.

The first Voortrekker Republic to be established was that of Natal in 1839. Natal co-existed with Zululand which was a separate state under its own king or chief. In 1843 Natal was annexed by Britain and it became a British Colony and thereafter most of the Afrikaners moved out to settle north of the Orange and Vaal Rivers but a few hundred remained behind in the northern districts of Natal. In May 1844 Natal became a district of the Cape Colony. In 1845 an administration consisting of a Lieutenant-Governor assisted by a Council of five members was appointed but this administration only had executive powers. Legislative authority was exercised by the Cape Government. In the middle of the 19th Century the population of Natal was increased by immigration from European countries, but mainly from Britain.

In 1856 Natal was separated from the Cape Colony and it became a separate Crown Colony. Provision was made for a legislative Council of four officials and twelve elected members. The new constitution came into operation on 24 March 1857. The Council was empowered to pass legislation subject to approval by the Lieutenant Governor or the British Sovereign. The Anglo-Zulu war occurred in 1879 and it culminated in the defeat of the Zulus. Notwithstanding this, Zululand was not annexed to Natal. Instead, Zululand was divided into thirteen districts each under the jurisdiction of a chief who ruled under the supervision of a British resident. In 1893 Natal was granted responsible government and a parliament consisting of two chambers was created. Executive authority lay with a Governor and a Cabinet. Zululand was annexed by the British on 19 May 1887 and

Togoland in 1895. They were not, however, incorporated into Natal but instead became separate British colonies. In December 1897, however, both Zululand and Togoland were incorporated into Natal.

The Afrikaners who left Natal together with others from the Cape settled between the Orange and the Vaal Rivers and north of the Vaal. In February 1848 the British annexed the land between the Orange, Vaal and the Drakensberg. This territory was called the "Orange River Sovereignty". The constitutional status of this territory was uncertain but in 1851 a separate government under a Lieutenant-Governor was created for it. This territory and the territory north of the Vaal were later recognized as independent states by Britain. The independence of the Transvaal, or South African Republic, was recognized by Britain in 1852 (by the Sand River Convention) and that of the Orange Free State in 1854 (by the Bloemfontein Convention).

The official languages of both republics were Dutch. Both republics were governed by a Volksraad with an independent executive and with an elected president. With the adoption of the Sand River and Bloemfontein Conventions all ties between the trekkers and Britain were loosened and the two republics ceased to be subject in any way to Britain.

Meanwhile after numerous wars between the Free State and the Basuto's on their eastern border, Basutoland was declared a British possession in 1868. The Basuto's henceforth became British subjects and Basutoland became a British territory. In 1871 Basutoland became part of the Cape Colony but in 1884 it was disannexed from the Cape and it became a British Colony.

In the Cape Colony, after the departure of the trekkers more and more British immigrants arrived, particularly in the 1850's. This process was accelerated when diamonds were discovered in the 1860's. In 1872 the Colony was granted responsible government with a constitution on the British model having an elected parliament of two houses and a cabinet which was responsible to it. The influx of immigrants and the steadily increasing population, together with the conflict with the Xhosas on the eastern border brought about a series of Kaffir wars and the result was that the boundaries of the Colony were extended by annexations of tribal territory. Gradually the borders were extended northward and eastward. Other areas such as Griqualand West (in 1871), Fingoland and Griqualand East (in 1877), Walvis Bay (in 1884), Tembuland, Golekaland and Bomvamaland (in 1885) and Pondoland in 1894 were incorporated into the Cape.

In 1847 the territory between the Keiskamma and the Kei Rivers was annexed to the Cape as a separate British dependency under the name British Kaffraria. In 1860 it became a Crown Colony and in 1865 it was incorporated into the Cape. Ultimately towards the end of the 19th Century the Cape was linked up with Natal.

The independence of the Free State and the absence of British control north of the Orange River did not last long. In 1867 diamonds were discovered in the district of Hopetown in the west of the Free State Republic. Nicholas Waterboer, the Griqua Chief, laid claim to the land on which the diamond diggings had arisen. This claim was based on a treaty that his father, Andries Waterboer, had entered into with Governor D'Urban. These claims led ultimately to Britain annexing all the territory claimed by Waterboer.

This territory was thereafter incorporated in the Cape Colony and became known as Griqualand West.

The dispute concerning the diamond fields also had an effect on the Transvaal because part of the diamond fields fell within the territory of the Transvaal. The Transvaal did not accept the British annexation of the area in question and the outcome was that Britain tacitly allowed the Transvaal to continue exercising control over the disputed area.

The Transvaal became increasingly involved with difficulties with African tribes, more particularly the Bapedi under Sekukuni, and war broke out with this tribe. Gold was discovered near the eastern border of the Transvaal and this drew attention to the Transvaal, more particularly, from the British. One of the problems faced by the Transvaal was that it did not have its own link to the sea and it was considered essential that it should have this facility so that it could become truly independent. In 1875 President Burgers began negotiations with the Portuguese with a view to constructing a railway line from Pretoria to Delagoa Bay. President Burgers visited Britain and Europe in connection with the railway scheme and received a sympathetic reception from the European countries. This caused concern amongst the British that their influence in Southern Africa might be threatened.

At the time Lord Carnavon, the Secretary for the colonies, wished to bring about a federation of the colonies and states in South Africa. The proposed railway link between Pretoria and Delagoa Bay was seen as a threat to this federation plan. In 1877 in defiance of the Sand River Convention and on the pretext of the Transvaal's financial and military weakness, Britain annexed the Transvaal.

The annexation of the Transvaal by Britain, far from promoting the ideal of a federation of South African states, caused much resentment in the Transvaal and in the Free State as well as resistance from the Cape Colony. Deputations from the Transvaal visited London and Britain was urged to undo its annexation of the Transvaal. In 1880 the Transvaal rose up against British rule and shortly after the defeat of the British at Majuba on 27 February 1881 the British government restored the independence of the Transvaal subject to the suzerainty of the Sovereign. This was brought about by the Pretoria Convention of 3 August 1881. The restoration of independence in terms of the Pretoria Convention was subject to several conditions which were unfavourable to the Transvaal. The Transvaal found these conditions onerous and a deputation under the leadership of President Kruger went to London to negotiate with the British government. These negotiations resulted in the London Convention of 27 February 1884 which restored the complete independence of the Transvaal and relinquished most of the conditions which had been imposed upon the independence granted by the Pretoria Convention. In particular, British suzerainty over the Transvaal ceased although the British retained certain rights such as the power to approve all treaties entered into with a foreign country. The London Convention was ratified by the Transvaal on 8 August 1884.

Shortly after the reinstated independence of the Transvaal gold was discovered on the Witwatersrand. Although earlier discoveries had taken place, the major and significant discovery was that of the main reef at Roodepoort in May/June 1886. One of the consequences of the discovery of gold was that large numbers of foreigners flocked to the gold fields, many of whom were British. This ultimately gave rise to what

is known as the "uitlander" problem, i.e. the presence in the midst of the primarily Afrikaner burgers of the Transvaal of large numbers of aliens to whom the government did not wish to grant meaningful voting rights. The "uitlander" question was aggravated by the Jameson raid which in later times was seen by historians to be a ploy on the part of the British government to reimpose their control over the Transvaal. The "uitlander" question along with various other questions such as the desire of the British to unite the various territories of South Africa, the growing economic independence of the Transvaal (inter alia through the creation of a direct rail link to Delagoa Bay) and growing ties between the Transvaal and the German Empire led to the threat of a British invasion of the Transvaal. In 1899 after consultation with the Orange Free State with which the Transvaal had entered into a pact in 1897, an ultimatum was given to Britain to withdraw its threats to Transvaal. This was rejected by Britain and on 11 October 1899 the Second Boer War broke out.

Meanwhile in 1890 Swaziland came under the joint government of the Transvaal and Britain. In 1895 it became a protectorate of the Transvaal.

In 1900 while the war was in progress Britain formally annexed the Orange Free State and the Transvaal.[3] In 1902 the war drew to a close and in May of that year peace negotiations were conducted at Vereeniging. A Peace Treaty was signed on 31 May 1902. Amongst the terms of the peace was the recognition of the authority and sovereignty of the

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3. The Orange Free State was annexed by a Proclamation dated 24 May 1900 and the Transvaal on 1 September 1900.

British Crown. The outcome of the Second Boer War was that from 1900, as confirmed in 1902, the Orange Free State and the Transvaal joined the Cape and Natal Colonies as being British dominions and this status was to continue for a number of years and until after 1917, when the Patents, Designs, Trade Marks and Copyright Act of 1916 came into operation.

In 1905 responsible government was introduced in the Transvaal, as a British Colony, followed by a similar development in the Orange Free State in 1907. In 1903 the administration of Swaziland passed from the Transvaal to rule as a separate territory by the British Governor of the Transvaal. In 1907 it became a British protectorate. In 1910 the four British colonies were forged into the Union of South Africa, a unitary self-governing dominion within the British Empire. As stated in Chapter III South Africa was accorded this status in the British Copyright Act of 1911.[4]

B. SOUTH AFRICAN COMMON LAW

(1) Roman-Dutch Law at the Cape Prior to 1795

When Jan van Riebeeck established a refreshment station on behalf of the East India Company in South Africa on 7 April 1652 Roman-Dutch law was introduced to the Cape. At that time there was no such thing as the Law of The Netherlands because, as mentioned above, each of the various provinces of the Republic of the United Netherlands was largely autonomous and had its own law. However, the best developed

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4. The aforegoing summary of this period of the history of South Africa is derived from Hahlo and Kahn, **Constitution**; CFJ Muller, *op cit*; and DW Krüger, **The Making of a Nation.**

and dominant law of the Republic was that of the Province of Holland. This came about because the Province of Holland was the wealthiest and most powerful province in the Republic. The result was that the Roman-Dutch law which took root at the Cape was strongly biased in favour of the law of the Province of Holland. A further factor which contributed to this was the fact that the bulk of the officials both in the East India Company and at the Cape came from Holland.

Roman-Dutch law as applied at the Cape during the first 150 years had a multiplicity of sources. These can conveniently be divided into two basic categories, namely, legislation and the works of the writers on Roman-Dutch law. Each of these sources will be dealt with briefly.

(a) Legislation

The most important aspect of the legislation was that the only body or institution which had proper legislative powers for the territories administered by the East India Company, and the Cape in particular, was the Estates General of The Netherlands. This body exercised its powers in this connection very sparingly and very little legislation applicable to the Cape emanated from it. The charter which the Estates General granted to the East India Company did not confer legislative powers on the East India Company and it in turn had no power to delegate any legislative authority to the Governor General and Council at Batavia, the so-called "Batavian Government", or the Governor and Council at the Cape. The States of Holland, the most influential legislative body in The Netherlands at the time, had no power to legislate for territories outside the Province of Holland and thus for the Cape. Nevertheless, in practice the substantive Roman-Dutch law applied in the Cape came to embody ordinances and other "legislation" passed by the Batavian

Government, the States of Holland and by the Governor and Council at the Cape.

DH van Zyl, **Geskiedenis van die Romeins Hollandse Reg**, has summarized decisions of the Appellate Division of the Supreme Court relating to the legislation which was in force at the Cape during this period as follows:[5]

(i) All placaaten of the Estates General which were of general application and which dated from before 7 April 1652.

(ii) Placaaten of the States of Holland dating from prior to 1652 insofar as they were specifically promulgated at the Cape.

(iii) All placaaten of the Estates General and of the States of Holland issued after 1652 if they were intended to be promulgated at the Cape or if they were of a general nature and were not directed at local circumstances in The Netherlands. In regard to the aforegoing criteria the courts have adopted a pragmatic approach in terms of which, in the case of a placaat which expressly purported to apply to the Cape or which has a general nature, promulgation at the Cape was presumed. In the case of a placaat which on the face of it appears to have been directed at local circumstances in The Netherlands itself, promulgation is presumed not to have taken place and the party alleging that it applied to the Cape was required to prove it.

(iv) Placaaten which were assimilated by the Roman-Dutch writers into their works and thus became part of the body of Roman-Dutch law.

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5. Page 438.

In 1642 the Governor General of Batavia issued a compilation of laws which were in operation in the East Indies. This compilation was referred to as "The Statutes of Batavia" or "The Statutes of India". In 1715 the Governor in Council at the Cape resolved that the Statutes of India should serve as the basis of Cape law together with the various other sources. A revised and updated version of the Statutes of India was issued in 1766 in Batavia and these became known as the "New Statutes of India". There is uncertainty as to whether the New Statutes of India were ever applied at the Cape. Neither of the Statutes of India were ever formally approved by the Estates General and in strict constitutional terms they had no official force or effect at the Cape.

The Governor and Council at the Cape issued numerous placaaten, of a mainly administrative nature and these were accepted as binding although strictly speaking they were of dubious validity in constitutional terms.

Certain modern writers hold the view that, save for legislation made by the Estates General which was clearly applicable to the Cape, the other forms of legislation became part of the Roman-Dutch law as implemented at the Cape by means of usage or de facto acceptance.[6]

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6. See for instance FJ van Zyl and JD van der Vyver, **Inleiding tot die Regswetenskap**, 2nd Edition, p 205 *et seq*; and JC de Wet, "**Die Resepsie van die Romeins Hollandse Reg in Suid-Afrika**" THRHR 21 (1958) pp 84-97, "**Nederlandse Reg in Suid Afrika tot 1806**", THRHR 21 (1958) pp 162-175, and De Wet en Swanepoel "**Die Suid-Afrikaanse Strafreg**, 2de Uitgawe, p 20 *et seq*. My aforegoing exposition on the legislation applicable in the relevant period is derived principally from the aforementioned works and from DH van Zyl, *op cit*, p 423, *et seq*; Hahlo and Kahn, **Legal System**, p 571, *et seq*; Hahlo and Kahn, **Constitution**, p 10, *et seq*; and GG Visagie, "**Regspleging en Reg aan die Kaap van 1652 tot 1806**".

(b) Roman-Dutch Writers

The pre-eminence of the States of Holland and of the disposition of the East India Company and its officials towards the law of Holland made it both natural and inevitable that the Batavian Government and the Governor at the Cape and their institutions should have recourse to the common law of the Province of Holland, namely the Roman-Dutch law. Because the Estates General never prescribed what law should be followed by the countries administered by the East India Company the persons concerned were left to their own devices. Accordingly the works of the great Dutch jurists such as Hugo de Groot, Johannes Voet, Simon van Leeuwen and the like exercised a great influence on the law at the Cape. The works of these authors supplemented the legislation discussed above as the legal system in operation at the Cape during the time of the administration of the East India Company. Although the structure of the courts and the administration of justice generally at the Cape lie outside the scope of this thesis, it is of significance to mention that a right of appeal from the Cape courts and other judicial institutions lay to the Raad van Justisie in Batavia and in certain circumstances litigants could have recourse direct to that court. There was no recourse to the courts of Holland or of The Netherlands generally. This is in keeping with the relative roles of the provinces, the Republic of the United Netherlands and the East India Company.[7]

(2) The First British Occupation

Although the Dutch East India Company was on the decline towards the end of the 18th Century it had not yet been dis-

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7. The aforegoing is derived from the sources cited in footnote 6 above.

banded when Britain occupied the Cape on 16 September 1795. The East India Company's administration of the Cape thereby came to an abrupt end.

A Governor was appointed by Britain to administer the Cape. There is no doubt amongst the writers that the Roman-Dutch law which was applied at the Cape at the time of the occupation continued to be applied without interruption. Lack of unanimity exists as to whether this was due to the Articles of Capitulation signed on 16 September 1795 or to the basic principle of English law that where territories are acquired by conquest or cession the old law remains in force until it is amended by the new government or administration. Be it as it may, on 11 October 1795 the Raad van Justisie was specifically perpetuated in a Proclamation issued by the Governor on behalf of the British Sovereign. The relevant portion of the Proclamation read:

> *"We have thought it expedient to re-establish .... the court of Justice in this country in the same manner as the said court has existed on the 16 September last ... in order to administer justice, in the name of his said Majesty, in the same manner as has been customary until now, and according to the laws, statutes, and ordinances which have been in force in this colony, which we command to be followed in their full tenor and effect, as far as the same are not by us or in our name, or in that of any Governor or Commander-in-Chief for the time being, already altered or in future may be altered for the general benefit".*[8]

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8. Quoted in **Visagie**, *op cit*, at p 91.

No changes of any consequence were made to the Roman-Dutch law applied at the Cape during the first British occupation. It would seem, however, that at least for the time being the Cape was cut off from any further developments to the law applied in The Netherlands and in particular in the Province of Holland. This follows from the fact that in terms of international law the domestic laws of a conquered territory remain in force because of their explicit or implicit adoption by the new political sovereign and not as a result of the will of the conquered; the law making power of the conquered is extinguished by conquest.[9] As the Cape once again became a Dutch colony after 1803 the interlude of the first British occupation was largely incidental to the development of Roman-Dutch law in South Africa.[10]

(3) The Cape Under The Batavian Republic

During the period of the first British occupation The Netherlands meanwhile underwent a period of dramatic reorganization and became the Batavian Republic. The Dutch East India Company had been disbanded. Under the Batavian Republic the responsibility for the former affairs of the East India Company lay with the "Raad van Aziatische Zaken en Bezittingen" which fell under the "Departement tot de Indische Zaken", a government department. In 1801 already the government of the Batavian Republic foresaw the possibility that Britain would return the Cape to it. JA de Mist, a member of both the "Raad van Aziatische Zaken en Bezittingen" and the "Departement tot de Indische Zaken" prepared a report in 1802 on what was necessary to be done

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9. **Halleck's International Law**, 3rd Edition by S Baker, Vol II, p 488.
10. The aforegoing is largely derived from **Visagie**, *op cit*, p 91 *et seq*.

at the Cape when it reverted to being a Dutch possession. De Mist's report recommended substantial changes to the administration of the Cape, including the administration of justice.

Article 6 of the Peace of Amiens of 27 March 1802 restored the sovereignty of the Cape to the Batavian Republic. In Article 12 Britain undertook to restore possession of the Cape to the Batavian Republic within three months. In May 1802 the government commissioned De Mist to reorganize the administration of justice, finances, police matters and defence at the Cape. De Mist departed for the Cape at the end of 1802. He was appointed to the position of Commissioner General of the Cape while JW Janssens was appointed as Governor. Although the two of them were jointly responsible for the administration of the Cape, in practice, Governor Janssens played a subordinate role.

On 1 March 1803, after he had taken formal occupation of the Cape on behalf of the Batavian Republic, De Mist issued a Proclamation in which he provided that the Cape was no longer subordinate to the Hoër Regering in Indië or any other commercial organization but would henceforth fall under the direct control of the Batavian Republic. As mentioned above,[11] under the Batavian Republic the Cape was regarded as an overseas province of the Republic.

De Mist devoted most of his energies to reorganizing the administration of the Cape, including the judicial institutions. He made no changes to the substantive law which prevailed. The short duration of the rule of the Batavian

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11. See p 174 *supra*.

Republic at the Cape prevented De Mist from completing all his proposed reorganizations at the Cape. The period of administration of the Cape by the Batavian Republic endured for barely three years and was brought to an end by the second British occupation of the Cape at the beginning of 1806.

Virtually all the South African legal historians devote very little attention to the Batavian Republic period of the Cape. Virtually nothing is said about the further development of the law at the Cape during the Batavian Republic period. Roman-Dutch law at the Cape is generally described as being the law which prevailed in the province of Holland supplemented by enactments by the various bodies and institutions concerned with the activities of the Dutch East India Company during the 18th Century. The contribution of the Batavian Republic to the development of Roman-Dutch law is not mentioned. Taking an overview of the matter, this is no doubt perfectly justified because Roman-Dutch law blossomed during the 18th Century and its further development tended to wither with the declining fortunes of The Netherlands towards the end of the 18th Century. In The Netherlands itself the Napoleonic period which gave rise to the codification of Dutch law terminated the development of Roman-Dutch law and the period of the Batavian Republic was but a short interlude - a sort of transition - between the final stages of the progressive period of the law and the time of codification. However, the period of the Batavian Republic assumes considerable significance for the law of copyright because what was in effect the first piece of Netherlands copyright legislation dated from July 1803 during which time the Cape was an overseas province of the Batavian Republic.

The following view stated by **van Zyl**[12] is typical of what writers in general had to say about the law at the Cape during the period of the Batavian Republic:

> *"Wat betref die reg wat gedurende die Bataafse tydperk toegepas is, was dit dieselfde reg as die wat tydens die VOC se bewind bestaan het en wat deur die Britse regering aan die Kaap vanaf 1795 tot 1803 aangewend is. Hoewel daar n hervormde prosedure - stelsel beoog was, het dit nie tot uitvoer gekom nie, sodat die prosedure, sowel krimineel as siviel, onveranderd gebly het. Ten spyte van die breek met die Hoër Regering te Batavia, is daar steeds na die Statute van Indië as geldende reg verwys terwyl Hollandse en Kaapse placaate eweneens steeds geëerbiedig is. Onder die ou skrywers was die name van de Groot, van Leeuwen, Voet, A Matthaeus II, van Bijnkershoek en van der Linden prominent in die gemeenregtelike verwysings wat voor die Raad van Justisie gedien het, terwyl die vele verdere skrywers, wat onder die vroeër bewinde as gesaghebbend aangehaal is, nie vergete geraak het nie."*

The authorities are silent on the question of what effect legislation passed by the Batavian Republic, while it was the sovereign power in respect of the Cape, had on the law which prevailed at the Cape during the Batavian Republic period. It is submitted that a law such as the Copyright Act of 1803 passed by the Batavian Republic legislature operated and had full force and effect at the Cape. Unlike during the time of the East India Company when, apart from the Estates General, which had a minor legislative function and was not really involved in the development of the law, no body or

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12. *Op cit*, p 447.

institution had legislative powers directly over the Cape, the legislature of the Batavian Republic had direct legislative powers in respect of the Cape because the Cape was regarded as an overseas province of The Netherlands, i.e. an integral part of The Netherlands.[13] If legislation of the Provincial States of Holland could have had force and effect in the Cape when the Provincial States of Holland had no direct control or legislative authority over the Cape, then there can be little doubt that legislation of the Batavian Republic of which the Cape was a province must have had force and effect at the Cape. One of De Mist's main objectives was to change the Cape from having been subject to the control and administration of a commercial company to a normal colony with the closest possible links to the motherland and the philosophies and attitudes of the Batavian Republic. The "Raad van Justisie" which was the judicial authority at the Cape during the period was independent of the Governor and the local Cape administration and it was answerable to the Batavian government. There was a right of appeal against decisions of this body to the Supreme Court in The Hague. All the indications were that the application of the law at the Cape was closely integrated with the law of the Batavian Republic. There is indeed no reason at all to reach any conclusion other than that legislation passed by the Batavian Republic, and in particular legislation of a general nature, had force and effect in its overseas province, the Cape.

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13. JP van der Merwe, **Die Kaap Onder die Bataafse Republiek 1803 tot 1806** at p 49, says the following, quoting De Mist: *"Wat die Kaapse afhanklikheid van Batawië aangaan, het De Mist hom nader toegelig, deur te kenne te gee dat die Kaap 'een deel van het Land zelve' word, 'gelyk Cas en Magazijnen hier thands den Eigendom van het Land zijn, even als in Amsterdam of Rotterdam'".*

De Mist himself was a lawyer. It was a requirement for appointment to the Raad van Justisie at the Cape that an appointee must have had legal qualifications, which could only have been obtained in The Netherlands or at least in Europe. This was in contrast to the position under the administration of the East India Company where legal qualifications were not a requirement for appointment to the Raad van Justisie. A law degree obtained at a university in The Netherlands was also a requirement for admission to practice as an advocate before the Raad van Justisie at the Cape. These factors would have enhanced the tendency to apply the current and up to date Roman-Dutch law at the Cape.

The aforegoing is supported by A Wijpkema, **Die Invloed van Nederland en Nederlands-Indië op Ontstaan en Ontwikkeling van die Regswese in Suid-Afrika tot 1881.**[14] The learned author mentions examples of legislation passed by the Batavian Republic which was applied at the Cape and these included placaaten dating from 1798, 1799 and 1802, i.e. placaaten dating from the period of the first British occupation when the Cape was not even under the jurisdiction of the Batavian Republic. **Wijpkema** goes as far as saying that the government of the Batavian Republic had exclusive legislative powers over the Cape and local legislation adopted during the period of the Batavian Republic only had provisional force until enacted by the Batavian Republic.[15]

Support for the aforegoing conclusion can also be found in an article entitled **"The Sources of South African Law"** writ-

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14. Pages 84, *et seq*, and in particular pp 88, 104 and 108.
15. *Op cit*, p 110.

ten by CH van Zyl[16] in which the following is said: *"In South Africa we follow the law of Holland as it was up to 1806 ... at the present day the whole of South Africa is governed by the Roman-Dutch law as it was in force in Holland up to 1806"*. Similar sentiments are expressed by J de V Roos in an article entitled **"The Statute Law of the Cape in Pre-British Days and Some Judicial Decisions in Relation Thereto"**.[17] Roos bases his view on a dictum of Sir Henry de Villiers in the case of **Seaville v Colley**[18] where the following is said:

> *"The conclusion at which I have arrived as to the obligatory nature of the body of laws in force in this Colony, at the date of the British occupation in 1806, may be briefly stated. The presumption is that every one of these laws, if not repealed by the local legislature, is still in force. This presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usages."*

With due respect to the bulk of the writers who tend to proceed on the assumption that the development of Roman-Dutch law in other territories beside South Africa terminated for purposes of South Africa in 1795 with the first British occupation of the Cape, it is submitted that it is not only historically sound but also logical that developments in that law between 1795 and 1806 should also have formed part of the body of the law for purposes of South Africa. Another factor which plays a role in this regard is that subsequently, and particularly in the Orange Free State and

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16. SALJ 19 (1902) p 49.
17. SALJ 18 (1901) p 242.
18. 9 SC 39, at p 44, per de Villiers CJ.

Transvaal Republics, Johannes van der Linden's book entitled **Rechtsgeleerd Practicaal en Koopmans Handboek** (also referred to in South Africa as the **Institutes of the Law of Holland**), which was published in Amsterdam in 1806, being the latest of the various works on Roman-Dutch law, was often given pre-eminence among the works of the Roman-Dutch authorities. The publication of this work coincided with the second British occupation and it is submitted that 1806 and not 1795 marks the true parting of the ways between the development of the Roman-Dutch law in South Africa and elsewhere. With the adoption of the Napoleonic code in 1809 in The Netherlands, indeed the development of Roman-Dutch law terminated in The Netherlands itself very shortly thereafter.

(4) Roman-Dutch Law After 1806

When the Cape came under British rule in 1806 Roman-Dutch law was the common law of the colony. When the British occupied the Cape in that year Roman-Dutch law was retained as the common law of the colony. There is some dissension amongst commentators as to whether this was brought about by the Articles of Capitulation of 1806 which provided that *"the burgers and inhabitants shall preserve all their rights and privileges which they have enjoyed hitherto"* or whether this came about on account of it being a settled principle of English law as well as of public international law that a conquered or ceded country with a civilized legal system retains its own laws unless they are altered by the new ruler.[19] The British government considered introducing British common law as the common law of the colony but this notion was rejected in favour of a policy of "gradualism",

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19. Hahlo and Kahn, **Constitution**, p 17. See also p 188 *supra*.

in terms of which British common law principles would gradually be assimilated into the common law of the colony.[20]

In a report into the state of the laws in the Cape Colony in 1857 it was stated that *"the Roman-Dutch law, which consists of the civil or Roman laws as modified by the laws passed by the legislature of Holland, and by the customs of that country, forms the great bulk of the law of the colony"*.[21]

With the occupation of the Cape by the British and the Roman-Dutch common law being cut off from its roots in The Netherlands it was inevitable that the legal system in the Cape leaned towards English law.[22] Although principles of English law crept into the South African common law, the common law remained Roman-Dutch and this has persisted up to the present time. A substantial proportion of South African statutory law has, however, been derived from or based on British statutory law. This is particularly true of the law of intellectual property, and specifically the law of copyright.

From the Cape Colony, Roman-Dutch law spread to the Transvaal, the Orange Free State and Natal. All three of these territories adopted Roman-Dutch law as their common law. As in the Cape, however, principles of English law were assimilated into the common laws of these territories, to a greater or a lesser degree.[23]

The early constitution of the South African Republic, the so-called "Drie-en-dertig Artikels" provided that that con-

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20. Hahlo and Kahn, **Constitution**, p 17.
21. Preface to **Statute Law of the Cape of Good Hope**, p vi.
22. Hahlo and Kahn, **Constitution**, p 18.
23. Hahlo and Kahn, **Constitution**, p 21.

stitution was to be supplemented by the "Hollandsche Wet". This was considered to be a reference to the Roman-Dutch law as applied at the Cape.[24] The "Drie-en-Dertig Artikels" was replaced by the Constitution of 1858. In 1859 three "Bijlages" were issued. In terms thereof the "Hollandsche Wet" would remain the law of the Republic but it was specifically provided that van der Linden's Koopmans Handboek would be the primary law book. It was further provided that in cases of uncertainty recourse could be had to Simon van Leeuwen's **Roomsch-Hollandsch Recht** and Hugo de Groot's **Inleidinge tot de Hollandsche Rechtsgeleerdheid.** Roman-Dutch law in the Transvaal survived annexation of the Transvaal by Britain and persisted as the basic common law.

The constitution adopted by the Orange Free State upon it becoming independent in 1854 provided in Section 57 that *"het Romeinsch Hollandsch Regt zal de grondwet van dezen staat zijn alwaar geen andere wet door den Volksraad gemaakt is"*. The term *"Romeinsch Hollandsch Regt"* was further defined in a subsequent ordinance in 1856 to be the law which prevailed in the Cape Colony at the time that English judges were appointed in the place of the Raad van Justisie and did not include any new laws or enactments whether of local or general application which were thereafter introduced in Holland and were not based on or were inconsistent with Roman-Dutch law as expounded by Voet, van Leeuwen, Grotius, De Papegaaij (the name of a work written by Willem van Alphen), Merula, Lijbrecht, van der Linden, van der Keessel and authorities referred to by them.

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24. **Van Zyl**, *op cit*, p 461.

The effect of this Proclamation was that the Roman-Dutch law as applied at the Cape in 1827 was to prevail and that special weight was to be attributed to the writings of the authors referred to. Post-1827 Dutch law was not to apply save in the circumstances mentioned. There would appear to be no doubt that legislation made in The Netherlands in 1803 was part of the law declared to be applicable in the Orange Free State. As in the Transvaal, Roman-Dutch law survived British annexation and remained the basic common law of the Orange Free State.

In Natal, shortly after the trekkers settled there, "Regulatien en Instructien" were issued in October 1838 wherein it was provided that the "Hollandsche Rechtspleging" would form the basis of the local law. This situation was perpetuated after Britain annexed Natal in 1843 and in Natal Ordinance No. 12 of 1845 it was provided that

> *"The system code or body of law commonly called the Roman-Dutch law, as the same has been and is accepted, and administered by the legal tribunals of the Colony of the Cape of Good Hope, shall be ... established as the law, for the time being, of the District of Natal".*

This situation prevailed unchanged thereafter.

Roman-Dutch law was retained as the basic common law of South Africa upon the formation of the Union of South Africa in 1910.

In effect The Netherlands statutory law prior to 1806 ceased thereafter in South Africa to be statutory law in the strict sense but rather became part of the common law. This is particularly true of the Transvaal, Orange Free State and Natal which adopted that statutory law because it was part of the law which had hitherto been applied at the Cape, without

there being any suggestion that the bodies or institutions which had passed that legislation had any power or jurisdiction over these territories. Accordingly it is submitted that a statute such as the Copyright Act of 1803 passed in the Batavian Republic must as far as the post-1806 development of the law is concerned be regarded as an element of the Roman-Dutch common law and not as a creature of statute, particularly with regard to the Transvaal, Orange Free State and Natal.

C. BRITISH STATUS OF TERRITORIES AND RESIDENTS OF SOUTH AFRICA

As has been shown above, early British copyright legislation in some instances conferred rights upon non-resident British subjects or residents of British dominions. Furthermore, certain of the early British copyright statutes extended their operation to the British dominions. It is thus important to establish at what stages parts of South Africa became and were British dominions prior to 1912 and which residents of South Africa during that period were British subjects or residents of British dominions.

It is perhaps fortunate that in all instances where early British copyright legislation confers rights upon non-resident British subjects it is stated in the alternative that being a resident of a British dominion would suffice because the British subject status of residents in South Africa during the 19th Century is obscure. There is greater clarity on the status of territories as British possessions than there is on the status of their inhabitants as British subjects. Nevertheless, an attempt will be made as far as possible to determine the status of residents of South

Africa during the 19th Century and early 20th Century as British subjects. Since the status of individuals as residents of British dominions or as British subjects is relevant to the interpretation of early British copyright statutes (i.e. British law), it is the British law interpretation of the nationality of individuals and of the status of territories which is conclusive and not the South African law interpretation. It would appear that in particular in regard to questions of the British subject status of an individual in some instances British law and South African law manifested different approaches.[25]

(1) Cape Colony

The Articles of Capitulation of 1806 made no provision as to the national status of the inhabitants of the colony. According to Parry, **Nationality and Citizenship Laws of the Commonwealth and of The Republic of Ireland**, the Dutch settlers and the "free Natives" were unquestionably considered to be British subjects.[26] "Natives" from outside the colony were, however, referred to as "foreigners" while slaves prior to their emancipation in 1833 were regarded as chattels and were thus probably without nationality.[27] From 1856 naturalization of aliens resident in the Cape Colony became possible.

The Cape Colony was undoubtedly at all relevant times from 1806 a British dominion. The annexation of other areas such as British Kaffraria and Griqualand West to the Cape Colony rendered them as part of the Cape Colony and therefore also

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25. Parry, **Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland**, p 664.
26. P 657.
27. Parry, *op cit*, p 657.

within the British dominions. In general terms the residents of the Cape Colony were British subjects.

(2) Natal

The basic approach of Britain was that the trekkers who left the Cape Colony remained British subjects and their settlement outside the borders of the Cape Colony was regarded as emigration to a foreign country.[28] The British authorities initially tolerated the republican regime established in Natal. However, in 1844 Natal was annexed to the Cape Colony and thereafter it became, and was thereafter at all material times, a British dominion. In general terms the residents of Natal were British subjects. In short, generally speaking, residents of Natal were at all material times, including during the republican regime, British subjects and Natal was a British dominion from 1844 until after 1917. As Natal was subordinate to the Cape Colony at that time, it follows that the naturalization system adopted in the Cape Colony in 1856 applied equally to Natal.

(3) Orange Free State

In accordance with the principle that the trekkers were British subjects who had emigrated, the trekkers who settled in the area which was to become the Orange Free State remained British subjects. When the territory between the Orange and the Vaal Rivers was annexed by the British in 1848 it became part of the British dominions. The precise constitutional status of the Orange River Sovereignty was somewhat unclear. It seems that only the emigrants were regarded as British subjects and not the natives.[29]

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28. **Parry**, *op cit*, p 42.
29. **Parry**, *op cit*, p 658 and Hahlo and Kahn, **Constitution**, p 63.

In 1854 the Orange River Sovereignty was relinquished and with the signing of the Bloemfontein Convention on 23 February 1854 the independence of the Orange Free State was recognized. The territory thereupon ceased to be a British dominion and the inhabitants ceased to be British subjects. Griqualand West, however, was assimilated to the Cape Colony in 1872 and once again fell within the British dominions and its inhabitants became British subjects.

The Orange Free State continued to be an independent state until 1900 when it was annexed by Britain. The further development of the Orange Free State will be discussed below.

(4) Transvaal

The trekkers who settled in what was to become the Transvaal were also regarded as British subjects who had emigrated. The independence of this territory from the British was recognized in the Sand River Convention in 1852. This Convention gave the trekker republic *"the right to manage their own affairs"*. It terminated the status of the inhabitants as British subjects.

In 1877 the territory was once again declared to be British territory. A Crown Colony was established.[30] The Pretoria Convention of 3 August 1881 restored *"complete self-government subject to the suzerainty of her Majesty"* to the territory.

Although the position is not clear, it would appear that the Transvalers once again became British subjects from 1879 to

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30. Hahlo and Kahn, **Constitution**, p 89.

1881. What became of their status as British subjects after 1881 is less clear. **Hahlo and Kahn**[31] refer to the effect of the Pretoria Convention as "retrocession" which seems to suggest that although the state was still under British suzerainty it once again became independent and presumably its inhabitants ceased to be British subjects. The Pretoria Convention was superseded by the London Convention of 27 February 1884 and this Convention made no reference to the territory being a suzerainty of Britain. According to **Hahlo and Kahn**[32] because the London Convention did not specifically remove British suzerainty it could be argued that it remained. The learned authors, however, hold the contrary view but state that the bulk of authorities regarded it as semi-foreign although they recognized it as a separate entity in international law. For purposes of copyright law, however, the Transvaal must be regarded as no longer being a British dominion and its inhabitants as no longer being British subjects at least from 1884 if not from 1881.

In the midst of the Boer War Britain annexed the Orange Free State by proclamation dated 24 May 1900 and the Transvaal by proclamation dated 1 September 1900. These annexations were followed by the Treaty of Vereeniging of 31 May 1902 which brought an end to the Boer War. With effect from 1900 the two territories became British dominions and this was perpetuated until after 1917. They became known as the Orange River and Transvaal Colonies, respectively.

No specific provision was made respecting the nationality of the inhabitants of the Orange Free State and the Transvaal

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31. **Constitution**, p 90.
32. **Constitution**, p 90.

according to Parry.[33] The law officers of the British had previously been consulted and advised that after annexation *"the burgers or citizens of these territories as well as any foreigners resident in them who could not claim to be nationals of some civilized foreign power, and their children, will become British subjects"*. This situation was later qualified with the suggestion that *"It has, however, been usual in recent times to allow those who do not desire to become subjects of the conqueror to leave the conquered territory within a reasonable time, and, we think this course would probably be followed in the present case"*. Persons who had become citizens of the two republics and who did not wish to become British citizens were permitted to make declarations to that effect and to leave the territories. Furthermore, citizens of the two republics who had withdrawn prior to annexation were not treated as British subjects. In general, therefore, after 1900 the inhabitants of the Orange River and Transvaal Colonies became British subjects and this state of affairs was perpetuated until beyond 1917.

(5) Union of South Africa

The South Africa Act, which was passed by the British parliament and assented to by King Edward VII came into operation on 31 May 1910. This Act established the Union of South Africa and its constitution. The four colonies, i.e. the Cape, Natal, Orange River and Transvaal became provinces. The status of the inhabitants of South Africa as British subjects and of the country as a British Dominion was perpetuated beyond the creation of the Union and beyond 1917.

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33. *Op cit*, p 662.

The above exposition relating to the status of individuals as British subjects is very generalized and references to the inhabitants or residents of a territory are intended to be construed as references to persons belonging to or having the "citizenship" of that territory. At any given moment people of vastly varying national status were present or residing in the various territories. Even while they were independent republics the Orange Free State and the Transvaal were hosts to a variety of people of different national status. In particular, there were many people of British origin - i.e. British subjects in the strict sense - resident in the Orange Free State and the Transvaal at all relevant times particularly after the discovery of diamonds and gold. A large proportion of the "uitlanders" from the Transvaal were Britons. In the circumstances, in assessing the nationality of the author of a particular work made in South Africa during the 19th and early 20th Centuries the peculiar circumstances of the individual in question must be examined and taken into account. The aforegoing exposition of the status of residents of the various territories during the 19th Century and early 20th Century is at best a very broad and general guideline and serves to make the point that authors of works made during that period in South Africa could have been British subjects or residents within a British dominion.

(6) British Territories and Subjects

Subject to what has been said in the preceding paragraph, the position regarding the status of the various territories as British dominions and of the inhabitants as British subjects can be summed up as follows:

(a) British Dominions

The Cape was a British dominion continuously from 1806 until after 1917. When territories such as British Kaffraria and Griqualand West were added to the Cape they became from that time part of the British dominions until after 1917. Natal became a British dominion in 1843 and continued as such until after 1917. Similar considerations applied to Zululand as applied to areas such as Griqualand West and British Kaffraria. The Orange Free State was a British dominion from February 1848 until 1854 and thereafter from 1900 until after 1917. The Transvaal was a British dominion from 1877 probably until 1881 (but possibly until 1884) and thereafter again from 1900 until after 1917. From 1900 onwards and until after 1917 the whole of South Africa was a British dominion.

(b) British Subjects

The status of the inhabitants of the various territories as British subjects coincided with the status of the territories in question as British dominions save that the trekkers who settled in Natal, the Orange Free State and Transvaal, being considered to be emigrants from a British dominion, were British subjects continuously until 1852, in the case of the Transvaal, and 1854, in the case of the Orange Free State. Inhabitants of the Orange Free State thereafter became British subjects again in 1900 as did inhabitants of the Transvaal, with the Transvalers, however, being British subjects for a brief interlude during the period 1877 to 1881 (or possibly 1884).

4. COPYRIGHT UNDER SOUTH AFRICAN COMMON LAW

As discussed above in Chapter III the British common law recognized common law copyright in unpublished works. There

is nothing in the development of the South African law to suggest that British common law copyright was ever accepted or adopted in South African law. Indeed, the historical developments set out above, namely the maintenance throughout the time after 1806 of Roman-Dutch law as the basic common law of South Africa, albeit supplemented from time to time by statute law based on British law and certain elements of English common law which were not inconsistent with Roman-Dutch common law, is strongly indicative of the contrary. Accordingly any search for a form of early South African common law copyright must be directed at the Roman-Dutch law. The relevance of South African common law copyright lies in the fact that, as will be shown in Chapter V, the 1917 Gateway provided by the South African Act of 1916 made provision for the granting of so-called "substituted rights" in the place of any copyright existing in South Africa no matter what its origin might have been.

A. NETHERLANDS COPYRIGHT

An invaluable analysis of the origins and development of copyright in The Netherlands prior to and in the 19th Century is to be found in the work **Het Auteursrecht in Het Nederlandsche en Internationale Recht** by HL de Beaufort.[34] The analysis which follows is derived substantially from this work. Early Dutch copyright law can be divided into two phases, namely, the period of the granting of privileges or letters patent in respect of works and the period of copyright legislation.

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34. A doctoral thesis which served as the basis of the Degree of Doctor of Laws at the University of Utrecht in 1909.

(1) Privileges or Letters Patent

Although even in the days of the Roman Empire reproduction of books took place (this was done by slaves who rewrote books) no economic interest in such reproduction existed. Copies were made to order and "publishers" were not required to make any financial outlay or investment in advance which needed to be protected. Reproduction by rewriting appeared in The Netherlands up to and in the time of the middle ages as well. It was not until the discovery of the printing press that there was any impetus to provide any form of protection to publishers. The introduction of the use of a printing press brought about a radical change in the distribution of books because now prior investments which needed to be recouped by means of the sale of copies of the books in large numbers took place. This economic interest gave impetus to the need to acquire some form of protection for books against reproduction.

As in Britain and in other parts of Europe, the earliest form of protection granted to the publishers of books was that of a privilege or letters patent to a publisher conferring on him the monopoly to reproduce particular books subject to certain conditions. The first privilege appears to have been granted in 1516 by Charles V. Shortly thereafter in 1570 a royal decree was issued that no privilege would be granted to a printer within three months after the expiry of a privilege granted to someone else for the same book.

After the creation of the Republic of the United Netherlands, the constitution of which has been described above,[35]

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35. See p 172 *supra*.

both the Provincial States and the Estates General continued the practice of granting privileges. The Provincial States could only grant privileges encompassing their particular provinces but the Estates General purported to grant privileges for the entire Republic (and possibly the overseas possessions). Privileges granted by the Estates General were not always recognized in all of the provinces, particularly the Province of Holland, and the practice developed for privileges granted by the Estates General to be accredited in each of the provinces. As in most other areas of endeavour, the Province of Holland played the leading role in the granting of privileges.

While privileges tended to be granted on a somewhat *ad hoc* basis a generalized description of their nature and character will be given below.

(a) Types of Works Protected

Privileges were granted in the first instance to written works of all types, i.e. scientific works, poems, travelogues, diaries and even official documents such as placaats, ordinances etc, music works, maps, works of fine arts (such as pictures, gravures, etchings and paintings), works of calligraphy, sculptures and works of artistic craftsmanship. At that time no clear distinction was drawn between what subsequently became the subject matter of copyright, designs and patents. It happened that in some privileges inventions as such as well as the written and pictorial material in which they were embodied were protected in the same privilege.

(b) Grantees of Privileges

The system of privileges was aimed at affording protection to those who incurred a financial outlay and thus a finan-

cial risk, namely, publishers and the like. The interests of authors as such were generally speaking not taken into account. Consequently the grantees of privileges were usually publishers and the like. Authors only obtained a very indirect form of benefit from the privilege system in that they could bargain with publishers for the right to acquire possession and use of their manuscripts; the publishers would be able to obtain privileges for the publication of such manuscripts. Gradually during the time of the privileges the notion began to develop that authors were entitled to some more direct benefit as a reward for the expertise and effort expended on producing works of intellectual property.

In exceptional cases privileges were granted to authors themselves but this was mainly in instances where the author was himself a publisher. However, there were isolated instances of privileges being granted to authors who were not publishers. There were also some instances where privileges were granted to the children and widow of an author.

As a result of the strong bias in favour of publishers it happened that a publisher could obtain a privilege without the knowledge of the author or even against his will.

By way of exception to the general rule, privileges for pictures and gravures were almost always granted to the author himself. This was largely due to the technical process by means of which these types of works were reproduced at that time. Namely, the engraving of a replica in copper or wood which was almost invariably done by the original artist and he was thus in a position to undertake his own mass reproduction of his work.

(c) Requirements and Conditions for Privileges

In order to obtain a privilege it was necessary to make a formal written request therefor. The request or application was required to state the name and author of the work and usually a brief indication of the contents thereof. As a rule the authority granting the privilege paid no attention to the contents but if it later transpired that a work was immoral or gave offence a privilege could be withdrawn.

Privileges were usually granted but not always in the precise terms in which they were requested. Sometimes they were granted for a shorter period and only in respect of one language whereas the application may have referred to a number of languages. Privileges were, however, sometimes refused and the most common ground was that a privilege had already been granted for the same work or a work of the same nature. **De Beaufort** makes mention of the fact that despite the fact that privileges were repeatedly sought from both the Estates General and the States of Holland in the years 1628 and 1629 for Hugo de Groot's work **Inleidinge tot de Hollandsche Rechtsgeleerdheid**, no privilege could be obtained.[36] The learned author expresses the view that this was due to the animosity which the members of these institutions had towards the author.

No payment was required in order to obtain a privilege save that the States of Holland required in consideration for the granting of a privilege that a copy of the work covered by the privilege should be donated to the Library of the University of Leiden.

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36. *Op cit*, p 7.

Privileges were only granted to published works or at least works in respect of which there was a firm intention of publication. The ratio of the privilege system was the protection of published works.

In the 17th and 18th Centuries the Dutch publishing industry was renowned throughout Europe. Many foreign writers chose to have their works published in Holland because of the relative freedom of expression in Holland. This was particularly true of French writers who sought to evade the restraints of censorship imposed in their home country. Privileges could thus be obtained by Dutch printers in respect of works of foreign origin as well as works of Dutch origin. Indeed, the bulk of works published in Holland during this era were works of foreign authors. This factor played a role in the author being regarded as unimportant under the privilege system. Because publication was a criterion for protection it did not matter whether the work in respect of which a privilege was sought was a current work or had been written or made earlier - even in previous centuries.

(d) Nature of Protection

The interest protected by a privilege was that of reproducing and publishing the work. This right was extended to cover the reproduction and/or publication of a whole work or of a part thereof as well as the importation and distribution of other versions of the same work produced elsewhere.

Sometimes privileges included the exclusive right to translate a book but privileges were often granted in one language only.

A performing right in works was not recognized as being subject matter for a privilege. To grant such a privilege would have been inconsistent with the ratio of the privilege system as being for the benefit of the publishing industry. This applied to both dramatic works and musical works.

The privilege system thus granted copyright in the strict sense (i.e. not including a performing right) and outside the privilege system there was no restriction against works being reproduced or published and there was no restriction at all against works being performed in public. Dramatic and musical works were thus protected only to the extent that they were in the form of "books" and were capable of being reproduced and/or published. The relief granted to a privilege holder was the surrender by the infringer of all "infringing copies" of a work covered by his privilege and the payment to the privilege holder of a penalty, the amount of which was usually determined in the privilege itself.

(e) Duration of Privileges

Privileges were of limited duration. The terms of the privileges varied from case to case and were sometimes as short as two months or two or three years. In general, however, privileges were for a term of approximately fifteen years.

(f) Transmission of Privileges

Although privileges were granted to specific persons, there is record of privileges being transmitted to others. **De Beaufort** expresses the view that it was unclear whether privileges were generally transmissible. The learned author makes reference to an opinion of Hugo de Groot given in the year 1632 in the case of letters patent granted in respect of an invention (he is of the view that the same principles

should apply to a privilege in respect of publication of a work). De Groot's opinion was to the effect that because letters patent were granted not in respect of a person but in respect of an invention it could legally be transferred to another. De Groot's view is expressly stated to be *"onder korreksie"*.[37]

(g) Territory of Privilege

As stated above, a privilege only held force in the territory over which the grantor had jurisdiction. A privilege granted by the States of a province only had force in that province while a privilege granted by the Estates General purported to have force throughout the republic. In general terms there was no question of privileges having international effect. What sometimes happened was that a Dutch publisher would seek foreign privileges in addition to his privilege obtained in The Netherlands. For instance, in the case of Hugo de Groot's **Annales et Historiae de Rebus Belgicis** Joan Blaauw was granted privileges by the States of Holland, the German Emperor Ferdinand III and by the Estates General.

There were instances of the Estates General granting privileges in The Netherlands to works published under privileges in other countries at the requests of the governments of such other countries. Apart from these exceptional instances, however, privileges were only granted in The Netherlands to Dutch publishers and the like. Although the general principle was that where a privilege had been granted in respect of a work in The Netherlands foreign versions of that same work were "infringing copies", in some of

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37. *Op cit*, p 22.

the privileges granted by the States of Holland in respect of Dutch versions of works which were originally published elsewhere it was stated that the privilege did not prevent the importation and distribution of the original foreign version of the work.

(h) Abolition of the Privilege System

The era of privileges in respect of the publication of works endured from 1516 until the end of the 18th Century. 1796 marked the end of the era and perhaps coincidentally therefore the era of the privilege system corresponded with the period of the full flowering of Roman-Dutch law or what is termed by **Hahlo and Kahn** as *"the glory of the Roman-Dutch law.*[38] The privileges made way for the era of Dutch statutory copyright law.

(2) Statutory Copyright

The era of Dutch statutory copyright must be viewed against the background of the systems of privileges out of which it developed. Apart, however, from the system of privileges there are other factors which are also relevant to the development of statutory copyright.

No protection was granted under the law of The Netherlands to unpublished works. In this regard a distinction must be drawn between copyright as a right of property with an economic value and personality rights which may in certain circumstances have enabled an author to prevent publication of his works because such publication would violate his personality rights, whether they contained information of a private nature or whether because publication would be damaging to his reputation. **De Beaufort** drew this distinc-

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38. Hahlo and Kahn, **Legal System**, p 543.

tion and confirms that the law of the time granted recognition to personality rights which could enable and author to restrain publication of his works in certain circumstances.[39]

In dealing with the issue of no "copyright" in unpublished works **De Beaufort** relates an episode which emerged from an exchange of letters between Hugo de Groot and some of his relatives and friends in 1623 and ensuing years. Reference is made in this correspondence to the fact that there were several copies of his work **Inleidinge tot de Hollandsche Rechtsgeleertheid** in circulation despite the fact that he had originally intended the work to be exclusively available to his children and his youngest brother. He was advised by his correspondents to publish the work before it was published by someone else. He decided to follow this advice and indeed published the work. It was, however, clear from the correspondence that although he referred to the existence of other copies of his work as plagiarism he did not regard this as being anything unlawful. The important point is that de Groot proceeded on the assumption that the only way in which he could control the circulation of his work would be to publish it himself which would then enable it to qualify for the granting of a privilege. While it remained unpublished no protection was available for it.

Notwithstanding the aforegoing the Estates General of Holland issued a placaat on 30 April 1728 which conferred upon a certain group of authors the right to prevent their works being published without their specific authority. This placaat provided for this form of protection to be granted

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39. *Op cit*, p 28.

to professors and other members of the teaching staff of the University of Leiden. Even this placaat was, however, primarily intended to protect the honour and reputation of the staff of Leiden University because in the motivation for the placaat it was stated that unless they could control the publication of their works serious errors and omissions could occur in such published works and even incorrect statements all of which would bring the good names of the professors and lecturers into disrepute. **De Beaufort** propounds the view that the fact that such a placaat was issued in favour of the lecturers at Leiden University was an exception which proved the general rule; if there was a general right available to authors to restrain publication of their unpublished works it would not have been necessary to pass such a statute in favour of the Leiden lecturers.

A form of *de facto* protection which was granted to works during the era of the privileges was a series of pacts between various publishers and distributors in the major Dutch cities such as Amsterdam, Rotterdam, The Hague and Utrecht that they would not copy each other's published books. The various city guilds also banded together to combat reproduction of published books.

Not surprisingly, it was in the Province of Holland that statutory copyright originated in The Netherlands and the privilege system was first abrogated. This occurred in 1796 by which time The Netherlands had undergone considerable constitutional changes and the Batavian Republic was in existence. The provinces no longer had the autonomy under the Batavian Republic which they had enjoyed during the time of the Republic of the United Netherlands. In that year the provincial administration of Holland issued a "publicatie" which provided that no further privileges would be granted

because the privilege system was contrary to the fundamental principle that every citizen was entitled to the protection of his own lawful property. The enactment provided further that every bookseller in the province who published an original book in respect of which he had acquired the right of copying enjoyed the exclusive right to print the book and to publish it. This enactment introduced the new principle that there existed a right of ownership in a work which had its origins in the author; however the exclusive right was not granted to the author but instead to the publisher. Thus while a measure of recognition was granted to the author the basic principle of the privilege system, namely, that it was the publisher who warranted protection, was perpetuated.

The "copyright" granted to publishers in this enactment was transmissible to the publishers' heirs and was of perpetual duration. The "copyright" included the right to publish translations and abridgements of the original work. The geographical extent of the right was limited to the Province of Holland and it therefore had limited value. It was possible to acquire a "copyright" in Holland in books which were originally published elsewhere and the original and other versions of such books were regarded as "infringing copies". This principle applied equally to a translation of a foreign work. A local publisher could acquire a copyright in a foreign work even before he commenced printing it or translating it as long as he advertised his intention of doing so in newspapers whereupon he was granted a right of preference which operated to prevent others from pre-empting his endeavours.

Bibles, wills, church and school books, calendars and diaries were specifically excluded from protection while the

"copyright" in official documents vested in the provincial administration.

The first Copyright Act which applied to all the provinces of the Batavian Republic (including it is submitted the overseas provinces or colonies) was the *Publicatie van het Staatsbewind der Bataafsche Republiek van 3 Juli 1803*. This enactment was based on the earlier enactment of the Province of Holland.

In the 1803 Act the publishers were once again the corner-stone of the system being introduced. Unlike in the earlier law of the Province of Holland, references were made in the Act of 1803 to the "*opstellers*" or compilers of books. Section 2 of the Act granted copyright automatically to anyone who in the Batavian Republic published an original work in which he enjoyed the so-called right of copying either because he was the compiler thereof or because he had acquired that right in some other lawful way.[39A] This Act went somewhat

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39A. *Sections 1 and 2 of the Act read as follows:*

"1. Dat voortaan geene Privilegiën of Octroijen, tot het drukken en uitgeven van boeken, op publiek gezag zullen worden verleend, als strijdende tegen de grondbeginselen van het maatschappelijk verdrag, volgens welk ieder een, zonder eenige bijzondere wet, ten zijnen behoeve, aanspraak heeft op de beveiliging van zijnen regtmatigen eigendom.

2. Dat diensvolgens, wanneer iemand in de Bataafsche Republiek een oorspronkelijk werk uitgeeft, waarvan hij het gewoonlijk alzoo genoemd Regt van Kopij, of bezit, omdat hij zelf daarvan de opsteller is, of om niet, of voor geld, of op eene andere, mits wettige wijze, bekomen heeft, hetzij dat het werk in eens of bij Deelen of Stukken, hetzij jaarlijks, maandelijks, wekelijks of dagelijks uitkomt, hij daardoor, zoo voor zich zelven als zijne erven, het regt heeft of verkrijgt, om dat werk uit te geven in zoodanig formaat en op al zulke wijze als hij zal goedvinden; als zijnde het gemelde Regt van uitgave een eigendom, waar op niemand, buiten deszelfs toestemming wettige aanspraak heeft, en in de uitoefening van welk Regt, niemand hem mag benadeelen."

further than the law of the Province of Holland towards recognizing the author of a work as the origin of copyright. Nevertheless this law did not give specific recognition to an author's inherent right in a work of intellectual property. The purpose of the Act of 1803 remained primarily the promotion of the trade in books and thereafter the dissemination of information and the promotion of science.

The Act of 1803 granted the same right of preference in respect of the translation of foreign works but did not grant such a right in respect of the mere reproduction of foreign works. For the rest, the Act of 1803 was substantially identical to the earlier law of the Province of Holland. In other words, it too granted perpetual copyright

which was capable of transmission to the heirs of the publisher.

Whereas the privilege system covered a wide variety of works including works of fine art and even works of sculpture, the law of the Province of Holland of 1796 dealt only with *"het drukken en uitgeven van eenige Boeken of Stukken"*. The law thus protected primarily books but also any type of work which could be printed which category of work would have included all the categories of works capable of being protected by privileges, save for works of sculpture. The law of the Batavian Republic of 1803 granted copyright to anyone who *"een oorspronkelijk werk uitgeeft"*. This appears to be a somewhat wider description of works than was covered by the law of the Province of Holland and it could conceivably have covered works of sculpture as well. However, as the primary objective of the law was to protect the book trade and the overall pattern of the law was to take over the earlier law of the Province of Holland, the category of works covered must perhaps be restrictively interpreted to be limited to works which were capable of being reproduced by means of a printing process.

The Batavian law of 1803 and its predecessor the law of 1796 of the Province of Holland arose out of the privilege system. The "copyright" granted by these laws was in effect a blanket privilege of unlimited duration granted automatically to any publisher instead of the largely ad hoc discriminatory and somewhat arbitrary system which had hitherto been followed. These laws thus conferred a somewhat primitive form of copyright and it was not until much later that true copyright which recognized the creative efforts of the author as the *ratio* for protection came into being. It was at this stage of the development of copyright in The Nether-

lands that formal ties between Roman-Dutch law in South Africa and the law of The Netherlands were severed.

Ironically, the Batavian law of 1803 only continued in force for some six years in The Netherlands because shortly after the incorporation of The Netherlands into the French Empire in 1809 Dutch law was replaced by French law. The French copyright law embodied in the *"Decret-Loi des 19-24 Juillet 1793"* was introduced into Holland. This law was supplemented by an Imperial Decree of 1810. The French law brought about an immediate change in emphasis because it recognized the author as the cornerstone of the protection. It also recognized the other cardinal principle of copyright law, namely, that the term of protection should be of limited duration. The French law was in turn repealed and replaced by a local law in 1814. This law was to some extent a retrogressive step because it once again changed the emphasis from the author to the publisher. In the meantime in Belgium which was at the time part of a unitary state with The Netherlands, the French approach to copyright was introduced in the same year. The co-existence of two entirely different systems of copyright in the same state gave rise to need to harmonize the law. A new law was introduced in 1817 which followed the French approach and gave due recognition to the position of the author. The term of copyright was the lifetime of the author and twenty years after his death. The law of 1817 gave authors of literary and artistic works the exclusive right to reproduce them by means of printing and to publish copies. Works of sculpture were excluded from protection as they did not fall within the term "artistic work" for purposes of the law.

The law of 1817 was found to be unsatisfactory in many respects. In 1860 work was commenced on a new Act and in the

drafts which were prepared for the first time copyright in The Netherlands came to be referred to as *"auteursrecht"* instead of *"kopierecht"*. Ultimately the *"Wet van den 28sten Juni 1881 tot regeling van het Auteursrecht (Staatsblad No. 124)"* was passed. This Act did not protect artistic works because at the time it was thought that these works should rather be dealt with in separate legislation. For the first time, however, in Dutch law a performing right was recognized. No further discussion of this Act is warranted save to mention that it provided the model for the Copyright Act adopted by the South African Republic some six years later in 1887. The Netherlands Act, which will be discussed below, was largely reproduced in the Copyright Act adopted by the South African Republic.

B. ROMAN DUTCH COPYRIGHT IN SOUTH AFRICA

It is submitted that in the light of the aforegoing analysis of the reception of Roman-Dutch law generally in South Africa, Dutch copyright law as it existed in The Netherlands in 1803 was received into South African law along with the general body of Roman-Dutch law. That there has been very little mention, if any, of Roman-Dutch copyright law in South Africa is hardly surprising because even today with the mass utilization of works of intellectual property in the media, entertainment industry and the vast proliferation of information together with technological developments in data processing and storing, copyright remains an esoteric branch of the law - how much more was this not the case prior to the 20th Century. It may well be that 19th Century South African lawyers were in blissful ignorance of the availability of copyright protection under the Roman-Dutch common law. This does not, however, alter the fact that the

law was there and the protection available to be called upon if required.

The extreme esoteric nature of copyright in South Africa prior to 1917 is illustrated by pointing out that, despite the fact that the British Copyright Act of 1842 operated from that year in the Cape Colony and thereafter in the other colonies in South Africa there were only eight known copyright cases in South Africa prior to 1917. The earliest of these was **Dickens v "Eastern Province Herald"** dating from 1861.[40] During the hundred year period from 1861 to 1961 there were only twenty two known copyright cases in South Africa.

None of the great Roman-Dutch writers during the golden era of Roman-Dutch law dealt with copyright or with anything akin to copyright in their works. It is indeed possible that some of the privileges granted by the Estates General may have had force at the Cape. The Estates General purported to grant privileges for the entire Republic of the United Netherlands and it of course is the only body which actually had direct legislative authority over the Cape. Apart from the esoteric nature of copyright, this is understandable because, as pointed out above, the privilege system operated during this era and each privilege was by and large to be interpreted according to its own terms. As has been seen, Hugo de Groot certainly had some involvement with the privilege system and the interpretation of privileges or letters patent as a legal practitioner. Interestingly enough, Van der Linden, the latest of the Roman-Dutch writers and the writer granted pre-eminence in the Transvaal

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40. **Dickens v "Eastern Province Herald"** (1861) 4 Searle 33.

and the Orange Free State Republics, although not having dealt in any way with copyright law, made reference to copyright in the preface to the **Koopman's Handboek** or **Institutes of the Law of Holland**. Van der Linden states in the preface that he came to write the book because one Johan Allart, a bookseller and the copyright owner in respect of a book written by Jacob Loveringh, the translated English title of which was **Legal, Notarial and Merchantile Manual**, last published in 1671, approached him to prepare a fresh edition of the book. Van der Linden says that upon investigating the proposed task he came to the conclusion that the book was so badly written that it would be virtually impossible to produce a new edition without substantially rewriting it and in that case he would prefer to write his own book afresh. Van der Linden's **Koopman's Handboek** was published in 1806, some three years after the passing of the law of 1803. Van der Linden was thus clearly aware of the existence of copyright but no doubt decided that the subject was not worthy of discussion in his book (in this his attitude is no different to non-specialist modern writers) and he may well have been influenced by the fact that copyright at the time was really only of any particular interest to publishers.

The fact that prior to 1806, when the Cape was occupied by the British for the second time, copyright was only of any real interest to the publishing trade would also have served to make the subject of very little importance at the Cape as it existed at the time. Under the Dutch East India Company the Cape had operated as a refreshment station and very little other business or economic activity took place there. The first printing press was only established at the Cape in 1800. It was only with the arrival of De Mist during the period of the Batavian Republic that any sort of change in

this regard began to take place. During the early days at the Cape no doubt very little publishing of books took place. By 1842 the British Copyright Act of that date was in operation at the Cape and thereafter it is likely that questions of copyright would have been dealt with primarily by reference to that Act. In other words, it is contended that the absence of references to Roman-Dutch copyright in our jurisprudence is not necessarily due to the non-existence of such copyright but rather to the lack of any real cause to have had recourse to it.

It will be submitted below that the adoption of Copyright Acts in the Cape in 1873, Natal in 1896 and the Transvaal in 1887 repealed the Roman-Dutch common law insofar as the types of works dealt with in those Acts are concerned. After the adoption of these Acts Roman-Dutch copyright law would have largely ceased to be of any significance in those three territories, but this was not true of the Orange Free State which never passed any Copyright Act. Roman-Dutch copyright law thus continued to operate in undiminished scope in the Orange Free State up until 1917.

The content of South African Roman-Dutch copyright was as follows: It protected literary, dramatic, artistic and musical works once published insofar as they were capable of being reproduced by means of printing. The right vested in the publisher provided he could show that he had compiled the work or had lawfully acquired the right to publish it from the author. The right existed automatically and came into being upon publication of the work. A work was protected against copying in whole or in part and against the making of translations. The right was of perpetual duration and it was capable of being transmitted to heirs. The right

was conferred only upon works published in the state in question.

Roman-Dutch common law copyright granted no protection to unpublished works. The distinction drawn by De Beaufort between the right to restrain publication of a work derived from the law dealing with personality rights, on the one hand, and copyright, on the other hand, is equally applicable to the Roman-Dutch common law during the 19th Century and indeed today. This distinction is aptly drawn and described in an article entitled "**Outeursreg en Persoonlikheidsregte : 'n Teoretiese Analise met Verwysing na Outeursregbevoegdhede in die Suid-Afrikaanse Reg**" by J Neethling.[41] Prof Neethling rightly joins issue with Prof A Copeling where he states in his work entitled **Copyright Law in South Africa**, in dealing with Section 44(4) of the Copyright Act, 1965, that the author's right to privacy is to be regarded as a right in the nature of copyright. Neethling points out that the right of privacy, being one of the species of personality rights, derives from the classic Roman law "*Acto Iniuriarium*" and has as its object the protection of the individual's "*dignitas*", while copyright law is essentially an economic right. As has been shown above, in Roman-Dutch law copyright has its origins in the system of privileges granted to booksellers to protect their investments. This distinction has been blurred to some extent by the protection under the law of copyright of what is termed the author's "moral rights" in the Copyright Act, 1978.[42] Protection for these rights was only introduced into South African copyright law in 1978 although a measure of

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41. (1975) 38 THRHR 332.
42. See p 66 *supra*.

protection was granted to them in the Copyright Act, 1965. These rights are, however, essentially rights of copyright, albeit of a personal nature to the author, and are distinguishable from common law personality rights. Thus, although Roman-Dutch common law in the 19th Century enabled an author to prevent publication of his works in certain circumstances by means of enforcing his personality rights, this could not at the time be achieved by means of copyright and these personality rights were not within the contemplation of the legislature in 1916 when substituted copyright was conferred by the Act of 1916 in lieu of a copyright which existed under the common law prior to 1917.

The only reference to a South Africa common law copyright which has been found in South African jurisprudence is in the Cape case of **Boosey & Co v Simmonds** dating from 1903.[43] That case dealt with the unauthorized sale of copies of musical productions which originated from and had been published in Britain. The court held in favour of the applicant on the grounds that it could enforce copyright conferred by the British Act of 1842. In arguing the case for the applicant, however, Searle KC, the applicant's Counsel, argued that in addition to the applicant's rights under the British Act he could rely on common law copyright protection. The alternative argument was not, however, pressed and was not dealt with at all in the judgement. It is not clear what common law copyright the learned Counsel had in mind. It was certainly not the British common law copyright because such copyright protected only unpublished works and the works in question had been published. Moreover British common law copyright had not been assimilated into the South African

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43. (1903) 20 SC 632; 13 CTR 1138.

common law. However, the Roman-Dutch common law copyright protected published works but it only conferred protection upon works published in the country itself, i.e. the Cape. In this instance the works in question had been published in Britain. Furthermore, it would only have been correct to rely upon Roman-Dutch common law copyright if the Cape Act of 1873 was to be construed as not having repealed the common law copyright. It will be contended below that this is not the case. It is submitted that the learned Counsel had Roman-Dutch common law in mind because British common law copyright would have been well known to protect only unpublished works. In the circumstances, the attempt to rely upon Roman-Dutch common law copyright appears to have been misguided but it is significant that such an attempt should have been made. It is submitted that this incident suggests an awareness of Roman-Dutch common law copyright although the precise nature and scope thereof may have been uncertain.

5. SOUTH AFRICAN WORKS ELIGIBLE FOR EARLY BRITISH COPYRIGHT

It was pointed out in Chapter III that pre-1911 British copyright law granted copyright in Britain to certain works originating from foreign countries and British dominions and that certain of the British statutes of this period granted copyright in British dominions. The effect of this body of law on South African works and works enjoying copyright in South Africa will be examined below.

In this section of this thesis the maker of a work who is someone who was a British subject residing in South Africa or was resident in a territory which was a British dominion

at the time of the making of the work will be referred to as a "South African qualified author"; a work first published in a territory in South Africa which was at the time a British dominion will be referred to as a "South African qualifying work".

As the purpose of this thesis is to examine which early works enjoy copyright in terms of the transitional provisions of the Copyright Act, 1978, and since works in which the copyright did not pass through the 1911 British Gateway or the 1917 South African Gateway do not qualify for current protection, the present analysis will be confined to works which would have passed through either of these gateways.

(1) Unpublished Works

Unpublished works enjoyed common law copyright under the British common law irrespective of the nationality and residence of the author. Accordingly, all works unpublished on 1 July 1912 made by authors who were inhabitants of South Africa enjoyed copyright in Britain up to 1 July 1912 and all such works passed through the British 1912 Gateway save for paintings, drawings and photographs.[44]

(2) Literary Works ("Books")

Literary works, including literary rights in musical and dramatic works, first published in Britain, a Berne Convention country or Austria-Hungary at any time after 1 July 1870 enjoyed copyright in the United Kingdom and passed through the British 1912 Gateway. This was so irrespective of the nationality of the author and a work emanating from South Africa which met this condition enjoyed copyright

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44. See p 151 *supra*.

which passed through the British 1912 Gateway. After 25 June 1886, as a result of the International Copyright Act of that year, works produced in a British dominion were placed on a par with works produced in the United Kingdom. Accordingly, a South African qualifying work produced after that date enjoyed copyright in Britain which passed through the British 1912 Gateway.

It will be shown below that the British Copyright Act of 1842 conferred copyright in British dominions in South Africa and was not repealed as far as South Africa is concerned until 1 January 1917. Furthermore it will be shown that the South African Act of 1916 did not confer copyright in South Africa on literary works which enjoyed copyright in Britain in that year, as distinct from other types of works eligible for copyright, e.g. dramatic, artistic, etc works. Accordingly, the only way in which literary works granted copyright under the British Copyright Act of 1842 could pass through the South African 1917 Gateway was if they would have continued to enjoy copyright under that Act on 1 January 1917 assuming that the Copyright Act of 1842 had not been repealed. In practice this means the work must have been first published in Britain or another recognized foreign country after 1 January 1875.

(3) Performing Rights in Dramatic or Musical Works

British law conferred a performing right which passed through the 1912 Gateway in a dramatic or musical work which was published in manuscript form if the work was first performed publicly after 1 July 1870 and provided the first public performance took place in the United Kingdom or a recognized country (or in a British dominion after 1886), or the author died on or after 1 July 1905; provided further the first publication of the manuscript took place in an

aforementioned territory. Certain formalities also had to be complied with. A work made by a South African author enjoyed the aforementioned protection if it was first performed as aforementioned in Britain or a recognized country or was first performed in a British dominion in South Africa after 1886.

It will be shown below that British performing rights in terms of the Copyright Act 1842 also subsisted in British dominions in South Africa and for these rights to pass through the South African Gateway of 1917 the same conditions as aforementioned must have been met save that the first public performance must have taken place after 1 January 1875 and the author must have died after 1 January 1910.

(4) Engravings (Prints)

British copyright law conferred copyright which passed through the 1912 Gateway in engravings which were first published in Britain or in another recognized country after 30 June 1884. After 1886 first publication could have taken place in a British dominion. An engraving of any South African author enjoyed these rights provided it was first published in accordance with these conditions.

(5) Sculptures

British copyright law conferred copyright in a sculpture which passed through the 1912 gateway if it was first published after 1 July 1898 or was published after 1 July 1884 where the author was still alive on 1 July 1898 and had not assigned his copyright. Where reliance was placed on first publication after 1 July 1884 and the author being alive on 1 July 1898 the first publication must have taken place in the United Kingdom and the author must have been a British

subject or resident in a British dominion; where reliance was placed on first publication after 1 July 1898 such first publication could have taken place in the United Kingdom or in a British dominion provided the author was a British subject or was resident in the United Kingdom or a British dominion. South African sculptures which satisfied these conditions enjoyed the aforementioned rights.

(6) Paintings, Drawings and Photographs

Pre-1912 statutory copyright subsisted if the author was a British subject or was resident in a British dominion. Such copyright passed through the 1912 gateway subject to certain conditions if the author was alive on or before 1 July 1905. The works of South African qualified authors enjoyed the aforementioned rights if they met the aforementioned conditions.

6. BRITISH COPYRIGHT IN SOUTH AFRICA

Only two of the pre-1911 British copyright statutes applied to British dominions in the sense that they conferred copyright in the British dominions upon works in respect of which they granted copyright. These Acts were the Copyright Act, 1842, and the International Copyright Act, 1886. The *"British dominions"* to which the Copyright Act 1842 applied by virtue of Section 15 were defined as follows in Section 2 *"All parts of the United Kingdom of Great Britain and Ireland, the Islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements and possessions of the Crown which are now or are hereafter may be acquired"*. This definition covers all the colonies of South Africa, from the time when, and for as long as, they were colonies, and the Union of South Africa.

The effect of the Copyright Act 1842 read together with the International Copyright Act, 1886, was that literary, dramatic and musical works ("books") enjoying copyright in the United Kingdom, and dramatic and musical works enjoying performing rights in that country (irrespective of their origin and thus including those originating from South Africa), enjoyed copyright and performing rights, respectively, in the British dominions in South Africa. A South African literary, dramatic or musical work which met the requirements of the Copyright Act of 1842 enjoyed protection in South Africa (or in those parts of South Africa which were British dominions at any given time) in terms of British legislation.

The British Copyright Act, 1842, and the Dramatic Copyright Act, 1833, as applied by and extended by the 1842 Act, were given effect in the Cape Colony in **Dickens v "Eastern Province Herald"; Searelle & Gilbert & Sullivan v Bonameci & Perkins "Proprietors of the Lyric Opera Company"; Marsh v Bevan, Edwardes v Pollard & Chester; Wheeler & Another v De Jong & Walton; Boosey & Co v Simmonds;** and **Koenig v Landeshut.**[45] These cases all dealt with the performing rights in the Cape Colony of British dramatic and/or musical works. In the **Marsh** case relief was refused on account of the fact that insufficient evidence of the subsistence of copyright was adduced. In the **Boosey** case the court expressed the view that no registration of British copyright

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45. **Dickens v "Eastern Province Herald"** (1861) 4 Searle 33; **Searelle & Gilbert & Sullivan v Bonameci & Perkins "Proprietors of the Lyric Opera Company"** (1893) 3 CTR 171; **Marsh v Bevan** (1893) 3 CTR 220; **Edwardes v Pollard & Chester** (1899) 9 CTR 31; **Wheeler & Another v De Jong & Walton** (1901) 11 CTR 3; **Boosey & Co v Simmonds** (1903) 20 SC 632; 13 CTR 1138; and **Koenig v Landeshut** (1904) 14 CTR 97.

in the Cape Colony was necessary and that *"the English Act protects the holders of such copyright through the British dominions, and under the 15th section of that Act, where there is an infringement by any one of such copyright, an action on the case can be brought by the holder of the copyright"*.[46] In the **Koenig** case relief was refused on account of the fact that, although the plaintiff had taken assignment of the relevant copyright and was registered as the proprietor (in the United Kingdom), he had in fact been acting as the agent of the defendant when he had acquired the copyright and the copyright accordingly properly belonged to the defendant. Relief was accordingly refused on the basis of copyright infringement.

Section 36 of the British Copyright Act of 1911 provided that, although the Act repealed the earlier legislation in Britain, the repeal would not take effect and the early legislation would continue to apply in any part of the British dominions until the act came into operation in that territory. This only came about on 1 January 1917 in South Africa. Accordingly, the British Copyright Act of 1842 and the International Copyright Act of 1886 continued after 1912 and until 1917 to have effect in South Africa as though they had not been repealed in Britain. British, foreign and South African works first published or performed in circumstances which would have conferred copyright or performing rights on them in the United Kingdom during the period 1 July 1912 until 1 January 1917, but for the repeal of these Acts in Britain, had copyright and/or performing rights conferred upon them in South Africa. This would have affected literary, musical and dramatic works. By the same token,

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46. Per Maasdorp J, at p 633.

however, literary works which acquired copyright in the United Kingdom under the British Copyright Act of 1911 during the period of 1 July 1912 to 1 January 1917, but which would not have acquired copyright under the Copyright Act of 1842 if it had remained in operation, did not necessarily acquire copyright in South Africa. The same is not, however, true of dramatic and musical works. This point will be reverted to below in Chapter V.

As the British common law in general and the common law relating to copyright in particular was not adopted in any part of South Africa, no copyright in any works came into existence in South Africa by virtue of the British common law.

7. EARLY SOUTH AFRICAN COPYRIGHT LEGISLATION

The Cape, Natal and Transvaal each adopted their own copyright legislation from the second half of the 19th Century onwards. The Orange Free State, on the other hand, adopted no copyright legislation. To the extent that these territories were British dominions this legislation was in part supplementary to the British Copyright Act, 1842, and the International Copyright Act, 1886. The copyright legislation of each of the aforementioned territories, insofar as such legislation deals with the subsistence, duration and ownership of copyright, will be dealt with below.

Early South African copyright legislation left much to be desired. The comments of the British Gorell Committee, 1909, on the state of early British copyright legislation[47] are

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47. See p 124 *supra*.

equally apposite to early South African copyright legislation. In many instances the British statutes, which were themselves imperfect, were imperfectly taken over and adopted apparently without a proper understanding of the subject matter and the background to the British legislation. As a result interpretation of the statutes is a complex and difficult matter.

The Transvaal took over The Netherlands Copyright Act of 1881, which differed widely in approach to British legislation, incompletely.

A. THE CAPE

(1) Act No. 4 of 1854

The earliest item of copyright legislation in the Cape was Act No. 4 of 1854 which had the title *"Act for Authorizing the Importation into the Colony of the Cape of Good Hope of Books, being Foreign Reprints of Books First Composed, or Written, or Printed, or Published in the United Kingdom, and in which there shall be Copyright"*. The effect of this Act was to mitigate the prohibition provided for in the British Copyright Act of 1842 against importation of foreign made copies of British copyrighted works into the British dominions and allowed for the importation of such foreign produced books in certain circumstances. As it had nothing to do with the creation or subsistence of copyright in the Cape no further attention will be devoted to it.

(2) Act No. 2 of 1873 - Copyright Act of 1873

Copyright in "books" was regulated by the Act of 1873.

(a) Types of Works Protected

The Act defined *"book"* to mean and include *"every volume, part or division of a volume, pamphlet, sheet of letter press, sheet of music, and map, chart or plan separately published"*.[48]

This definition is identical to the corresponding definition in the British Copyright Act of 1842. Dramatic works and musical works were protected insofar as they were published in book form. Maps, charts and plans were also protected.

Section 1 of Act 4 of 1888 amplified the definition of *"book"* by stating that it did not include

> *"any publication which consists merely of a price list, sale catalogue, annual report, trade circular or trade advertisement or any volume, pamphlet, sheet of letter-press, sheet of music, map, chart or plan intended for private circulation, and not for sale, and of which not more than fifty copies shall be printed".*

(b) Conditions for Subsistence of Copyright

Copyright was created by the act of first publication. No specific requirement of originality was imposed. However, as in the case of the British Copyright Act of 1842, no doubt something which was a mere copy of a previous book was not entitled to protection.[49] This had to take place in the Cape Colony. The preamble to the Act provided that *"whereas it is expedient to protect the rights of authors in this colony in respect of*

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48. Section 9.
49. See p 127 *supra*.

their works and to afford encouragement to the production of literary works of lasting benefit to the colony". No further reference is made in the Act to the nationality or place of residence of the author but it would seem that the Act only applied to the publication of works of authors resident in the colony. Accordingly, for copyright to subsist in the work it must have been first published in the Cape Colony and the author must have been a resident of that colony. It was not necessary that the author was alive at the time of first publication.[50]

Section 3 of the Act made provision for a registry book to be kept by the Registrar of Deeds in Cape Town and for the proprietorship and assignments of copyright to be registered in that book. A certified copy of an entry in the register issued by the Registrar of Deeds was admissible evidence in the court and constituted *prima facie* proof of the proprietorship or assignment of copyright as reflected in the certificate but such *prima facie* evidence could be rebutted by other evidence. Section 5 provided that any person aggrieved by any entry made in the register could apply to the Supreme Court for the entry to be expunged or varied.

It is not clear whether registration was a formal requirement for the subsistence of copyright. In **Boosey & Co v Simmonds**[51] it was argued that the work in question, which was a British work, enjoyed no copyright in the Cape because it had not been registered in terms of the 1873 Act. Maasdorp J expressed himself as follows:

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50. Section 2.
51. *Supra*, at p 633.

> *"Now it seems to me upon reference to the Act of 1873 that the registration therein required is of books which are published and brought out in this colony, and without reference to publications in England, but it is not necessary now to decide that point".*

He went on to hold that British copyright could be enforced without registration in the Cape but he left open the question of whether a work which derived its protection from the 1873 Cape Act was required to be registered either as a pre-condition for the subsistence of copyright or for the enforcement of copyright.

The 1873 Act is clearly modelled on the British Act of 1842. That Act required that copies of books must be delivered to Stationers Hall for registration but the consequence of lack of registration was that copyright infringement proceedings could not be brought. Copyright subsisted in the work irrespective of registration. It is submitted that at worst under the Cape Act a work must have been registered before the copyright could be enforced; registration was not a condition precedent for the subsistence of copyright.

Any person aggrieved by any entry made in the Registry book maintained by the Registrar of Deeds could apply to the Supreme Court for such an entry to be expunged or varied.[52]

From 1886 onwards - after the International Copyright Act, 1886, came into operation in Britain - first pub-

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52. Section 5.

lication of a book in the Cape was sufficient to create copyright in the United Kingdom under the British Act of 1842 and registration in the Deeds Registry had the same effect as registration at Stationers Hall in the United Kingdom and made the taking of this formal step unnecessary. Consequently, after that date first publication in the Cape and registration at the Deeds Registry conferred copyright in a work not only in the Cape but also in Britain and in all places to which the British Copyright Act of 1842 extended, including the Cape, as well as in all the countries of the Berne Convention and Austria-Hungary.[53]

The term *"copyright"* was defined in the Act to mean *"the sole and exclusive liberty of printing or otherwise multiplying copies of any book"*.[54] Consequently, the Act did not create any performing right in musical or dramatic works as did the British Act of 1842. This meant that, since first publication in the Cape simultaneously caused copyright to be vested in the work in both the Cape and in Britain, the British copyright (which extended back to the Cape) granted a wider right, including the performing right, than the Cape Act.

Section 1 of the Act, in dealing with the subsistence and duration of copyright in a work published in the lifetime of its author read *"the copyright in every book which shall* **after the passing of this Act** *be published in the lifetime of its author"* (emphasis added).

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53. See p 143 *supra*.
54. Section 9.

This wording is taken from the British Act of 1842. By contrast, Section 2 which deals with the subsistence and duration of copyright in works published posthumously does not contain this phrase. This section too is taken verbatim from the British Act of 1842. The British Act of 1842 was preceded by earlier copyright legislation. This legislation conferred statutory copyright on living authors upon the printing of their works. The term of such copyright was twenty-eight years after publication or, if the author survived this period, his lifetime. The legislation conferred no statutory copyright upon works first published posthumously. Accordingly, when dealing with the published works of living authors, the Act of 1842 had a built in transitional provision and it only gave the longer period of copyright provided by the 1842 Act to works which were first published by living authors after it had come into operation. In the case of works published posthumously, copyright was created retrospectively because these works had previously not enjoyed copyright. When the Cape adopted the Copyright Act of 1873 there was no existing statutory copyright and it may appear anomalous to have adopted in the case of works published during the lifetime of the author the wording of a British section which had a built in transitional provision. However, under Roman-Dutch common law copyright, perpetual copyright subsisted in a published work. Accordingly Section 1 is perfectly logical viewed against the background of the common law copyright. The Roman-Dutch common law copyright also protected works published posthumously and there is therefore no justification for making a distinction in the Cape Act between works first published during the lifetime of the author and those first published

posthumously. This distinction is an anomaly but it is of no practical importance. It is submitted that it was not the intention of the legislature to make this distinction and the anomaly which it has created was due to the adoption of the wording of the British Act of 1842 which applied to a different historical situation.

The effect of Sections 1 and 2 of the Act was to make provision for the Act to regulate the copyright in all published books and to provide that the copyright had a limited duration. Since the Act clearly contemplated that published books could only enjoy copyright in accordance with its provisions[55] and allotted the ownership of the copyright to the author, in contrast with the common law which allotted it to the publisher, it is submitted that it effectively repealed the common law copyright and, in the case of existing works, it in principle changed the ownership of the copyright from the publisher to the author. Of course, in terms of the common law copyright the publisher was required to acquire the right to publish a work from the author, unless the publisher had compiled the work, and it is possible that in some cases the mode of acquisition of the publication right might have constituted an assignment of copyright recognized under the Act.

(c) Authorship and Initial Ownership of Copyright

The author of the work was the initial owner[56] provided that where a work was first published posthumously the initial owner of the copyright was the proprietor of

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55. Both Sections 1 and 2 read *"The copyright in* every book *which shall ... be published ..."* (emphasis added).
56. Section 1.

the manuscript from which the first published version was derived.[57]

In this respect the Act was also modelled on the British Act of 1842 but, unlike that Act, the Cape Act made no special provision regarding the authorship and initial ownership of collective works. In the case of these works the British Act made exceptions to the general rule that the ownership of copyright vested initially in the author. In these exceptional circumstances the ownership of the Cape copyright and the British copyright might have vested in different persons.

(d) Duration of Copyright

Where the work was published during the lifetime of the author, the term of copyright was his natural life and a further period of five years, or thirty years from the first publication of the book, whichever was the longer.[58] In the case of posthumous works, the term of copyright was thirty years from the first publication thereof.[59]

The corresponding periods under the British Act of 1842 were the lifetime of the author and seven years thereafter, or forty-two years from first publication, whichever was the longer, or, in the case of posthumous works, forty-two years from the date of first publication. Accordingly, in the case of works first published after 1886 the British copyright which was con-

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57. Section 2.
58. Section 1.
59. Section 2.

ferred upon the work simultaneously was of longer duration than the Cape copyright.

(e) Transmission of Copyright

Copyright could be assigned by means of a written agreement or by means of making an entry in respect of an assignment in the Registry book maintained by the Registrar of Deeds. Partial assignments of copyright were possible.[60] The British copyright in a work could be assigned in the same way as the Cape Copyright and it would seem to follow that unless a distinction was drawn in an assignment between the Cape copyright and the British copyright, an assignment would cover both copyrights simultaneously.

The right to claim copyright in a work, which came into existence upon first publication, could be transferred prior to publication and ownership of copyright could be passed by legacy or by operation of law in addition to formal assignment as described above.[61] As stated above the acquisition by the publisher of the right to publish a book from the author in terms of common law copyright could in some cases be construed as a transfer of the right to claim copyright referred to above. The aforementioned provision was thus compatible with the position under the common law.

(3) Act 4 of 1888 - The Books Registry Act, 1888

This Act was entitled *"To Provide for the Preservation of Copies of Books Printed in this Colony and for the Registra-*

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60. Section 4.
61. Section 4.

tion of Such Books". Section 1 of the Act amplified the definition of *"book"* in the Copyright Act of 1873, as mentioned above.

For the major part the Act was concerned with requiring the deposit of four copies of the first edition of any book printed or lithographed in the Cape, irrespective of whether such work was produced before or after the Act came into force, with a government officer. Provision was made for a copy of each of such books to be delivered to the librarian of the South African Public Library and to the Grahamstown Public Library. The government officer receiving the copies was required to prepare a memorandum of the particulars required for registration of copyright under the Act of 1873 and to transmit that memorandum to the Registrar of Deeds who was in turn required to enter the relevant particulars in respect of the book in the Registry book maintained by him in terms of the Act of 1873. The entry of such particulars in the Registry book by the Registrar had the same effect as registration of copyright by the proprietor under the 1873 Act. Failure to deliver the requisite copies of a book gave rise to criminal proceedings but had no bearing on the subsistence of copyright in the book. Similar requirements were made in respect of imported books. This Act was described as being *"to amend the law relating to the protection of copyright against the importation of foreign reprints into this colony and to the registration of books"*.

(4) Act 18 of 1895 - The Copyright Protection and Books Registration Act, 1895

This Act repealed the 1854 Act and reimposed the prohibition against importation of foreign editions of books enjoying British copyright. It extended this prohibition to foreign printed editions of works registered under the Cape Act of

1873 and books registered in any state or colony in South Africa.

(5) Act 45 of 1905 - Copyright in Works of Art Act, 1905

(a) Types of Works Protected

The Act defined *"work of art"* (sometimes called *"work"*) to mean *"a painting or drawing and the design thereof, a photograph and the negative thereof, and any positives or copies made therefrom, an engraving or a piece of sculpture"*.[62] It is clear from Section 4, which deals with registration of copyright, that the term *"photograph"* included *"a series of photographs commonly known as living pictures, cinematographs, or bioscopes"*.

Effectively the Act covered the same types of works as the British Engravings Copyright Acts, 1734 and 1736, the Prints Copyright Act, 1776, the Prints and Engravings Copyright (Ireland) Act, 1836, the Sculpture Copyright Act, 1814, and the Fine Arts Copyright Act, 1862. Insofar as the British Sculpture Copyright Act, 1814, protected industrial designs as sculptures, the same applied to the Cape Act. In this respect the definition of *"copyright"* in Section 1 is significant; it states that *"copyright"* means *"the sole and exclusive right of copying, reproducing, repeating or otherwise multiplying copies of any work of art and of the design thereof in any size, in the same or any other material, or by the same or any other kind of art"*. In order to be eligible for copyright a work of art must have been original and it must have been *"produced in the colony"*.[63] No qualification is made in the Act as to the nationality or

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62. Section 1.
63. Section 2.

any other status of the author of the work and as long as it was produced in the Cape it qualified for copyright no matter who the author might be.

(b) Conditions for Subsistence of Copyright

The Act made provision for registration of copyright. The proprietorship of every copyright in a work of art and any assignments thereof were required to be recorded in the Register. Any certified copy of an entry in the Register issued by the Registrar (an official specifically appointed for this purpose) constituted *prima facie* proof of the proprietorship or assignment of the relevant copyright, but could be rebutted by other evidence. Any person aggrieved by an entry in the Register could apply to court for the entry to be expunged or varied.[64] Section 11 of the Act provided that no proprietor of copyright in a work of art first produced in the colony *"shall be entitled to the benefit of this Act until he shall have registered his copyright, nor shall any prosecution or action be competent for anything done before registration"*. Registration is nowhere in the Act stated to be a condition precedent for the subsistence of copyright and, bearing in mind that none of the British statutes dealing with copyright in works of art require registration, and that the British statutes doubtless inspired the Cape Act, it is submitted that registration was no more than a requirement for the enforcement of copyright which subsisted automatically provided the work was produced at the Cape. The wording of Section 11 is consistent with this interpretation. The section speaks of proprietor of the copyright in a work of art first produced in the colony who is not entitled to the benefit of the Act until registra-

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64. Section 4.

tion. This pre-supposes that the copyright subsists before the act of registration had occurred.

The effect and implications of registration of copyright was considered in the case of **Moore v Argus Printing & Publishing Co. Limited & Another.**[65] In that case one P assigned the copyright in a photograph to the plaintiff and this assignment of copyright was recorded in the Register. However, prior to effecting the assignment P had granted a licence to the defendant in respect of the publication of the photograph. The scope of the licence which was granted was in dispute. The plaintiff sought to enforce the copyright against the defendant and restrict publication of the photograph. The registration of the photograph in the name of the plaintiff was unqualified by any entries in the Register. *Ex facie* the Register the plaintiff had the unqualified right to restrain publication of a photograph by the defendant. Maasdorp, J.P. had the following to say:

> *"But it appears that under section 4 this certified copy of the entry is only* **prima-facie** *proof of the proprietorship or assignment, and is subject to be rebutted by other evidence. The question now is whether the defendants have produced any evidence to rebut the unrestricted title of the plaintiff in the copyright. I am inclined to think that the defendants have not challenged the plaintiff's right in the proper manner. They should, in my opinion, considering the nature of the claim set up by them, have proceeded under the provisions of Section 4, clause 2 of the Act, and have asked for an order varying the entry in favour of the plaintiff, in accordance with the right claimed by them."*

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65. 1911 CPD 174.

It is submitted that registration of copyright was a mechanism for creating certainty regarding the subsistence of and title to copyright and it did no more than record an existing factual situation. At the same time it was an evidential tool for establishing the subsistence of and title to copyright in court proceedings. Failure to register copyright or to record an assignment did not as a question of substantive law affect the subsistence of and/or title to copyright in a work, but merely had a bearing on the enforceability of the copyright at any given time. In this regard it is significant that Section 11 of the Act, in prescribing that registration is necessary before a proprietor of copyright is entitled to the benefit of the Act, states that *"nor shall any prosecution or action be competent for anything done before registration"*. It is not stated that no copyright subsists before registration but simply that registration is a condition precedent before any act could become an infringing act.

Section 6 of the Act provided that if copyright was infringed the infringer was *"liable to an action for damages for infringement of the copyright, and all such copies shall be forfeited to such proprietor"*. In terms of this section the primary remedies available to a copyright owner were a claim for damages and delivery-up of infringing copies. These remedies were required to be sought by way of action proceedings. This provision was amplified by Section 10 which provided that in any action for infringement of copyright it was competent for the court, on the application of the plaintiff or defendant, respectively, to grant an order for an interdict, inspection or an account. This power of the court was made subject to the proviso that the work on which the proceedings were based must have borne on it a mark or

notification showing that it had been copyrighted. This was an unusual provision in that it made marking of a work a condition precedent for obtaining an interdict, inspection or account but not for an award of damages or an order of delivery-up of infringing copies. Marking was only a requirement for the form of primarily interlocutory relief provided for in Section 10 and not for the main action for damages in terms of Section 6. In the circumstances, marking of the work was clearly no more than a requirement for the enforcement of copyright in certain respects and was irrelevant to the subsistence of copyright in the work. This was in contrast to the British legislation dealing with artistic works which made marking of the work a condition for the subsistence of copyright.

On a proper construction of the Act it is submitted that it conferred copyright on works made both prior to its coming into operation as well as works made thereafter. It is couched in terms wide enough to cover both existing works and works made thereafter and specific reference is made in Section 2, which deals with the subsistence and initial ownership of copyright as well as its duration, to works sold or disposed of for the first time after the passing of the Act. Such a reference would have been unnecessary if the Act was to be construed as applying only to works made after it came into operation. The effect of this reference is, however, that the exception to the normal rule of vesting of copyright (i.e. that copyright vested initially in the author of a work) made in favour of a purchaser of the work, applied only to works made and sold after the Act came into operation and not to existing works which had already been sold. The aforementioned exception will be discussed below.

(c) Authorship and Initial Ownership of Copyright

The Act defined the author of a work as follows: "*The inventor, designer, engraver, sculptor or maker of any work of art: Provided that the author of a work of art made by the employee of any person or firm in virtue of his employment shall mean the person or firm under whose orders, or in the course of whose business, the work of art was made by such employee.*[66]

Ownership of the copyright in a work vested initially in the author save that where the work was made or executed for, or on behalf of, any other person for a good or valuable consideration, or was sold or disposed of for the first time after the passing of the Act the maker or seller of the work was not the proprietor of the copyright but the copyright vested in the purchaser or assignee or the person for or on behalf of whom the work was executed, as the case may be. This position could be varied by an agreement entered into between the author and the other person at or before the time of the sale or disposition of the work by the author in which provision was made for the copyright to remain vested in the author.

(d) Duration of Copyright

The term of copyright for paintings and sculptures was the lifetime of the person in whom the copyright initially vested (i.e. not necessarily the author) and thirty years after his death. In the case of engravings not published in, or forming part of, a book and photographs the copyright

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66. Section 1. This position was in sharp contrast to later South African copyright legislation which in the employer/employee relationship conferred the initial ownership of copyright on the employer while retaining the employee as the author. In this regard see p 34 *supra*.

endured until thirty years after the end of the year in which the works or any copies thereof were first offered for sale, delivered to a purchaser or advertised or exposed as ready for sale to the public or for delivery to a purchaser, or the work was registered.[67] This provision emphasizes the fact that registration was not a condition precedent for the subsistence of copyright as it is clear that copyright could have subsisted from a time prior to the date of registration if any of the other aforementioned events occurred prior to registration. The term of the copyright in the aforementioned engravings and photographs was determined by whichever of the aforementioned events happened first. Although it is not specifically stated in the Act, presumably the term of the copyright in an engraving which was published in or formed part of a book was determined by the Copyright Act, 1873, which dealt with copyright in "books".

The term of copyright differed substantially both in length and manner of determination from the corresponding British legislation.[68]

(e) Transmission of Copyright

Copyright could be assigned in whole or in part in a written document executed by the assignor and attested by two witnesses. On production of a Deed of Assignment for and on behalf of the assignee the Registrar was required to record such assignment. After registration an assignment was effective in law to all intents and purposes. Only the registered proprietor of copyright could enter into a valid Deed of

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67. Section 2(1).
68. See p 137 *supra*.

Assignment which suggests that no assignment took effect unless it was recorded in the Register of Copyright. On the question of assignments of copyright the Register therefore went somewhat further than merely recording an existing factual situation. This explains the attitude of Maasdorp J.P in the Moore case[69] in insisting that the defendant should have sought to rectify the Register before it could make any challenge to Moore's unqualified title to the copyright in that case. On the other hand, the term *"assigns"* is defined in the Act as including *"every person in whom the interest of an author is vested, whether derived from such author before or after publication or registration, and whether acquired by sale, donation, legacy or by operation of law, or otherwise"*.[70] In the final analysis the true construction appears to be that a person could acquire title to copyright by any of the aforementioned means referred to in the definition of *"assigns"* but could not exercise any of the rights or powers of ownership of the copyright until he had been recorded as such in the Register.

(f) Sole Source of Copyright

The Act was the only source of copyright in artistic works in the Cape Colony because although Cape authors could qualify for British copyright in their artistic works in some circumstances, the British Act dealing with copyright in artistic works did not extend to the Cape Colony. As will be shown below, however, such British rights were subsequently granted recognition in South Africa in certain circumstances after 1917. The Roman-Dutch common law copyright did not cover artistic works save to the extent

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69. **Moore v Argus Printing & Publishing Co Ltd & Another**, *supra*.
70. Section 1.

that they were published in a printed form e.g. as part of books.

B. NATAL

(1) Ordinance No. 14 of 1856

This Ordinance was entitled *"Ordinance for authorizing the importation, into the Colony of Natal, of books, being foreign reprints of books, first composed or written, or printed or published, in the United Kingdom, and in which there shall be copyright"*. This Ordinance was *mutatis mutandis* identical to Act No. 4 of 1854 of the Cape Colony and what is said above in connection with the latter Act applies equally to this Ordinance.[71] It had no bearing on the creation or subsistence of copyright in Natal.

(2) Act No. 9 of 1896 - The Copyright Act, 1896

This Act was dated 1 June 1896 and it appears to have been regarded as a mistake as it was repealed a year later by Act No. 17 of 1897 which was somewhat confusingly called *"The Copyright Act, 1896"*, despite being an Act of 1897.[72] It

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71. See p 237 *supra*.

72. The debate on the Bill in question took place in the Legislative Assembly of the Colony on 22 and 29 April and 5 May 1897. The Bill was proposed by the Prime Minister and he spoke in very guarded and euphemistic terms. It transpired that the Act of 1896 had been referred to the appropriate authorities in England and that as a result the Act had to be repealed. The shortcomings of the Act were said to be of a *"highly technical character."* In alluding to the necessity for the new Act the Prime Minister said *"And when the Bill was referred Home it was found that, in trying to do too much, we had overleaped ourselves over it, and we had to come back to a more modest Bill, namely, the present Bill. We are very anxious for the Bill to go through in its present form, because we know it will satisfy the people at Home. ... I am terribly afraid the matter is so technical and difficult that if we begin to deal with it now we may not be acting in consonance with people at Home, and we shall have another miscarriage."*

thus appears as though the intention was to obliterate the earlier Act completely but nevertheless, as will be shown below, the repeal of this Act was made subject to the saving of any copyright brought into existence by it. It can thus not be disregarded. This Act repealed Ordinance No. 14 of 1856.

(a) Types of Works Protected

The Act protected *"literary and artistic work"*. This term was defined to mean *"every book, print, lithograph, article of sculpture, dramatic piece, musical composition, painting, drawing, photograph and other work of literature or art"*.[73]

The term *"book"* comprised in the aforementioned definition was in turn defined *"to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, a map, chart or plan separately published"*.[74] This definition coincided with the Cape definition in the Copyright Act of 1873 and with the British Act of 1842.

The term *"copyright"* was defined to mean *"the sole and exclusive liberty of multiplying copies of any literary or artistic work"*.[75] Consequently, although dramatic works and musical works were protected, they were only protected against copying and no performing right was granted.

(b) Conditions for Subsistence of Copyright

Copyright in literary and artistic works was created by the act of first publication. No qualification was made as to

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73. Section 3.
74. Section 3.
75. Section 3.

where first publication must have taken place or as to national status of the authors of the works. Accordingly publication anywhere in the world of the works of authors of whatever nationality created copyright in Natal. This was probably the major reason why it was decided to obliterate this Act as far as possible because Act 17 of 1897, which repealed this Act, specifically provided in Section 4 that it would only apply to the copyright in Natal of works first produced in Natal, and in Section 5 that neither the Act of 1897 nor the Act of 1896 would have the effect of limiting any copyright which would have been conferred in Natal by the British Act of 1842; this was the unmitigated effect of the 1896 Act by virtue of it applying, inter alia, to works first published in Britain or in other countries with which Britain had copyright relations.

Sections 4 and 5 of the Act were substantially identical to Sections 1 and 2 of the Cape Act of 1873 insofar as their effect on works first published prior to the date of the Act is concerned. For the reasons advanced in discussing the Cape Act of 1873, it is submitted that this Act also conferred copyright on works first published prior to its effective date, irrespective of whether the authors were living or deceased at the time of first publication and it also repealed the common law copyright.[76] Copyright was thus conferred in Natal on all literary and artistic works published anywhere in the world prior to 1897.[77] The generosity of the Natal legislature has, as will be shown below, had

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76. See p 242 *supra*. Like the Cape Act, Section 7 also catered for registration of works published before the date of the Act as well as those published thereafter.

77. The works which were covered were those first published in such circumstances that their term of copyright would not have expired on 31 August 1897 when Act No. 17 of 1897 came into operation.

important implications upon the copyright in works which passed through the 1917 Gateway.

The Act made provision for registration of copyright by the Registrar of Deeds in Pietermaritzburg. A registry book was required to be maintained by the Registrar of Deeds and the proprietorship in copyright in literary and artistic works as well as assignments thereof could be recorded in that book. Registration constituted *prima facie* proof of the ownership of copyright and of any assignment thereof. This evidence could be rebutted by other evidence.[78] As stated above, copyright in an artistic or literary work could be registered notwithstanding the fact that the work had been published prior to the date of the Act.[79]

Any person aggrieved by an entry in the Register could make application to the Supreme court to expunge or vary such entry.[80]

Registration was not a condition precedent for the subsistence of copyright and was no more than a requirement for the enforcement of copyright.[81]

(c) Authorship and Initial Ownership of Copyright

The term *"author"* was defined in Section 3 of the Act to mean *"the author, inventor, designer, engraver or maker of any literary or artistic work; and includes any person*

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78. Section 6.
79. Section 7.
80. Section 8.
81. See Section 9 and Section 10. The latter section states *"any literary or artistic work wherein there shall be copyright, and of which an entry shall have been made in the said registry book"*. This passage clearly contemplates that copyright subsists prior to registration.

claiming through the author, and in the case of a posthumous work means the proprietor of the manuscript, plate or design of such work and any person claiming through him". The inclusion of the expression *"includes any person claiming through the author"* in the definition of author is a very strange provision and it was not repeated in the 1897 Act. If the definition is interpreted literally it would have been extremely difficult to distinguish between a work published during the lifetime of the *"author"* and one published posthumously. In the event that a person claiming through the author (would this have included his heirs?) could be the *"author"*, a work could only be first published posthumously if not only the actual author was deceased but also all claimants through him.

Section 4 of the Act provided that the copyright in a work first published in the lifetime of its author *"shall be the property of such author and his assigns"*. The term *"assigns"* was defined in Section 3 of the Act to mean and include *"every person in whom the interest of an author of copyright shall be vested, whether derived from such author before or after publication, and whether acquired by sale, donation, legacy, or by operation of law or otherwise"*. This was an interesting provision because, although the act of first publication was what gave rise to the subsistence of copyright, it is clear that the *spes* of copyright to be created by subsequent publication could be assigned and when the work was published thereafter the assignee was the initial owner of the copyright which was created by publication. This provision ties in with the inclusion of the phrase *"includes any person claiming through the author"* in the definition of *"author"*. The result was that if the *spes* of copyright had been transmitted from the actual author to another person prior to publication, upon publication that

other person was the initial owner of the copyright.[82] He could perhaps even be argued to be the *"author"* in view of the fact that the definition of this term says that it *"includes any person claiming through the author"*. However, it is submitted that this could not have been the intention of the legislature. In the case of a work first published posthumously the copyright created upon first publication vested initially in the proprietor of the author's manuscript or the design from which such work in its published form was derived, or the assigns of such person.[83]

(d) Duration of Copyright

The copyright in any literary or artistic work published during the lifetime of its author endured for the natural life of such "author" and for five years after his death. If, however, the work was a "book" and the aforementioned five year period expired within thirty years from the date of first publication of such book, the copyright endured for a period of thirty years after first publication. In other words, the term of copyright in a book was the same as the term under the Cape Act of 1873.[84]

In the case of a work first published posthumously the term of copyright was thirty years from the date of first publication.[85]

(e) Transmission of Copyright

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82. The position outlined above is entirely consistent with Roman-Dutch common law copyright, and as it differed from the corresponding British legislation, it is perhaps not without significance. Perhaps the legislature had the Roman-Dutch common law position in mind!
83. Section 5.
84. Section 4.
85. Section 5.

Copyright could be assigned by means of a deed or other instrument or by means of registration in the registry book, either in whole or in part.[86] Apart from being assigned, copyright could be transmitted by testamentary disposition, by operation of law or otherwise in any way in which ownership of property could be transferred.[87]

(f) Parallel British Copyright

As in the case of the Cape, first publication of books in Natal after 1886 gave rise to British copyright under the British Copyright Act of 1842. This copyright extended to Natal, as a British dominion. A Natal copyright owner thus enjoyed two parallel copyrights in his book. The British copyright had a longer duration than the Natal copyright. An assignment of copyright entered into in respect of the copyright in a book first published in Natal after 1886 would have covered both copyrights unless the assignment stated the contrary. The British Act of 1842 made certain exceptions to the rule that copyright in books vested initially in the author. These exceptions were not embodied in the Natal Act of 1896. This meant that where the exceptions applied in the case of the British copyright, such copyright and the Natal copyright might have been owned by different persons. The same position could have obtained as a result of the unusual definition of "*author*" in the Natal Act.

Unlike the Cape Act, the Natal Act, as stated above, did not only confer copyright in Natal upon works first published in Natal but also on works first published anywhere in the world. This meant that a book first published in Britain or

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86. Section 7.
87. Definition of "*assigns*" in Section 3.

in a country with which Britain had international copyright relations enjoyed copyright in Natal not only under the British Act of 1842 but also under the Natal Act. As will be shown below in dealing with the Natal Act of 1897, doubt arose as to whether the Natal Act of 1896 had the effect of limiting or qualifying the British Act of 1842 as it applied to Natal. It could have done this for instance by shortening the duration of the British copyright to that of the shorter term granted by the Natal Act. This unintended consequence of the Natal Act and the uncertainty about it was one of the major factors in bringing about the attempted obliteration of the Natal Act of 1896. Section 5 of the Natal Act of 1897 specifically provided that nothing in the Act of 1896 shall have been deemed to lessen, or to have lessened, any rights in respect of copyright in Natal which subsisted in Natal prior to its adoption by virtue of the British legislation, more particularly, the Copyright Act of 1842.

Natal authors of paintings, drawings and photographs enjoyed British copyright under the British Fine Arts Copyright Act, 1862. Prints and sculptures first published in Natal after the date of the British International Copyright Act, 1886, also in principle enjoyed copyright under the British copyright legislation dealing with these works. It was, however, a formality for the subsistence of copyright in published prints and sculptures that the name of the author and the date of first publication appeared on the work and each copy issued. If this formality was not complied with the work would have fallen into the public domain in terms of British copyright. The aforementioned copyright did not, however, extend to Natal. As will be shown below, however, such British rights were subsequently granted recognition in South Africa in certain circumstances after 1917. The ownership and duration of a British copyright would have depended

entirely on the British legislation and the British and Natal copyrights might have had a different duration and ownership in any particular case.

(g) Far Reaching Consequences of the Natal "Error"

Although the Natal Act of 1897 obliterated the 1896 Act as far as possible, it nevertheless, as stated above, preserved copyright created by that Act. This has, as will be shown below, had far reaching consequences for South African copyright law because copyright was conferred in Natal on all works first published anywhere in the world prior to 31 August 1897, including in the Orange Free State and in Transvaal, not to mention countries which were not members of the Berne Convention at the time (or Austria-Hungary), works originating from which did not enjoy copyright in Natal by virtue of the British Act of 1842. Many of these works in which copyright was so generously granted by Natal would have enjoyed copyright in 1917 which passed through the South African 1917 Gateway.

It must be borne in mind that registration was not a condition precedent for the subsistence of copyright under the Natal Act of 1896 and the fact that many of the extremely wide range of works which were eligible for copyright in Natal were never registered by the Registrar of Deeds did not for the purposes of the 1917 Gateway make any difference to, or detract from, the subsistence of copyright in those works. The error made by the Natal legislature in 1896 no doubt made little difference at the time because, for instance, few, if any, American authors registered their works in Natal. Copyright in such works would thus not have been enforceable at the time, although it subsisted. Nonetheless such unregistered copyright in many instances passed

through the 1917 Gateway. This renders the error significant for modern South African copyright law.

(3) Act No. 17 of 1897 - The Copyright Act, 1896

As stated above, although this Act was passed in 1897 it was given the name *"The Copyright Act, 1896"* in Section 1 in consistency with the approach of obliterating the Copyright Act of that specific year. The Act amounted to an attempt on the part of the Natal legislature to *"put the record straight"*. However, by virtue of the fact that the 1897 Act preserved copyright granted by the 1896 Act it did not quite have this effect.

Section 2 of the Act repealed the Act of 1896. It provided that such repeal did not affect any copyright then existing under that Act, and further that such copyright should continue as if it had been created by the 1897 Act and registrations of such copyright were deemed to have been registrations effected under the 1897 Act. It is significant that the 1896 copyright continued to subsist *"as if created"* by the 1897 Act. This must be taken to mean that the provisions of the 1896 Act dealing with the types of works protected, the conditions for subsistence of copyright, the authorship and initial ownership of copyright, the duration of copyright and the validity of assignments entered into prior to its repeal continued to govern works upon which 1896 copyright was conferred. On the other hand, it is submitted that the remedies available to owners of 1896 copyright, the procedures for effecting and recording copyright and assignments made after 1897 and procedural and administrative provisions generally of the 1897 Act applied to works in which 1896 copyright subsisted after 31 August 1897, the commencement date of the 1897 Act. It is submitted that the aforementioned division gives effect to the purport

of Section 2 in not affecting any existing copyright but at the same time continuing such copyright as if created by the 1917 Act.

The inter-relationship between the 1896 and 1897 Acts is fraught with difficulties and the distinct impression is gained that the whole question was not properly thought out by the legislature. In what follows an attempt will be made to reconcile the two Acts as best possible and to interpret the 1897 Act in a way which leads to the fewest anomalies.

(a) Types of Works Protected

The Act protected so-called *"books"* and original works of art.[88] The term *"book"* was defined in Section 1 to *"include[s] every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music and map, chart or plan separately published"*. Allied to this definition is the definition of *"serial work"* which meant *"includes encyclopaedia, review, magazine, periodical work, or work published in a series of books or parts"*. *"Serial works"* were a species of *"book"* - in effect they were collective works, the term used in the British Act of 1842 on which this Act was based.

As in the case of the Cape Act of 1873, dramatic and musical works were protected insofar as they were published in book form.

The term *"work of art"* was defined in Section 1 to mean *"a painting or drawing and the design thereof, or a photograph and the negative thereof, or an engraving"*. This definition

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88. Sections 6, 7 and 8.

covered the same works as those covered by the British Engraving Copyright Act, 1734 and 1736, the Prints Copyright Act, 1776, and the Prints and Engravings Copyright (Ireland) Act, 1836, and the Fine Arts Copyright Act, 1862. It did not, however, cover sculptures as protected by the British Sculpture Copyright Act, 1814. Industrial designs, insofar as they were protected under the pre-1912 British legislation, were protected under the Sculpture Copyright Act and this means that industrial designs enjoyed no protection under the Natal Act of 1897. By contrast, the Natal Act of 1896 did confer protection upon sculptures. However, Natal passed an Act to provide for the registration of designs in 1899 (Act No. 19 of 1899).

As previously mentioned the Act of 1897 perpetuated the copyright in works of the type granted protection under the Act of 1896.

(b) Conditions for Subsistence of Copyright

Copyright in a book was created by the act of first publication in Natal. Copyright in a work of art subsisted if that work was made in Natal coupled together with registration of the copyright in terms of Section 13.[89] In the case of a book it did not matter whether the work was published during the lifetime of the author or posthumously.

Unlike the Act of 1896 and the Cape Act, subject to what is said below, this Act did not appear to grant copyright retrospectively. In the case of artistic works registration was a condition precedent for the subsistence of copyright and this obviously could not take place until the passing of

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89. Sections 6, 7 and 8.

the Act. The Act, however, specifically stated in Section 8 that an artistic work made after the passing of the Act of 1896 was eligible for copyright.[90] In the case of books, works published before the date of the Act were granted copyright by the Act of 1896 and this copyright was perpetuated in the Act.

Section 6 of the Act, which dealt with the subsistence and duration of copyright in books published during the lifetime of the author, made reference to books published *"after the passing of this Act"*. The reasoning advanced in discussing the corresponding provision in the Cape Act of 1873[91] is not applicable here as in Natal there was already subsisting statutory copyright, i.e. the copyright conferred by the Act of 1896, and common law copyright had already been repealed. It is submitted that in this Act the relevant wording must be interpreted as indicating that the substantive provisions of the Act only related to works which were first published during the lifetime of the author after the coming into operation of the Act.

Section 7, which dealt with books first published posthumously, must be interpreted in a like manner notwithstanding that there is no specific reference to works pub-

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90. This is an unusual provision because the Act of 1896 granted copyright to artistic works **first published** before 1896 and as well as during and after that year until 31 August 1897. The effect of this provision was that an artistic work first published before 1896 enjoyed copyright under the Act of 1896; one made prior to or during 1896 and first published in that year or prior to September 1897 enjoyed copyright under the Act of 1896; and one made during 1896 or thereafter enjoyed copyright (once registered) under the Act of 1897, and if published during 1896 or the first eight months of 1897, enjoyed copyright under the Act of 1896 as well, i.e. two separate copyrights with two separate terms and possibly different owners.

91. See p 242 *supra*.

lished after its coming into operation. Any other interpretation to Sections 6 and 7 would lead to anomalous results as to the duration and first ownership of copyright in books first published prior to August 1897.

The Act made provision for the Registrar of Deeds to maintain registry books entitled *"Register of Copyright in Books"* and *"Register of Copyright in Works of Art"*, respectively, in which copyright in books and works of art, respectively, could be registered.[92] Certified copies of entries in the Register constituted prima facie proof of the proprietorship of copyright and other matters stated therein.[93] Any person aggrieved by any entry in the Registers could apply to the Supreme Court for such entry to be expunged or varied.[94]

The proprietor of the copyright in any serial work could register such work in the Register of Copyright in Books and that serial work thereupon enjoyed all the benefits of registration.[95]

In the case of books, registration of copyright was not a condition precedent for the subsistence of copyright but merely for the enforcement of that copyright. This point was specifically dealt with in Section 28 of the Act which stated that *"provided that the omission to register shall not affect the copyright of any book, but only the right to*

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92. Sections 10, 11 and 13.
93. Section 16.
94. Section 18.
95. Section 22. It is not clear whether a serial work first published prior to 31 August 1897 could be registered. It is thought not in view of the conclusion that the Act of 1897 only applied to works first published after 1897.

sue as aforesaid". By contrast, Section 29 provided that the proprietor of copyright in a work of art first made in Natal was not entitled to the benefit of the Act until he had registered his copyright. In conformity with this principle, Sections 24 and 25 which dealt with remedies available to the owner of copyright in an artistic work made specific reference to works of art "*in which there shall be registered copyright*". The corresponding provisions which dealt with the remedies available to the owner of the copyright in a book (Section 23) by contrast made reference to "*any book in which there shall be subsisting copyright*". Registration was thus a condition precedent for the subsistence of copyright in an artistic work in Natal under the 1897 Act but no time constraints were placed upon registration of copyright in an artistic work subsequent to the making thereof which meant that once the work had been made copyright could at any time thereafter be acquired by meeting the formal requirement of registration. After the making of a work of art and prior to registration thereof there was thus a *spes* of copyright.

As previously stated, the Copyright Act of 1896 conferred copyright upon every artistic work first published anywhere and registration was not a condition precedent for the subsistence of copyright in such a work. The Act of 1897 perpetuated that copyright although it did not become enforceable until registered either under the 1896 Act or under the 1897 Act.

In order to qualify for copyright, an artistic work must have been original.[96] On the other hand, it was not specifi-

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96. Section 8 which makes reference to "*every original work of art*".

cally stated that a book must have met this requirement in order to be eligible for protection. However, on the strength of British authority something which was a mere copy of a previous book was not entitled to protection.[97]

Unlike the Cape Act of 1873, which stated in its preamble that its purpose was to protect the rights of authors in that colony, the Act of 1897 was silent on the question of the national status of authors of works seeking protection. Accordingly, it would seem that as long as a book was first published in Natal or a work of art was made in Natal it was eligible for protection irrespective of the national status of the author.

After the passing of British International Copyright Act of 1886 first publication of a book in Natal was sufficient to cause copyright to subsist in the United Kingdom under the Copyright Act of 1842. Registration of such copyright in Natal was the equivalent of registration of copyright at Stationers Hall. In consequence, first publication of a book in Natal conferred upon that book not only copyright in Natal by virtue of the Natal Act of 1897 but also by virtue of the British Act of 1842, which extended to Natal.

The term *"copyright"* was defined in the Act of 1897 to mean *"the sole and exclusive right of multiplying copies of any work, whether by printing, copying, engraving or otherwise"*. The Act did not create any performing right in dramatic or musical works whereas the British Act of 1842 did confer such a right. Accordingly, the British copyright conferred upon a book of Natal origin had a wider scope than the Natal copyright conferred upon the same work.

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97. See p 127 *supra*.

Artistic works originating from Natal could in certain circumstances enjoy British copyright but such copyright did not extend to the colonies and therefore did not operate in Natal. The value of this British copyright was that, as will be shown below, it could pass through the 1917 Gateway and thereafter confer South African copyright on works originating from Natal.

(c) Authorship and Initial Ownership of Copyright

The term *"author"* was defined in Section 1 of the Act to mean *"the author, inventor, designer, engraver, or maker of any work, and in the case of a posthumous book means the proprietor of the manuscript"*. This definition did not, as pointed out previously, include the expression *"includes any person claiming through the author"*, as was the case in the Act of 1896. This was a distinct improvement on the corresponding definition in the Act of 1896. Attention is drawn to the fact that, as was the case in the Act of 1896, the author of a book first published posthumously was the proprietor of the manuscript. This did not, however, apply to artistic works but then copyright in artistic works was not dependent upon first publication, otherwise than under the Act of 1896.

Copyright vested initially, in the case of a book first published during the lifetime of the author, in that author (or in certain circumstances his assigns).[98] Copyright in a book first published posthumously vested in the proprietor of the author's manuscript from which the first published version

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98. Section 6.

of the book was derived, and thereafter in his assigns.[99] The position was the same as under the Act of 1896.

In terms of Section 19, where a publisher or any other person (for the purposes of Sections 19, 20 and 21 both these classes are collectively referred to as a *"publisher"* - perhaps "employer" would have been a more appropriate term) *"projected, conducted or carried on, or is the proprietor of"* any serial work, or of any book whatever, and employed any person to compose a serial work or book, or any volumes, parts, essays, articles or portions thereof for purposes of publication in, or as a part of any such serial work or book, the publisher was in certain circumstances the owner of the copyright in such a serial work or book and in all works composed for inclusion therein. The aforementioned circumstances were that the work must have been composed under such employment on the terms that the copyright in it would have belonged to the publisher, and must have been paid for by the publisher. In principle the copyright vested in the publisher for the full term save in the case of essays, articles or portions forming part of, and published in, serial works. In the case of these works, after the expiration of twenty-eight years from the first publication of the serial work incorporating them, the right of publishing such essays, articles or portion in a separate form reverted to the author for the balance of the term of copyright. During the twenty-eight year term before the reversionary rights came into operation the publisher was not entitled to publish any such essay, article or portion separately or singly without the prior consent of the author or his assigns.[100]

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99. Section 7.
100. Section 20.

The aforegoing provisions relating to works made under employment had their origins in Section 18 of the British Copyright Act of 1842. Under that Act it was held that actual payment by the publisher to the author was required before copyright vested in the publisher; a contractual obligation to make payment was insufficient.[101] In terms of Section 21, the aforegoing did not affect any right of separate publication reserved by a contributing author and he was in this instance entitled to the copyright in his individual work for purposes of publication in a separate form. This was, however, without prejudice to the copyright of the publisher in the collective work.

The aforementioned exception to the general principle applicable to the initial ownership of copyright was specifically stated in Section 19 to apply *"either before or after the passing of this Act"*. The Act of 1896 contained no similar provision. If this section is to be interpreted as applying to works first published prior to 31 August 1897, then it would mean that the initial ownership of some existing copyrights would *ex post facto* have been changed. This would have been in conflict with the provisions of Section 2 of the Act of 1897 which provided that the substitution of the Act of 1897 for the Act of 1896 did not affect any copyright subsisting under the earlier Act. Accordingly it is submitted that Section 19 applied to works made prior to 31 August 1897 but first published after that date; if such a work was first published prior to the aforementioned date the exception did not apply. The exception related to the circumstances of the making of the work and not of its first publication.

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101. **Richardson v Gilbert** 1 SIM.N.S. 336.

The author was the initial owner of an artistic work made in Natal (or in certain circumstances his assigns). An exception to the aforegoing principle was made in the case of a painting, drawing or a negative of a photograph sold, disposed of or made or executed for or on behalf of another person, for a good or valuable consideration after the passing of the Act. In the aforementioned circumstances the purchaser, assignee or commissioner of such a painting, drawing or negative of a photograph was the owner of the copyright unless the seller or maker of the work expressly reserved the copyright to himself in a written agreement entered into at or before the time of the transaction in question.[102] This exception applied to the copyright under the Act of 1897 which depended upon the making of the work but it did not apply to the possible concurrent copyright under the Act of 1896 which depended upon the **publication** of the work prior to 31 August 1897. Consequently the two separate copyrights could have been owned by different persons.

The term *"assigns"* was defined in Section 2 as including *"every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after publication, and whether acquired by sale, donation, legacy or by operation of law or otherwise"*. As in the case of the Act of 1896, it is apparent from this definition that, in the case of a book, the *spes* of the copyright to be created subsequently by first publication could prior to publication be assigned and upon first publication the copyright would then have vested initially in the assig-

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102. Section 8.

nee.[103] The same principle applied in essence to artistic works in which copyright was conferred upon and by registration. The *spes* of copyright to be created subsequently by registration could also be assigned and, upon registration, the copyright would have initially vested in the assignee.

The authorship and initial ownership of works granted copyright under the Act of 1896 was determined by that Act and perpetuated by the Act of 1897. As stated above the Act of 1897 did not *ex post facto* alter any ownership of copyright subsisting under the earlier Act. To have done so would have meant that vested rights would have been abrogated and it is submitted that the legislature must not be assumed to have done this unless the Act of 1897 contained specific provisions in that regard.

(d) Duration of Copyright

The term of copyright of a book published during the lifetime of the author was the natural life of such author and a period of seven years after his death, or a period of forty-two years from first publication of such book, whichever was the longer. In the case of a book first published posthumously, the term of copyright was forty-two years from the date of first publication of such book. The aforementioned terms of copyright were the same as those provided in the British Act of 1842. They were longer than the equivalent terms provided for in the Natal Act of 1896 and the Cape Act of 1873. As stated above, the Act of 1897 must be construed as not applying to works first published before 31 August 1897 and consequently the term of copyright provided for in

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103. This conformed with the position under the common law and under the Act of 1896.

the Act only applied to works first published after the aforementioned date.[104]

Copyright in a work of art endured for the lifetime of the author and for seven years after his death.[105] This term of copyright applied to all works of art made in Natal after the passing of the Act of 1896. As stated above[106] parallel copyrights in certain works could have subsisted under the Act of 1896 and the Act of 1897. The term of copyright granted by the Act of 1897 was longer than the term of copyright granted by the Act of 1896. This meant that the 1896 copyright would have expired two years earlier than the 1897 copyright. As pointed out above it was possible that the two copyrights could have vested in different persons.

(e) Transmission of Copyright

Copyright could be assigned as a whole or in part. Such assignment could be effected by means of an entry in the Register of Copyright.[107] In terms of the definition of *"assigns"* in Section 3, the copyright in a book could be assigned either before or after publication. A person qualified as an *"assign"* whether he acquired the copyright by means of sale, donation, legacy, or by operation of law or otherwise. The definition of *"assigns"* in the Act was identical to the corresponding definitions in the Cape Act

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104. See Sections 6 and 7 and in particular p 267 *supra*. See also the specific reference to *"after the passing of this Act"* in Section 6, read together with Section 2 which provided that the repeal of the Act of 1896 did not affect any copyright existing under that Act. To have granted the longer term of copyright to books first published prior to 31 August 1897 would have *"affected"* the copyright granted by the Act of 1896.
105. Section 8.
106. See p 267 *supra*.
107. Section 17.

of 1873 and the Natal Act of 1896. However, whereas both the aforementioned Acts, in making provision for an assignment of copyright to be effected by means of an entry in the Register of Copyright, stated that such an entry had the same effect as a written deed of assignment, Section 17 of the Act of 1897 contained no such similar provision. The question therefore arises whether copyright could be assigned by means of a written deed of assignment.

In the proviso to Section 8, which dealt with the initial ownership of copyright in sold or commissioned artistic works, provision was made for the author to avoid the copyright initially vesting in the purchaser or the commissioner by expressly reserving the copyright to himself *"by agreement in writing, signed at or before the time of such sale or disposition"*. This is one instance of what is in effect an assignment of copyright being made possible by means of a written agreement. As copyright was transmissible by sale or donation it was clearly possible for a transfer of the ownership of copyright to take place other than by registration. The British legislation on which the Act of 1897 was based allowed for the assignment of copyright to be effected by means of a written agreement. In the circumstances, it is submitted that copyright under the Act of 1897 could be assigned by means of a written agreement. The question then arises whether, apart from by means of registration and a written agreement, copyright could be assigned without compliance with any formalities at all. If copyright could be transmitted by sale or donation and no specific reference was made to the necessity of a written agreement of assignment, it could be argued that even an informal disposition of copyright could transfer the ownership of copyright. By contrast to Section 8, which required the author of an artistic work to make an express reserva-

tion of copyright in a written agreement, Section 21, which dealt with the rights of authors of works incorporated in a collective work and made during the course of employment, made reference merely to the *"right of separate publication reserved by the composer of any such composition"* without any specific reference being made of the reservation having to be in writing.

The Act made provision for a rebuttable presumption that the registered proprietor of copyright was the owner of such copyright. It would probably have been extremely difficult for the actual proprietor of copyright to rebut the presumption created by registration in another's name in the absence of his being able to adduce evidence of his acquisition of copyright in a written document. There was every incentive for a copyright owner, more particularly one who might have acquired copyright otherwise than by means of a written document, to record his title to copyright and facilitate proof thereof by means of registration. In practical terms, if ownership of copyright could be transferred by an informal transaction it is probable that such transfer of ownership would have been recorded in the Register and that act itself would have placed the transfer of the ownership of the copyright beyond all doubt. In purely practical terms, therefore, the transfer of ownership of copyright would have been effected either by means of a written agreement or by registration. Nevertheless, the possibility exists that an assignment of copyright might validly have taken place by means of an informal transaction.

It is submitted that the Act of 1897 regulated assignments of both 1896 and 1897 copyright which were effected after 31

August 1897.[108]

(f) Parallel British Copyright

After the passing of the British International Copyright Act of 1886 first publication of books in Natal gave rise to British copyright under the British Copyright Act of 1842. This copyright extended to Natal, as a British dominion. As in the case of 1896 copyright, under the Act of 1897 a Natal copyright owner thus enjoyed two parallel copyrights in his book, viz Natal copyright under the Act of 1897 and British copyright under the Act of 1842. An assignment of copyright entered into in respect of the copyright in a book first published in Natal after 1886 would have covered both copyrights unless the assignment stated the contrary.

By virtue of the fact that the Act of 1897 contained the same exceptions as the British Act of 1842 to the general rule that copyright in books vested initially in the author, in the exceptional circumstances both the Natal copyright and the British copyright would have vested in the same person, unlike the position under the Act of 1896 and under the Cape Act of 1873. This, of course, only applied to books first published in Natal after 31 August 1897.

Reference has been made to the point that the Natal Act of 1896 might have given rise to the interpretation that it qualified and limited British copyright subsisting in Natal by virtue of the provisions of the British Act of 1842. Section 5 of the Act of 1897, however, specifically provided that

> *"nothing in this Act, or in the Copyright Act of 1896, shall be deemed to lessen or to have lessened any*

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108. See p 264 *supra*.

rights in respect of copyright in Natal which existed prior to the passing of the Act of 1896 in virtue of any Act of the Imperial Parliament or any order of her Majesty in Council made thereunder".

It is strange that this section appears on the surface only to preserve rights under the British Copyright Act which existed in Natal prior to 1896 and not British rights existing during the currency of the 1896 Act. However, it is submitted that the provision must be interpreted as covering such rights as well as it would have been absurd to preserve British rights existing prior to 1896 and after 31 August 1897 but not during the interim period. The effect of Section 5 was that the British copyright which subsisted in Natal in terms of the British Act of 1842 was a parallel copyright and was unaffected by any Natal legislation.

Natal authors of paintings, drawings and photographs enjoyed British copyright under the British Fine Arts Copyright Act, 1862, and engravings and sculptures first published in Natal after 1886 in principle enjoyed British copyright under the relevant British copyright provided the relevant formalities were complied with. Such copyrights were discussed above in relation to the Natal Act of 1896; the same considerations are applicable in relation to this Act.

(g) Case Law

There are no known or reported cases dealing with either of the Natal Acts of 1896 or 1897.

(h) Recognition of "Foreign" Copyright

Certain of the enforcement provisions of the Act of 1897 were available to Cape copyright owners in respect of books or any other work in respect of which there was registered copyright. In order to avail himself of this protection, a

Cape copyright owner must have registered his copyright in the Cape Colony and must have given to the Collector of Customs of Natal a written notice together with a certificate confirming the existence of registered copyright in the Cape Colony.

(4) Act No. 44 of 1898 - Play Rights Act, 1898

(a) Types of Works Protected

This Act came into operation on 28 March 1899 and was clearly intended to emulate the British Dramatic Copyright Act of 1833 read together with the Copyright Act of 1842 which provided for a performing right in dramatic and musical works.

The Act dealt with rights in works which it called *"play right"* as distinct from "copyright" or from the performing right granted by the British legislation. It was perhaps unfortunate that the Natal legislature chose to use a different term, and in fact granted a wider right than, that contained in the British legislation because the British Act of 1911, which created the 1912 British Gateway, and the South African Act of 1916, which created the South African 1917 Gateway drew a sharp distinction between copyright on the one hand and performing rights on the other hand. As will be shown the Natal play right does not fit easily into this distinction.

The term *"play right"* was defined in the Act to mean:

> *"(a) The sole and exclusive right to represent, perform, act, play or exhibit any dramatic, operatic or musical work, being a tragedy, comedy, play, opera, farce, scene, pantomime (or its class)*

song, dance, or other scenic or musical or dramatic production or representation registered under this Act;

(b) *The sole and exclusive right of converting or adapting any work registered under this Act into any form, whether dramatic or otherwise".*

Paragraph (a) of the above definition corresponds basically with the performing right granted to dramatic and musical works in the British legislation. Paragraph (b), on the other hand, goes beyond anything contained in the British legislation and creates a wider right than a mere performing right.

The definition of *"play right"* must be read in conjunction with Section 13 of the Act which provided that an infringement of a play right occurred if any person, without the consent in writing of the proprietor or his agent, copied (which term was defined in the Act to mean *"to repeat or colourably imitate"*) any play right work, either by dialogue, scenic effect, or composition, or in any manner whatsoever, or if any person shall adapt, multiply, or publish, or expose for hire, sell, or import any imitation of any play right work, or any portion of any play right work".

It must be borne in mind that dramatic, musical and dramatico-musical works, insofar as they were published in book form, were granted copyright, in the normal sense of the word, by the British Act of 1842 and the Natal Act of 1897. To the extent that this Act protected such works in the manner outlined in Section 13 it appeared to create an overlap with the Act of 1897.

For the present purposes it is not necessary to define the scope of the infringement right in respect of a play right; all that is necessary, for purposes of the 1917 Gateway, is to determine whether the play right conferred upon a work anything more than a performing right, because if it did, then, upon passing through the 1917 Gateway, the play right would have been substituted by full copyright rather than simply by a performing right. It is submitted that in the light of the extended definition of the term "play right" in Section 2 of the Act, read together with Section 13, the play right was indeed something more than the performing right and that it qualified for substitution by a full copyright under the Act of 1916.

Section 15 of the Act specifically provided that play rights were deemed to be personal property.

(b) Conditions for Subsistence of Play Right

In order to qualify for protection under the Act, a work must have been *"first produced"* in Natal. The use of the term *"produced"* is unfortunate because it is capable of being interpreted as meaning either "created" or "performed". It is submitted that the latter is the correct interpretation of the term because the British legislation on which the Act was based utilized first performance as the criterion for protection and Section 6 of the Natal Act, which specified the information required to be inserted in the Registry Book, makes reference to the date of first performance in Natal.

In addition to being first performed in Natal, in order to qualify for protection under the Act a work was required to be registered in the Book of Registry maintained by the

Registrar of Deeds.[109] Section 17 of the Act provided that no proprietor of play right first produced in Natal was entitled to the benefit of the Act until his play right had been registered and that the play right could not be enforced prior to registration. This and other provisions of the Act make it perfectly clear that registration was a condition precedent for the subsistence of play right in a work. Prior to registration the author or his successor in title had no more than a *spes* of play right. No time limits were laid down in the Act for registration to take place and the play right could thus be registered at any stage after first performance of a work in Natal.

The proprietorship and any assignments of play right could be entered in the Register and a certified copy of an entry in the Register constituted *prima facie* proof of the subsistence of a play right and of the proprietorship thereof. Strangely enough, unlike in the case of all the other colonial registration systems considered thus far, the Act made no provision for a person aggrieved by an incorrect entry in the Register to rectify such entry. It did, however, provide that any person who made a false entry in the Register was guilty of an offence. It seems inconceivable that a false entry could not be rectified and possibly it was considered that the Supreme Court had inherent powers to rectify the Register.

After the coming into operation of the British International Copyright Act of 1886, a dramatic or musical work first performed in Natal would have enjoyed a performing right in Britain under the British legislation and such performing

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109. Sections 4 and 5.

right would have extended to Natal by virtue of the provisions of the British Copyright Act of 1842. This was, however, subject to the proviso that any relevant formalities prescribed by British law were complied with. As in the case of books under the Natal Act of 1897, parallel British and Natal rights would have subsisted in works first performed and registered in Natal. In this regard Section 18 of the Act provided that nothing in the Act lessened any rights in respect of play right in Natal which existed in Natal prior to the passing of the Act by virtue of Imperial legislation. The Natal rights and the British rights thus co-existed in parallel, although, as has been stated above, the scope of the Natal right was broader than that of the British right.

It was nowhere provided in the Act that the author of a work must be a Natal resident or citizen for the work to be eligible for play right under the Act and it would thus seem that as long as the first performance of the work took place in Natal, it qualified for protection and the national status of its author was of no consequence.

There is nothing in the Act to suggest that it only applied to, and conferred protection upon, works first performed after it came into operation. Section 10 of the Act mentioned that it confers protection upon works whether *"composed before the passing of this Act or not"* but the Act is silent on the question of works first performed prior to its commencement. Section 3 of the Act, read together with Section 18, says that the Act will apply to play right in Natal of works first produced in Natal save that it shall not be deemed to lessen any British rights which existed in Natal prior to its being passed. This is one instance at least when it was contemplated that the Act had some application

to works first performed in Natal prior to the date of the Act. Bearing in mind that the other Natal copyright legislation applied to works made before the dates thereof, and taking all the circumstances into account, including the unqualified statement in Section 3 that *"this Act shall apply to play right in Natal of works first produced in Natal"*, it is submitted that works first performed in Natal prior to 28 March 1899 qualified for registration under the Act and therefore were eligible for play right.

(c) Authorship and Initial Ownership of Play Right

The term *"author"* was defined in Section 2 of the Act to mean

> *"the inventor or writer or adaptor of any and every work capable of registration under this Act, and in the case of a posthumous work, means the proprietor of the manuscript"*.

The term *"assigns"* was defined in Section 2 of the Act to mean

> *"every person in whom the interest of an author or proprietor in play right shall be vested, whether derived from such author or proprietor, before or after the publication of any play right work, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise"*.

This definition coincided with the corresponding definition in the Natal Act of 1897.

When a work had been first performed in Natal a *spes* of play right came into being. Play right as such was not created until the work was registered. The *spes* vested in the author as defined but such *spes* was freely transmissible (apparently without formalities) prior to registration of

the work taking place and play right coming into existence. The "holder" or "owner" of the *spes* at any given time could register the work and become the proprietor of the registered play right.[110]

There were no exceptions to the general principle that the author was the initial claimant in respect of play right. This coincided with the position under British legislation.

(d) Duration of Play Right

The term of play right registered during the lifetime of the author of the work endured for the lifetime of such author and for a period of seven years after his death, or for a period of forty-two years from the date of registration of the work, whichever was the longer. Where a work was registered after the death of the author, the term of play right was a period of forty-two years from the date of registration. Bearing in mind that a work could be registered for play right any time after its first performance (there could thus have been a lapse of many years between first performance and registration) it was strange to calculate the term of protection on the basis of the date of registration; this meant that works could have enjoyed play right for a very long term - far longer than in the case of copyright in books.

The term of the performing right granted by British law was determined on a different basis to that of the Natal Act.[111] The result was that the parallel British and Natal rights could have terms of different length.

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110. Section 4 read together with the definitions of *"author"* and *"assigns"*.
111. See p 131 *supra*.

(e) Assignment of Play Right

Once registered, play right could be assigned by making an entry in the Book of Registry.[112] Unlike in the case of the Act of 1897, it was provided that an assignment effected by making an entry in the Register had the same effect as an assignment effected by means of a deed. Accordingly, the ownership of registered play right was also capable of being transferred by means of a written Deed of Assignment.[113]

An assignment of play right effected by means of an entry in the Register would not have had the effect of transferring the British performing right as it appears that such right could only be transferred by a written deed. An assignment of the performing right embodied in a written deed could, however, have transferred the ownership of both the British and Natal rights unless otherwise specified.

C. TRANSVAAL

(1) Act No. 2 1887 - Copyright Act

Roman-Dutch common law copyright subsisted in the Transvaal from the outset of its existence as a separate state.[114] During the period 1877 to 1881 (or possibly 1884) the Transvaal was a British dominion, and the British Act of 1842 would thus have conferred British copyright in the Transvaal

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112. Section 9.
113. See also the definition of *"assigns"* in Section 2.
114. See p 197 *supra* in regard to the recognition of the Roman-Dutch law in the Transvaal. It is submitted that such law included common law copyright.

(but such copyright would only have been enforceable for as long as the 1842 Act was operative in the Transvaal - i.e. whilst the Transvaal was a British dominion). The Transvaal passed its first copyright law on 23 May 1887. The Act pro vided in Section 24 that it would come into operation three months after publication in the Staatskoerant. Such pub-lication took place on 1 June 1887 which means that the Act came into operation on 1 September 1887. Unlike the Cape Act of 1873 which was already in existence and the Natal Acts of 1896 and 1897 which were to follow, the Transvaal Act was not derived from British legislation. It was derived from the Copyright Act of The Netherlands of 1881 and it adopted much of the wording of that Act verbatim. The style and basic approach differed substantially from that of the British, Cape and Natal legislation.

(a) Types of Works Protected

The Act conferred copyright on *"writings, engravings, maps, musical works, plays and oral lectures"*. The copyright owner was given the right to control the publication of such works and to perform or exhibit dramatic-musical works and plays in public. Accordingly, in respect of dramatic, musical and dramatic-musical works "copyright", within the meaning of this term as understood in the 19th Century, as well as the performing right were covered by the copyright, while in the case of the balance of works the protection consisted simply of copyright in the strict sense.[115]

The Act recognized collective works as separate works as distinct from individual works comprised therein.[116]

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115. Section 1.
116. Section 2.

Unless otherwise provided by the Government, there was no copyright in laws, resolutions, ordinances or any other notifications, both oral or in writing, made on behalf of any public authority.[117]

The Act made special provision for translations. As a general principle a translation was treated as being equivalent to any other verbal work.[118] However, where a work was simultaneously issued in several languages, only one version was considered to be the original work and the other versions were deemed to be translations. The author was entitled to designate on the title page, or failing that the cover, of the work which of the versions he considered to be the original version. If he failed to give any such indication, the version in the mother language of the author was deemed to be the original version. The question of whether or not a work or a version of it was the original work or a translation had relevance to the conditions for the subsistence of copyright and the duration of copyright, and will be dealt with below.

(b) Conditions for the Subsistence of Copyright

The Act was mainly concerned with works published by means of printing. It, however, contemplated the existence of copyright in unpublished works - more by way of presupposing that such copyright existed than by way of making provision for it - but in the absence of any copyright law protecting unpublished works existing in Transvaal prior to the passing of the Act, it must be interpreted as having

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117. Section 4.
118. Section 2.

created copyright in unpublished works. No conditions were, however, prescribed for the subsistence of copyright in unpublished works and the only requirement seems to have been that they should have been in existence, not necessarily in a material form as evidenced by the fact that it recognized oral lectures as a type of work eligible for protection. Nothing is said in the Act about the national status of the authors whose works fell within the compass of the Act or about where the works must have been made. Accordingly, it would seem that the unpublished works of foreign authors as well as domestic authors were protected. In this and other respects the protection granted to unpublished works under the Act showed a large measure of similarity to British common law copyright in unpublished works.

The fact that the Act protected unpublished works of both foreign and domestic origin is of considerable significance to the 1917 South African Gateway because all unpublished works which enjoyed copyright in the Transvaal at the time of the 1917 Gateway would have passed through that Gateway and would have been granted substituted rights under the Act of 1916. The works of foreign origin which would have qualified for substituted rights under the 1916 Act in this way would have included works originating from all parts of South Africa as well as abroad.

The Act protected works made before it came into operation although it laid down formal requirements in respect of published works. These will be dealt with below. In the case of unpublished works, however, no qualifications were made to the protection which they enjoyed under the Act. In the case of published works the Act perpetuated the common law copyright provided the formalities laid down in the Act were complied with. By making the continued subsistence of

copyright in existing published works and the creation of copyright in future works conditional upon the compliance with formalities, the Act in effect repealed the common law copyright.

Where a work was published by means of printing, the current copyright owner, the publisher or the printer was required to lodge with the Registrar of Deeds within two months after the issue of the published version of the work, three copies of the work all signed on the title page, or failing that on the cover. The aforementioned endorsement was required to mention the place of residence of the person signing the copies and the date of issue of such copies. The Registrar of Deeds issued a certificate stating the date of the first issue of copies of the work.[119] It is not clear whether the three copies of the work lodged with the Registrar of Deeds were required to be signed by the author or by the person lodging them with the Registrar (i.e. an assignee, the publisher or the printer). There is nothing in the Act to suggest that it did not protect works first published in printed form posthumously (the common law protected such works) and in this instance the copies lodged with the Registrar of Deeds could obviously not have been signed by the author. Accordingly the correct interpretation appears to be that the copies must have been signed by the person lodging them.

- The three copies lodged with the Registrar of Deeds were required to be accompanied by a sworn declaration made by a printer with a place of business in the Transvaal stating that the copies in question had been printed at his estab-

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119. Section 10.

lishment in the Transvaal.[120] This provision was later relaxed by a resolution of the Second Volksraad dated 1 June 1895 (Article 296) which provided that the State President could by proclamation confer the benefits of the Act on all works eligible for copyright printed or published in any state or colony which granted reciprocal protection to works issued and printed in the Transvaal. This provision did not appear to have any practical effect since neither the Cape nor Natal granted such reciprocal protection to Transvaal works.[121]

The copyright in a work comprised the right to issue printed publications of that work. Where the original work was published by means of printing in order to perpetuate the exclusive right of publishing printed translations in other languages the author was required to specifically reserve to himself the exclusive right in specified languages at the time of first publication. This had to be done by means of an endorsement on the title page, or failing that on the cover, of the original issue of the work. Thereafter, translations in the reserved languages must have been published within three years after the issue of the original version of the work. In the case of works which consisted of separate volumes or numbers the three year term was calculated separately in respect of each volume or number.[122] The manner of determining which version of a work published in

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120. Section 10.
121. The Natal Act of 1896 protected works first published in the Transvaal and this form of protection probably complied with the Transvaal's requirements as to reciprocity. However, this reciprocal protection was short lived and ceased with the coming into operation of the Natal Act of 1897. See p 263 *supra*.
122. Section 5.

several languages was the original version is described above.[123]

The performing rights in dramatic works and dramatic-musical works were required to be specifically reserved upon first publication, and if they were not they fell into the public domain. Such reservation must have appeared on the title page, or failing that the cover, of the original issue of the work.[124]

Upon receipt of the required copies lodged with him, the Registrar of Deeds issued a certificate. Unlike in the case of the other provincial statutes, the Transvaal Act did not specifically provide that a certificate issued by the Registrar constituted *prima facie* proof in court proceedings. On the other hand, the system provided for in the Act was in essence a deposit system rather than a registration system. The Registrar of Deeds was not required to keep a register and no further record was kept of the ownership of the works after the initial deposit. Presumably the fact of deposit, a necessary formality for the continued subsistence of copyright in works published in a printed form, could be proved by means of a certificate issued by the Registrar of Deeds.

It is significant that Section 10, which deals with the requirement of the deposit of copies of the published version of a work with the Registrar of Deeds, makes reference to the copyright "lapsing" in the event of failure to comply with the post-publication formalities. This confirms the

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123. See p 290 *supra*.
124. Section 12.

existence of common law copyright in published works. The Act recognized the common law copyright for an initial period but provided for it to lapse if the prescribed formalities were not complied with.

Although the Transvaal Act makes reference to *"original"* works, the term is used in the context of the initial version of a work rather than in the context of "originality" as a condition for the subsistence of copyright. This approach would have been consistent with the development of copyright in The Netherlands.

The Act was retrospective in effect and it recognized copyright in works made before its passing. This principle was subject to the qualification in the case of works published in printed form that the copyright owner, the publisher or the printer must within six months of the Act coming into operation have lodged with the Registrar of Deeds three copies of the work, which copies were required to comply with the same formalities as those in respect of works first published in printed form after the coming into operation of the Act. The copies lodged were required to state the date of first publication of the work and that date was regarded as the date of commencement of the term of copyright.[125] Lodging of copies as aforementioned was confirmed by the Registrar of Deed by means of a certificate.[126] Any common law copyright not registered in this way thus lapsed on 1 March 1888.

The concept of publication in a printed form was not described or defined in the Act. Bearing in mind the origins

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125. Section 20.
126. Section 21.

of the Act, it is submitted that it took place when a freshly printed type set version of a work was multiplied and copies so produced were issued to the public. This is an important issue because if a work was **unpublished** in printing copyright subsisted in it without compliance with any formalities.

(c) Authorship and Initial Ownership of Copyright

Ownership of copyright under the law vested initially in the author.[127] The compiler of a collective work consisting of separate individual works was regarded as the author and initial copyright owner of the collective work but the authors of the component works retained the ownership of the copyright in their individual works unless otherwise agreed to the contrary. Translators were considered to be the authors and initial owners of their translations of works of others.[128]

Section 2 (b) of the Act provided that *"public institutions, associations, establishments and partnerships"* were the authors and initial copyright owners *"in respect of the works provided by them"*. This provision in effect states that juristic persons and quasi-juristic persons were considered to be the authors and initial owners of works made by their employees. The sub-section did not, however, apply to employers who were individuals, as distinct from partnerships. It must be pointed out that the sub-section must not be construed as simply making the relevant employers the initial copyright owners, but as actually constituting them as the authors of works made by their employees.

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127. Section 1.
128. Section 2.

In the case of anonymous or pseudonymous works published in a printed form the publisher was considered to be the author and initial copyright owner provided his name was mentioned on the title page or failing that on the cover of the work. If not, the printer was deemed to be the author and initial copyright owner. This position obtained unless and until the name of the author was disclosed, whereupon he became entitled to the copyright provided the provisions relating to the deposit of three signed copies were complied with afresh, save that the two month time limit for lodging such copies after first publication no longer applied.[129]

The term *"author"* was not defined in the Act and it must therefore generally be given its ordinary meaning, namely, the maker of the work.

(d) Duration of Copyright

The copyright in works which were not published in a printed form (including oral lectures) endured for the lifetime of the author and for thirty years after his death.[130]

The performing rights in dramatic-musical works or plays which were published in printed form and in which the performing right was reserved enjoyed protection for ten years after the date of lodgement of the required copies with the Registrar of Deeds.[131]

The right to publish translations in printed form where the original work had been published in printed form endured for

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129. Section 3.
130. Section 14.
131. Section 15.

a period of five years from the date of the lodgement of the required copies with the Registrar of Deeds.[132]

Save for the aforegoing, the copyright in all works published in a printed form endured for fifty years from the date stated in the certificate issued by the Registrar of Deeds as being the date of the first issuing of copies of the work. In the event that the author was still alive at the expiration of this term and had not assigned the copyright, the term of copyright was prolonged up to the death of the author. This exception, however, applied only in the case of authors who were natural individuals and in addition did not apply in the case of compilers of collective works.[133]

In the case of works first published in printed form before the Act came into operation, the fifty year term of copyright dated from the date of actual issue of the original printed versions of the work.[134]

In the case of works consisting of different volumes or numbers, the term of copyright was calculated separately in respect of each volume or number.[135]

(e) Transmission of Copyright

Copyright was deemed to be movable property and it could be ceded or assigned in whole or in part. It could also be transmitted by way of inheritance. It was not liable to attachment.[136]

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132. Section 16.
133. Section 13.
134. Section 20.
135. Section 17.
136. Section 9.

No formalities were laid down for a cession or assignment of copyright. As the Act is not based on any of the British copyright statutes in which generally speaking an assignment of copyright was required to be in writing, it cannot necessarily be assumed that there was any such requirement under the Transvaal Law. Copyright may thus have been assignable otherwise than in writing. For instance, the acquisition of the ownership of the original manuscript of a work may by implication have included the acquisition of the ownership of the copyright in the work in question.

(f) Parallel British Copyright

As has been shown, after the passing of the British International Copyright Act of 1886, works first published in a British dominion were treated under British copyright law in the same way as works first published in Britain. This only became a factor in the Transvaal after 1 September 1900 when Britain formally annexed the Transvaal. From that time onwards and until after 1917 Transvaal was a British dominion.

After 1 September 1900 any "book" first published in Transvaal enjoyed protection under the British Act of 1842. Lodging of copies of the book with the Registrar of Deeds in terms of the Transvaal Act, although not registration in the strict sense, probably was deemed to be the equivalent of registration at Stationers Hall. In any event, registration at Stationers Hall was not a condition for the subsistence of copyright, but simply for the enforcement thereof in Britain. The British copyright in a book first published in the Transvaal also extended to the Transvaal after 1 September 1900, the Transvaal then being a British dominion. Accordingly, after the aforementioned date a book first pub-

lished in the Transvaal enjoyed parallel copyright under both the Transvaal Act and the British Act of 1842. The ownership and duration of such separate copyrights were determined by the individual Acts from which they were derived and they thus had different durations and could have vested in different persons. An assignment of copyright in the Transvaal executed after the aforementioned date, if in writing, would have operated to transmit the ownership of both copyrights unless a contrary indication appeared therefrom. An unwritten assignment, if valid under Transvaal law, would not have operated to transmit the ownership of the British copyright because a written deed was necessary to assign British copyright.

The same considerations applied to performing rights in musical and dramatic works and these works would likewise have enjoyed British copyright under the Dramatic Copyright Act, 1853, read together with Section 20 and 21 of the Copyright Act of 1842. British law at the relevant time only granted a performing right in a published musical work if express reservation of that right was made on the title page of each copy released to the public. This formal requirement went further than the equivalent formalities under the Transvaal Act which merely required that the name of the copyright owner should appear on the three copies of a work lodged with the Registrar of Deeds. It is thus possible that many musical works first published in the Transvaal during the relevant time did not comply with the aforementioned British formality and they would thus have fallen into the public domain as far as their performing rights under British law were concerned, after first publication in the Transvaal.

Prints or engravings first published in the Transvaal after 1 September 1900 in principle will have enjoyed copyright in Britain under the British legislation granting copyright in such works, namely, the Engraving Copyright Acts, 1734 and 1736, the Prints Copyright Act, 1776, the Prints and Engravings Copyright (Ireland) Act, 1836 and Section 14 of the International Copyright Act, 1852. It was, however, a requirement for the subsistence of copyright under British law that the date of first publication and the name of the proprietor should be engraved on the plate and should appear on each print. In some circumstances compliance with the Transvaal formalities of having the name of the copyright owner and the date of first publication appear on the three copies lodged with the Registrar of Deeds might have led to works complying with the British formalities as well. The British formalities required the relevant information to appear on all copies of the work issued whereas the Transvaal formalities only required that this information should appear on the three copies lodged with the Registrar of Deeds. In the event that the British formalities were not complied with the print or engraving would have fallen into the public domain as far as British copyright law was concerned. The British legislation dealing with prints did not extend to the British dominions with the result that any British copyright subsisting in a Transvaal work would not have extended to the Transvaal. However, as will be shown below, such copyright could have passed through the British 1911 Gateway and the South African 1917 Gateway and could have become operative in South Africa after 1917. The ownership and duration of any British copyright subsisting in a Transvaal print or engraving would obviously have been determined by the British legislation and such duration and ownership might have differed from the duration and ownership of the Transvaal copyright.

(2) First Volksraad Resolution, 20 June, 1895 - Article 420

As stated above, the Copyright Act was amended by a Resolution of the Second Volksraad dated 1 June 1895 which made provision for published works printed outside the Transvaal to enjoy protection under the Transvaal Act provided the territory of origin of the works granted reciprocal protection to Transvaal works. This Resolution of the Second Volksraad was confirmed by the First Volksraad on 20 June 1895 in Article 420.

(3) Proclamation No. 24 of 1902 - Copyright in Military Maps

This Proclamation was made on 19 April 1902, after the Transvaal had been annexed by Britain in 1900 and immediately prior to the Treaty of Vereeniging signed on 31 May 1902. It dealt with copyright in the Transvaal in British military maps. It is doubtful whether the Proclamation was strictly speaking necessary save to the extent that the maps might have been published in the Transvaal prior to 1 September 1900, the date of formal annexation of the Transvaal by Britain. Maps were classified as "books" under the British Copyright Act of 1842 and any maps first published in the Transvaal after 1 September 1900 would have enjoyed copyright in Britain and that copyright would in terms of the British Act of 1842 have extended to South Africa. As long as the maps remained unpublished they would have been protected under the Transvaal Law of 1887, despite being British. Perhaps it was considered to be politically expedient to claim copyright in both published and unpublished military maps of the Transvaal under Transvaal legislation rather than under British legislation. Another

possible explanation is that a simple and unambiguous form of protection which did not involve the niceties of constitutional law and the annexation of the Transvaal by Britain in the middle of the Second Boer War, was desired.

(a) Types of Works Protected

Maps and the like types of works were eligible for copyright under the Act of 1887. Nevertheless the 1902 Proclamation conferred copyright *"in all maps of His Majesty's South African Dominions made and compiled by the Field Intelligence Department of His Majesty's forces in South Africa, and published in this Colony"*.[137]

(b) Conditions for the Subsistence of Copyright

The maps were required to be published in the Transvaal and within two months of such publication three copies thereof signed by someone authorized by the General Officer Commanding in Chief His Majesty's Forces in South Africa must have been deposited with the Registrar of Deeds in Pretoria. No transitional provisions were incorporated in the Proclamation and this suggests that it only applied to maps published after the date of the Proclamation or within two months prior to the date of the Proclamation. The maps were exempted from compliance with any further formalities laid down in the Law of 1887. The maps were, however, regarded as enjoying all the benefits of the Act of 1887 - in other words they were deemed to have been duly copyrighted under that Act.[138]

(c) Authorship and Initial Ownership of Copyright

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137. Section 1.
138. Section 2.

The General Officer Commanding-in-Chief his Majesty's Forces in South Africa was deemed to have been the author of any map covered by the Proclamation and he was the initial copyright owner.[139]

(d) Duration of Copyright

Copyright in a map covered by the Proclamation enjoyed the normal term of copyright prescribed for a published map in the Act of 1887.

(e) Transmission of Copyright

No provision was made in the Proclamation for the transmission of the copyright in a map covered by it but presumably the ownership of such copyright could have been transferred in the manner in which the copyright in other maps protected by the Act of 1887 could have been disposed of.

(f) Parallel British Copyright

As stated above, the maps would have enjoyed parallel copyright in the Transvaal in terms of the British Copyright Act of 1842 and such parallel copyrights had different terms. At least in theory the ownership of the separate copyrights could have vested in different persons, depending upon the provisions in that regard of the two pieces of legislation.

D. ORANGE FREE STATE

Although no copyright legislation was adopted by the Orange Free State while it had a separate existence, after 1842 the

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139. Section 1.

British Copyright Act of that year would have applied in the territory at all times when it was a British dominion. Furthermore, the Roman-Dutch common law copyright continued unabated in the Orange Free State until 1917 when it was terminated by the Act of 1916.

E. UNION OF SOUTH AFRICA

After the creation of the Union of South Africa in 1910 copyright in South Africa desperately required reformation and consolidation. Three of the four provinces each had their own copyright legislation and the provisions of such provincial legislation were not easily reconcilable. The Orange Free State had no copyright legislation although works originating from the Orange Free State enjoyed copyright in certain circumstances, as outlined above, in Natal and the Transvaal, and common law copyright prevailed.

Shortly after the formation of the Union the British Copyright Act of 1911 was passed and it repealed the early British Copyright legislation in Britain, although not in the self-governing dominions, including South Africa. The British Act of 1911, known as the "Imperial Act", was not automatically operative in South Africa although it was eligible for adoption with or without qualifications.

It took six years after the formation of the Union of South Africa before the Union legislature devoted its attention to consolidating and modernizing intellectual property law, including copyright, in South Africa. With the aftermath of the formation of the Union and the immense task of consolidating and standardizing the laws of the unified country, taken together with the outbreak of the First World

War in 1914 it is hardly surprising that this hiatus period occurred. With the passing of the Patents, Designs, Trade Marks and Copyright Act, 9 of 1916, which came into force on 1 January 1917, South African copyright law was properly consolidated. The coming into operation of this Act marked the commencement of modern South African copyright law.

8. TYPES OF WORKS NOT PROTECTED IN SOUTH AFRICA PRIOR TO 1917

The following types of works eligible for copyright under the South African Copyright Act, 1978, did not enjoy protection under any of the laws in operation in South Africa prior to 1917:

(a) Works of artistic craftsmanship and works of craftsmanship of a technical nature, unless they qualified as sculptures.
(b) Works of architecture, being buildings or models for buildings.
(c) Stories reduced to a material form in a cinematograph film or music reduced to a material form in a gramophone record or other mechanical contrivance. As in the case of early British legislation, however, these types of works probably enjoyed a performing right.[140]
(d) Sound recordings.
(e) Cinematograph films.
(f) Broadcasts.
(g) Programme carrying signals.

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140. See p 144 *supra*.

The balance of the types of works enjoyed copyright under one or more of the pieces of legislation in operation in South Africa but not necessarily in all the territories. However, as will be shown below, for a copyright to pass through the 1917 Gateway and to be substituted by a "new" copyright under the Act of 1916 with countrywide force and effect it was sufficient that it subsisted in only one of the territories which became part of the Union of South Africa.

CHAPTER V

COPYRIGHT UNDER THE PATENTS, DESIGNS, TRADE MARKS AND COPYRIGHT ACT 9 OF 1916

1. INTRODUCTION

With the coming into being of the Union of South Africa on 31 May 1910 there was a distinct need to unify the laws of the Union and the legal institutions as well as the practice of law. In May 1911 a Commission was appointed to undertake the consolidation of the laws. This Commission consisted of Lord de Villiers, the then current Chief Justice, Sir James Rose Innes and Mr W. Schreiner. Amongst the laws which this Commission was required to consolidate were the laws relating to patents, trade marks, designs and copyright. The work of the Commission gave rise to the Patents, Designs, Trade Marks and Copyright Act, 9 of 1916 which came into operation on 1 January 1917.

The Act of 1916 was divided into five chapters of which chapter IV dealt with copyright. The passing of this Act marked the beginning of the modern era of South African copyright law. Although this Act was subsequently followed by two further Copyright Acts the foundations of the basic principles and concept of modern South African copyright law were laid in this Act. Insofar as these basic principles and concepts are set forth in Chapter II of this work they apply equally to copyright under the Act of 1916 unless the contrary is stated.

In 1916 South Africa was a self-governing dominion within the British Commonwealth. The Imperial British Parliament had in 1911 passed the Copyright Act of that year, the so-

called "Imperial Copyright Act". This Act consolidated the British copyright law and at the same time complied with the minimum requirements of the Berlin text of the Berne Convention dating from 13 November 1908. Section 25 of the British Act of 1911, while providing in principle that the Act extended throughout the British dominions, stated that it would not extend to a self-governing dominion unless the legislature of that dominion declared it to be in force either with or without modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies or as may be necessary to adapt it to the circumstances of that dominion.

Section 26 of the British Act of 1911 empowered the legislature of any self-governing dominion to repeal at any time all or any of the enactments relating to copyright passed by the British parliament to the extent that such enactments were operative within that dominion. This power was subject to the proviso that no such repeal would prejudicially affect any rights existing at the time of the repeal. Thereafter the dominion would cease to be a territory to which such an enactment extended.

Section 26(2) of the British Act of 1911 provided that, insofar as prior legislation repealed by the British Act of 1911 extended to a self-governing dominion, such prior legislation remained in force until such time as it was repealed by the legislature of that self-governing dominion.

When the aforementioned consolidation commission commenced its work it was thus faced with the situation that the legislature of the Union of South Africa had a discretion to introduce the British Act of 1911 with or without modifications. Until such time as it did so the British Copyright Act of 1842 and the International Copyright Act of 1886

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would continue to apply in all four provinces along with the domestic laws of each of those provinces. As has been shown in Chapter IV the domestic laws of the four provinces varied considerably and in the case of the Cape and Natal consisted of statutory law based on some but not all of the various early British Copyright Acts, while in the Transvaal there existed legislation based on the Dutch Copyright Act of 1881 and in the Orange Free State there was no legislation at all, only Roman-Dutch common law copyright. This amounted to a true mêlèe of different copyright laws. The Commission opted for the course of adopting the British Act of 1911 with a few relatively minor variations to cater for local circumstances. The way in which this was put into effect was that the British Act of 1911 was incorporated in its entirety as the Third Schedule to the Act of 1916 and this Schedule was made applicable to South Africa subject to the variations introduced in Chapter IV of the Act of 1916. Amongst the special provisions made in Chapter IV of the Act of 1916 were transitional provisions relating to the domestic laws of the four provinces - the statutory laws of such provinces were referred to as the "Provincial Copyright Acts". All the Provincial Copyright Acts (i.e. all the Acts dealt with in Section 7 of Chapter IV above, save for the first of the two Natal Acts of 1896) were specifically repealed by the Act of 1916. The various registers maintained under the Provincial Copyright Act were incorporated into the central register for which provision was made in the Act of 1916.

In terms of Section 160 of the Act of 1916 no person was entitled to copyright or any other similar right in any literary, dramatic, musical or artistic work, whether published or unpublished, otherwise than in accordance with the Act or any other statutory enactment for the time being in force. This provision repealed any common law copyright

which was in existence at the time of the coming into operation of the Act of 1916 but it was specially provided that this repeal of common law copyright was not to be construed as abrogating any right to restrain a breach of trust or confidence. This remedy to restrain a breach of trust or confidence has been held by the South African courts to be a principle of the English common law which has no application in South Africa.[1]

In the light of the provisions of Sections 41 and 43 of the Copyright Act 1978, which deal with the transitional provisions of the current law, the following discussion of the Act of 1916 will be limited to those provisions which are relevant to the ownership, duration and subsistence of copyright under it. Attention will first be given to the provisions of the Act of 1916 as they applied to works made after the Act came into operation and thereafter attention will be devoted the transitional provisions of the 1916 Act and to the complexities surrounding the 1917 Gateway.

In terms of Section 43 of the 1978 Act, strictly speaking it is only necessary to determine which works were capable of enjoying copyright under the 1916 Act as, although the 1978 Act is retrospective, subject to certain exceptions, it cannot create a copyright in a pre-1965 work which did not exist under the 1916 Act. Strictly speaking the ownership, duration and continued subsistence of works made prior to 1965 is determined by the Copyright Act, 1965. However, it will be shown in Chapter VI that where it deals with the

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1. See for instance **Northern Office Micro Computers (Pty) Limited & others v Rosenstein**, 1981 (4) SA 123 (C). See also **"Die Derde Maal is Skeepsreg"**, HJ van der Westhuizen, (1979) 4 TRW 2 and **"Outeursreg en Persoonlikheidsregte : 'n Teoretiese Analise met Verwysing na Outeursregbevoegdhede in die Suid-Afrikaanse Reg"**, J Neethling (1975) 38 THRHR 332.

ownership, duration and continued subsistence of copyright in works made prior to 1965, the 1965 Act substantially preserves the position which obtained under the 1916 Act. It is therefore necessary in addition to analyze the provisions of the 1916 Act as to the ownership, duration and continued subsistence of copyright regulated by it.

2. COPYRIGHT IN WORKS MADE AFTER 1 JANUARY 1917

A. CLASSES OF WORKS PROTECTED

The British Copyright Act granted protection to original literary, dramatic, musical and artistic works.[2] Certain cinematograph films were treated as a *species* of the *genus* "dramatic works" and sound recordings were protected as if they were musical works.

In view of the provisions of Sections 43(a) and (c) of the 1978 Act, the precise definitions of the aforementioned classes of works are very relevant. They are discussed below.[3]

(1) Literary Works

The term *"literary work"* was defined to: *"include[s] maps, charts, plans, tables and compilations"*. The term "literary work" was used and interpreted in the same sense as is discussed in Chapter II in dealing with the meaning of this term under the Copyright Act, 1978.[4] Lectures and other works which did not exist in tangible form but were pro-

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2. Section 1(1) of the Third Schedule.
3. Section 35(1) of the Third Schedule comprises the definitions of the various categories of works.
4. See p 14 *supra*.

tected under the old British legislation were no longer protected.

(2) Dramatic Works

The term *"dramatic work"* was defined to:

> *"include[s] any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character".*

The distinction between "copyright" in the strict sense and "performing right" which existed under the pre-1912 British legislation was done away with in the British Copyright Act of 1911 and the copyright in a dramatic work under the Act comprised both these rights.

(3) Artistic Works

The term *"artistic work"* was defined to:

> *"include[s] works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs".*

A number of terms in the aforegoing definitions were themselves defined in the Act:

(i) *"works of sculpture" - "includes casts and models";*

(ii) *"architectural works of art" - "means any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction";*

(iii) *"Engravings" - "include etchings, lithographs, wood cuts, prints, and other similar works not being photographs"*. Maps, charts and plans had been capable of protection as engravings under the pre-1911 legislation, as an alternative to being protected as literary works, but this ambiguity was eliminated in the Act of 1911 which ceased to regard these types of works as artistic works in general or engravings in particular.

(iv) *"Photograph" - "includes photo lithograph and any work produced by any process analogous to photography"*. The individual frames of a cinematograph film were considered to be and were protected as photographs.

As in the case of literary works, the term "artistic works" were understood in the same sense as currently used in the Copyright Act, 1978, and as discussed in Chapter II above. The question of artistic works which corresponded to industrial designs is discussed below.

(4) Musical Works

There was no definition of this category of work. It will be recalled that the Musical (Summary Proceedings) Act, 1902 contained a definition of musical work, namely *"any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced"*.[5] **Copinger and Skone-James on the Law of Copyright**, 8th Edition,[6] contends that the term "musical works" should be given this same definition in the Act of 1911. This seems logical and the effect would have been that a musical work must have existed in a printed or written

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5. See p 130 *supra*.
6. at p. 65.

form, which is consistent with the position today, save that under the Act of 1978 the work can be embodied in any material form, which would include embodiment in a magnetic tape.

In the so-called "**Redwood case**"[7] it was held that a song which consists of words and music is a composite work consisting of a separate and distinct musical work and literary work and not a single dramatic-musical work as would have been the case under pre-1912 legislation. The same would apply to an opera or a so-called "musical production".

As in the case of dramatic works, the copyright in a musical work under the Act of 1911 comprised both "copyright" in the strict sense and the performing right.

(5) Cinematograph Films

As mentioned above in the definition of *"dramatic work"*, recognition was given to *"any cinematograph productions where the arrangement or acting form of the combination of incidents represented give the work an original character"*. The term *"cinematograph"* was defined as *"includ[ing] any work produced by any process analogous to cinematography"*. In terms of the aforegoing definition a documentary film which did not have a plot and actors would not have constituted a cinematograph film *qua* dramatic work although the individual frames would nevertheless have constituted "photographs" and thus "artistic works". In the case of a so-called "feature film" two copyrights would have subsisted, namely, a

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7. **Redwood Music Ltd v Francis, Day and Hunter Ltd** (1978) RPC 429 (QBD); **Redwood Music Ltd v Feldman (B) & Co. Ltd** (1979) RPC 1 (QBD); **Redwood Music Ltd v Feldman (B) and Co** (1979) RPC 385 (CA); culminating in **Chappell and Co. Ltd v Redwood Music Ltd; Redwood Music Ltd v Francis, Day and Hunter Ltd** (1981) RPC 337 (HL).

copyright *qua* dramatic work and a copyright in the sequence of frames *qua* "photographs" and thus "artistic works".

(6) Sound Recordings

Provision was made for sound recordings in Section 19(1) of the Third Schedule, the relevant part of which read *"copyright shall subsist in sounds, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced"*. These *"sound recordings"* were, in terms of the Section, protected *"in like manner as if such contrivances were musical works"*.

B. CONDITIONS FOR SUBSISTENCE OF COPYRIGHT

For copyright to subsist in one of the categories of works recognized by the 1916 Act, in the case of a published work, the work must have been first published in South Africa or in a territory to the works of which the 1916 Act was extended, and in the case of an unpublished work, the author must at the date of the making of the work have been a British subject or resident in South Africa or a person who was the citizen of or was resident in a country to the works of which the operation of the Act had been extended.[8] For a protected unpublished work to continue enjoying protection after first publication, first publication must have taken place in South Africa or an appropriate country. A work which might have been made by an appropriate person and thus enjoyed protection while unpublished ceased to enjoy protection if first publication did not take place in South Africa or an appropriate country. The question of which foreign works enjoyed protection in South Africa will be dealt with separately below.

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8. Section 1(1) of the Third Schedule.

The 1916 Act, read together with the Third Schedule, conferred upon the Governor-General powers to extend the operation of the Act to various countries and various proclamations were made from time to time dealing with the extension of the Act to other countries. It is beyond the scope of this treatise to deal with all these various proclamations but a list of them is conveniently set out in the Third Schedule to Proclamation No. R73, 1966 published in Government Gazette No. 1402 dated March 18, 1966, in terms of Section 32 of the Copyright Act, 1965. The Second Schedule to such Proclamation conveniently sets out a list of the countries to which the 1916 Act was extended together with the date in each case upon which the extension took effect.[9] The only omission from this table of countries, which consists basically of countries which were at the time members of the Berne Convention and/or were British dominions, is the United States of America. South Africa entered into a bilateral agreement with the United States of America in 1924 and a Proclamation extending protection to works emanating from the United States of America was published under the 1916 Act in Proclamation No. 118 of June 13, 1924.[10]

The term *"publication"* or *"publish"* was defined in Section 1(3) of the Third Schedule read together with Section 35(2) and (3) thereof. *"Publication"* meant in relation to any work the issue of copies of the work to the public. The performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of

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9. See p 363 *infra*.
10. See p 364 *infra*.

art did not constitute publication. Nor did the issue of photographs and engravings of sculptures and architectural works constitute publication of those works. A work was not deemed to have been published or performed in public and a lecture was not deemed to have been delivered in public if this occurred without the authority of the copyright owner.

In terms of Section 35(3) of the Third Schedule a work was deemed to be published simultaneously in more than one place if such publications took place within fourteen days of each other. A work was considered to have been first published in South Africa or in an appropriate country notwithstanding the fact that it had been simultaneously published in South Africa or that appropriate country and some other place simultaneously provided the publication which took place in South Africa or the other appropriate country was not merely colourable and was intended to satisfy the reasonable requirements of the public. Section 35(4) of the Third Schedule provided that, where the making of a work extended over a considerable period, the author would have been considered to have been an appropriate person if he met the qualifications therefor during a substantial part of that period. Section 35(5) of the Third Schedule provided that an author was deemed to be resident in South Africa or an appropriate country if he was domiciled in any of those territories.

Insofar as it is relevant to the place of residence of an author, the Third Schedule provided in Section 19(1), dealing with "sound recordings" and "photographs", that a body corporate was deemed to reside in a territory if it had established a place of business within that territory.

In addition the general requirements described in Chapter II above applied to works under the Act of 1916. Furthermore,

specifically in the case of a cinematograph film qualifying as a "dramatic work", the film must have comprised an arrangement or acting form of the combination of incidents represented to give the work an original character.[11]

The pattern of the extension of the 1916 Act to other territories was to make the provisions of the Act applicable to a particular country as from a specified date. The effect of such a measure was that, as from the specific date, copyright was extended to works emanating from that country whether made before or after that specified date.[12]

C. AUTHORSHIP AND INITIAL OWNERSHIP OF COPYRIGHT

Save in the case of photographs and "sound recordings", neither the 1916 Act nor the Third Schedule defined or specified the identity of the author of a work. The general principles relating to authorship of works set forth in Chapter II in regard to the author applied equally under the Act of 1916. In the case of a photograph, the person who was the owner of the negative at the time when it was made was deemed to be the author,[13] while in the case of a "sound recording" the person who was the owner of the original plate from which the sound recording contrivance was made at the time when such plate was made was deemed to be the author.[14] Insofar as a "cinematograph film" was a "dramatic

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11. See definition of *"dramatic work"* in Section 35(1) of the Third Schedule.
12. See for instance para 1(b)(iv) of the Proclamation extending the protection of the Act to the United States of America - see p 366 *infra*. This did not, however, apply to works made prior to 1917 - see p 367 *infra*.
13. Section 21 of the Third Schedule.
14. Section 19(1) of the Third Schedule.

work" the individual producer of the film was usually considered to be the author while insofar as it consisted of a series of photographs, the identity of the author was as defined above. There could thus be two authors of a cinematograph film and indeed there were two parallel copyrights. The authorship of so-called "collective works" is dealt with below.

Section 5(1) of the Third Schedule provided that the author of a work was the first owner of the copyright in that work. Exceptions to that general rule in the case of certain commissioned works (i.e engravings, photographs and portraits) and works made in the course of employment were made in the proviso to the aforementioned Section. In the case of the commissioned works, the person giving the commission, although not the author of the work, was the first copyright owner, and in the case of works made in the course of employment, the employer, though not the author, was the first copyright owner; provided that where the work was an article or other contribution to a newspaper, magazine or similar periodical, although the employer was the first owner of the major part of the copyright, the author retained the right to restrain the publication of the work otherwise than as part of a newspaper, magazine or similar periodical. In the case of all the aforementioned exceptions, the position could be varied by agreement between the parties. The first ownership of the copyright in works prepared or published by or under the direction of the State will be dealt with below.

Where any work was prepared or published by or under the direction of the State the copyright vested in the State.[15]

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15. Section 18 of the Third Schedule.

A *"work of joint authorship"* was defined in Section 16(3) of the Third Schedule to mean a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors. In order to enjoy copyright in South Africa it was sufficient if any one of the joint authors was an appropriate person.

Sections 152 to 159 of the Act of 1916 made provision for registration of copyright. Registration served to record the proprietorship of the copyright in any work registered and the existence of licences under that copyright. Assignments and other transmissions of copyright could be recorded therein. Provision was made for the Register to be rectified. Section 159 specifically provided that registration shall not in any case be deemed to be a condition for the subsistence of copyright or the exercise of any rights under copyright. In terms of Section 144(e) of the Act of 1916 read with Section 8 of the Third Schedule, registration constituted constructive knowledge of the subsistence of copyright in a work for purposes of establishing liability for damages upon infringement of the copyright. The Registers kept under the Provincial Acts were incorporated into the Register kept under the 1916 Act. Such Registers thus lost their significance under the Provincial Acts although, where registration was a condition precedent for the subsistence of copyright under a repealed Act, it retained this historical significance.

D. DURATION OF COPYRIGHT

The term of copyright under the 1916 Act was, generally speaking, the lifetime of the author of the work and a

period of fifty years after his death.[16] In the case of a "sound recording" the term was fifty years from the making of the original plate from which the contrivance was directly or indirectly derived,[17] and in the case of a photograph, the term of the copyright was fifty years from the making of the original negative from which the photograph was directly or indirectly derived.[18] The enforceability of the copyright in a work for the full period of its duration was tempered by the proviso to Section 3 of the Third Schedule which created a form of compulsory licence in the case of published works after the lapse of a certain period. Such a licence did not, however, affect the duration as such of the copyright but it did create a vested right in favour of the "compulsory licensee".

Special provisions regarding works of joint authorship and posthumous works, and in particular the determination of the term of copyright enjoyed by such works, were contained in Sections 16 and 17 of the Third Schedule. In the case of a work of joint authorship the term of copyright was the lifetime of the author who died first and fifty years after his death, or the lifetime of the author who died last, whichever period was the longer. Where it was necessary to calculate a period of years after the death of the "author" for any purpose other than the term of the copyright, the calculation commenced with the earlier of the two deaths. Where a copyrighted literary, dramatic or musical work, or an engraving, had at the time of the death of the author (or the longest surviving author in the case of a work of joint authorship) not been published, nor, in the case of a dramatic or musical work, been performed in public, nor in

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16. Section 3 of the Third Schedule.
17. Section 19(1) of the Third Schedule.
18. Section 21 of the Third Schedule.

the case of a lecture, been delivered in public, the copyright endured until publication, performance or delivery in public, as the case may be, whichever happened first, and for a period of fifty years thereafter.

The copyright in a work prepared or published by or under the direction of the State endured for a period of fifty years from the date of first publication of the work.The ownership of the copyright was, however, subject to variation by agreement with the author.[19]

E. TRANSMISSION OF COPYRIGHT

The copyright in any work was freely assignable, either in whole or in part, for the full territory of the copyright or for particular geographical areas such as provinces, and for the whole term of the copyright or any part thereof. Unlike under the subsequent South African legislation, it was not stated in the Act of 1916 that future copyright could be assigned, i.e. the copyright in a work which was not yet in existence. In the circumstances, it must be concluded that no such assignment was possible. This view is shared by **Copinger and Skone James.**[20]

No assignment was valid unless it was in writing and signed by the assignor or by his duly authorized agent.[21] An exception to this rule was that, in terms of Section 17(2) of the Third Schedule, the ownership of an author's manuscript after his death, where such ownership has been acquired in terms of a testamentary disposition made by the author and

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19. Section 18 of the Third Schedule.
20. *Op cit*, p 105.
21. Section 5(2) of the Third Schedule.

the manuscript was of a work which had not been published nor performed in public, nor delivered in public, was *prima facie* proof of the ownership of the copyright in the work embodied in the manuscript being vested in the owner of the manuscript.

Although, as stated above, specific provision was made as to the situation where ownership of a manuscript was acquired by the heirs of an author, the Act did not specifically provide that copyright was transmissible by testamentary disposition or by operation of law as was provided in the later statutes. **Copinger and Skone James**, however, is of the view that copyright was personal property and that upon the death of the copyright owner it passed to his heirs. Similarly, upon the bankruptcy of the proprietor ownership of the copyright passed to the trustee of his insolvent estate. The learned authors also submit that copyright could be taken in execution by a judgement creditor of the proprietor of the copyright.[22] All these issues were specifically dealt with and provided for in the later copyright statutes.

In the South African case **Boshoff v Art Metal and Electroplating Works (Pty) Limited**, dating from 1939,[23] the court was called upon to decide whether the sale of the physical object embodying a copyrighted artistic work in terms of a written Deed of Sale (which made no specific mention of a transfer of the copyright) operated as an assignment of the copyright in addition to the transfer of the ownership of the physical object. In this regard Schreiner, J said

> *"It seems to me that where what is sold by a written document (this, of course, is essential) is in terms a*

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22. *Op cit*, p 104.
23. 1939 WLD 198.

> *physical object, it must in all cases be a question of inference whether the transaction was intended to pass the copyright. This inference might conceivably be drawn in appropriate cases from the sale of a mould or other tool where the original is no longer in existence. At any rate, I assume that might be the position. But I do not see why any such inference should be drawn in this case ... as a matter of inference therefore I see no reason to come to the conclusion that the applicant passed his copyright to Hoffman by the transaction of 9th February".*[24]

The provisions of the 1916 Act regarding the transferring of ownership of copyright by assignment were subject to the limitation that, where the author of the work was the first owner of the copyright in it, no assignment of copyright could vest in the assignee any rights in respect of the copyright beyond the expiration of twenty-five years from the death of the author; after the expiry of that period, the copyright reverted to the executor of the author as part of his estate. Any agreement entered into by the author as to the disposition of his aforementioned reversionary right was declared null and void. These provisions did not, however, apply to the copyright in a collective work.[25] The aforementioned reversionary right did not apply where the author was not the initial owner of the copyright, i.e. in the cases of the exceptions as to initial ownership of copyright discussed above. **Copinger and Skone James** expresses doubt as to whether the aforementioned reversion of copyright applied to photographs and "sound recordings", the terms of copyright in which were not calculated from the

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24. At pp 205-6.
25. The proviso to Section 5(2) of the Third Schedule.

death of the author but rather from the making of the negative or the plate, as the case may be. The learned authors contend that the relevant provisions of the Act should be interpreted so as to exclude from their operation photographs and "sound recordings".[26] The learned authors base their view on the fact that the reversion of copyright was closely related to the provisions of Section 3 of the Act which provided for compulsory licences to be obtained in respect of works twenty-five years after the death of the author. These compulsory licence provisions were considered by the authors not to apply to photographs and "sound recordings". Furthermore, the authors point out that it was possible (and indeed likely in many instances) for a juristic person to be the author of a photograph or a "sound recording" and it would obviously be impossible to calculate a period of twenty-five years after the "death" of these authors. Neither the South African nor British courts were ever called upon to decide the issue but it is submitted that the views of the learned authors are persuasive. The learned authors also point out that although there was a restriction against the author disposing of the reversionary right, no such restriction applied to the trustee or executor of his deceased estate.[27] The views of **Copinger** and **Skone James** in regard to the non-applicability of the reversionary right to photographs and "sound recordings" are shared by Laddie Prescott and Vitoria, **The Modern Law of Copyright.**[28]

In the **Redwood case**[29] it was held that in the case of a collective work the non-applicability of the reversionary right

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26. *Op cit*, p 112.
27. *Op cit*, p 113.
28. At p 349.
29. *Supra*.

to that type of work was confined to the separate copyright which subsisted in the work as a compilation and not to the individual copyrights in the various component works. Consequently, the reversionary right would apply to, for instance, an article in an encyclopaedia but would not apply to the encyclopaedia as a whole. It was also held in this case that the reversionary right applied to any assignment made after the coming into operation of the British Act of 1911 no matter when the work was made.

F. INDUSTRIAL DESIGNS

One of the categories of *"artistic works"* protected by the Act was *"works of drawing"*. Drawings were protected by the Act irrespective of whether they had artistic quality or whether they were made with any artistic intent. Consequently such drawings included engineering or technical drawings.[30] The copyright in a drawing was infringed by the unauthorized reproduction of the drawing in a three-dimensional form and it did not matter whether the infringer copied the original drawing or an intermediate reproduction of the drawing. Such an intermediate reproduction could be in a three-dimensional form.[31]

By virtue of the aforegoing there was a potential for an overlap of protection to exist between protection indirectly given to the design of articles through copyright subsisting in drawings from which the articles were derived and the law of designs. The design of an article could potentially be

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30. **Klep Valves (Pty) Ltd v Saunders Valve Co Ltd** 1987 (2) SA 1(A).
31. **King Features Syndicate Inc. & Segar v O & M Kleeman Ltd**, (1940) Ch 806 (CA), (1940) 2 All ER 355 (Ch), (1941) AC 417; and **Klep Valves (Pty) Ltd v Saunders Valve Co Ltd**, *supra*.

protected by relying on the copyright in an underlying drawing. It was considered undesirable by the British legislature that there should be an overlap in the protection given to designs under the Copyright Act and under designs legislation. An attempt was made to demarcate between the two types of protection.

Section 22(1) of the Third Schedule, read together with Section 144(c) of the 1916 Act, provided that the Act would not apply to designs capable of being registered under Chapter II of the 1916 Act, save where such designs, though being capable of being registered as such, were not used nor intended to be used as models or patterns to be multiplied by any industrial process. Designs were dealt with in Chapter II of the Act of 1916. In terms of Section 76 a *"design"* was defined as follows:

> *"'Design' shall mean any design applicable to any article whether for the pattern, for the shape or configuration, or for the ornament thereof or for any two or more such purposes and by whatever means it is applicable whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined, not being a design for sculpture".*

In the case of **Allen-Sherman-Hoff Company v Registrar of Designs**[32] Tindall, J held that, in deciding whether certain features constituted a design,

> *"one has to see whether that which it is desired to register is something which can be treated as a design appealing to the eye, or whether the shape is obviously*

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32. 1935 TPD 270, a decision of the Full Bench of the Transvaal Provincial Division of the Supreme Court.

nothing more than part and parcel of the function without any appeal to the eye as a design, in which case there should be no registration".

This *dictum* was confirmed by the Appellate Division in the **Klep Valves case.**[33]

In consequence, if a design of an article was purely functional it was not inherently capable of registration as a design. In that case a drawing corresponding to such a design was not disqualified from enjoying copyright in terms of the aforementioned sections.

In terms of Section 22 of the Third Schedule, even if a design embodied in a drawing was inherently capable of registration as a design it could still be spared disqualification for copyright protection if the design in question was not used nor intended to be used as a model or pattern to be multiplied by an industrial process.

Section 8(3) of the Sixth Schedule to the Copyright Act, 1965, gave a description of the circumstances in which a design is deemed to be used as a model or pattern to be multiplied by an industrial process.[34] The question of which designs were excluded from registration and thus nevertheless eligible for copyright as artistic works was fully canvassed in the **Klep Valves** case.[35] It was held in this case that technical drawings constituted artistic works and that artistic intent on the part of the maker of the drawing was not a requisite for the work to be eligible for copyright.

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33. **Klep Valves (Pty) Ltd v Saunders Valve Co. Ltd,** *supra,* at p 28.
34. See p 330 *infra.*
35. **Klep Valves (Pty) Ltd v Saunders Valve Co Ltd,** *supra.*

This provision of the Sixth Schedule to the 1965 Act repeats an earlier provision contained in regulations issued under the 1916 Act. In terms of this provision a design was deemed to be used as a model or pattern to be multiplied by an industrial process:

(a) when the design was reproduced or was intended to be reproduced on more than fifty single articles, unless all the articles on which the design was reproduced or was intended to be reproduced together formed a single set of articles, or

(b) when the design was applied to the following:

(i) printed paper hanging;

(ii) carpets, floor cloths or oil cloths manufactured or sold in lengths or pieces;

(iii) textile piece goods, or textile goods manufactured or sold in lengths or pieces; or

(iv) lace not made by hand.

The crucial time for determining whether the disqualification contained in Section 22 of the Third Schedule applied was the time when the work was made. Unless it could be said at that time that the design was used or intended to be used as a model or pattern to be multiplied by an industrial process the disqualification would not apply no matter what happened afterwards. The material intention was that of the author of the drawing.[36]

It is important to emphasize that when Section 22 of the Third Schedule applied to a drawing no copyright subsisted in that drawing. This point is of considerable significance for purposes of Section 43 of the 1978 Act as will be shown below.

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36. **King Features Syndicate Inc. v O & M Kleeman (Pty) Ltd**, *supra*.

G. COLLECTIVE WORKS

The term *"collective work"* was defined in Section 35(1) of the Third Schedule to mean:

> *"(a) an encyclopaedia, dictionary, year book or similar work;*
>
> *(b) a newspaper, review, magazine or similar periodical; and*
>
> *(c) any work written in distinct parts by different authors, or in which works, or parts of works, of different authors are incorporated."*

A distinction must be drawn between a collective work and a *"work of joint authorship"* which was defined to mean *"a work produced by the collaboration of two or more authors, in which the contribution of one author is not distinct from the contribution of the other author or authors"*.

In terms of the aforegoing definitions a song consisting of lyrics and music written by separate authors constituted a collective work while if two or more authors contributed both to the writing of the music and of the lyrics it was a work of joint authorship.

In the case of a collective work two categories of copyright subsisted, namely, copyrights in the component works contained in the collective work and copyright in the collective work *per se*, as a compilation. The reversionary right to the heirs of the author of a work which came into operation twenty-five years after his death took effect upon the death of each of the authors of each of the component

works.[37] The question of the assignment of the copyright in collective works, and of the copyright in the component works, has been discussed above.

3. COPYRIGHT IN WORKS MADE PRIOR TO 1 JANUARY 1917

A. THE "1917 GATEWAY"

As explained in Part 3 of Chapter III above, the British Copyright Act of 1911 was a codification of British copyright law and it applied to works made prior to 1912 as well as to works made thereafter. It repealed all the then existing British copyright legislation (save for minor exceptions) as well the common law copyright and it provided for a system in terms of which pre-1912 rights, or "old" rights could be replaced by "new" or "substituted" rights conferred by it. This was brought about in Section 24(1) read together with the First Schedule of the Act. This system of providing substituted rights with the critical date being 1 July 1912 is referred to as the "1912 Gateway". The incorporation of the British Act of 1911 as the Third Schedule to the Act of 1916, read together with Section 151 of that Act and the Fourth Schedule thereto, created the same system but with the operative date being 1 January 1917. Section 151 of the South African Act and the Fourth Schedule are substantially identical to Section 24 and the First Schedule of the British Act. The First Schedule to the British Act is reproduced on page 146 above. For the sake of convenience and clarity, however, the Fourth Schedule to the Act of 1916 is reproduced below.

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37. See the **Redwood** case, *supra*.

Fourth Schedule

EXISTING RIGHTS IN WORKS THE SUBJECT OF COPYRIGHT UNDER CHAPTER IV

Existing Rights	*Substituted Right*
(a) In the case of works other than Dramatic and Musical Works	
Copyright	*Copyright as defined in the British Copyright Act*
(b) In the case of Musical and Dramatic Works	
Both copyright and performing right	*Copyright as defined in the British Copyright Act.*
Copyright, but not performing right	*Copyright as defined in the British Copyright Act, except the sole right to perform the work or any substantial part thereof in public.*
Performing right, but not copyright	*The sole right to perform work in public, but none of the other rights comprised in copyright as defined in the British Copyright Act.*

For the purpose of this Schedule the following expressions, where used in the first column thereof, have the following meaning:

'copyright', in the case of a work which according to the law in force immediately before the commencement of Chapter IV has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work;

'performing right', in the case of a work which has not been performed in public before the commencement of Chapter IV, includes the right at common law (if any) to restrain the performance thereof in public.

The only material difference between the First Schedule to the British Copyright Act and the Fourth Schedule to the Act of 1916 is the omission from the Fourth Schedule to the South African Act of the saving in favour of third parties of a right of publication of an essay, article or portion forming part of and first published in a review, magazine or other periodical or work of a like nature which existed at the time of the commencement of the British Act or which would have existed under the Copyright Act of 1842 if the 1911 Act had not been passed.[38] For the rest, the only differences are that references to *"this Act"* in the British Schedule have been substituted by references to *"the British Copyright Act"* in the South African Schedule and references to the commencement of the British Act have been substituted by references to the commencement of Chapter IV of the South African Act.

Accordingly, what is said above on pages 145 to 148 in regard to the 1912 Gateway applies mutatis mutandis to the 1917 South African Gateway.

The British 1912 Gateway catered only for works which had previously enjoyed copyright in Britain, whether under the common law or under early British copyright statutes. The South African 1917 Gateway similarly catered for works which had enjoyed copyright under early South African copyright statutes or under the British Copyright Act of 1842 and the International Copyright Act of 1886. The position of South African common law copyright will be dealt with below. However, the South African 1917 Gateway had a wider scope than the British equivalent because in terms of Section 147(1) of the Act of 1916 copyright which existed in any

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38. See p. 163 *supra*.

musical, dramatic or artistic work in the United Kingdom prior to 1 January 1917 also passed through the South African 1917 Gateway. It must be noted that Section 147(1) did not refer to literary works and this category of work protected in Britain was excluded from the wider ambit of the 1917 Gateway. This was presumably as a result of the fact that British literary works enjoyed copyright in South Africa prior to 1917 by virtue of the extra territorial operation of the British Copyright Act of 1842. It must be appreciated, however, that the British works which passed through the South African 1917 Gateway were works which already enjoyed substituted rights under the British Act of 1911 and not copyrights in British works which existed prior to 1 July 1912. On the other hand, the copyrights in British literary works which passed through the South African 1917 Gateway were the copyrights which subsisted under the Copyright Act of 1842 on the assumption that this Act remained in force until 1 January 1917. This came about, because, in the first place, the critical date for assessing "old" rights under the South African Act of 1916 was 31 December 1916, and in the second place, as stated above the British Act of 1911, while repealing the earlier British legislation as far as Britain was concerned, did not repeal such legislation as far as the self-governing dominions were concerned and left such repeal to the legislatures of the self-governing dominions; such repeal only took place in South Africa with the passing of the Act of 1916, with effect from 1 January 1917.

As has been shown in Chapter IV above, no common law copyright in unpublished works existed in South Africa. The reference in the Fourth Schedule to the 1916 Act to the terms *"copyright"* and *"performing right"* including common law rights to restrain publication and to restrain public performance, respectively, was misguided, unless the legis-

lature had in contemplation British common law copyright in musical, dramatic or artistic works which had passed through the British 1911 Gateway and had been converted into substituted rights under the British Act of 1911 and thereafter passed through the South African 1917 Gateway by virtue of the provisions of Section 147(1). It is, however, not strictly speaking correct to refer to these copyrights or performing rights as "common law" rights because by the time they passed through the South African 1917 Gateway they were statutory rights, having been converted to same by virtue of the British 1912 Gateway.

Clearly what happened was that the South African legislature in enacting the Fourth Schedule simply slavishly reproduced the British First Schedule making only essentially editorial changes to cater for the fact that the British Act was a Schedule to the South African Act. Perhaps the legislature took consolation from the fact that all references in both Schedules to common law rights were followed by the words *"if any"* in parenthesis which meant that the legislature was not committed to a definitive statement that common law rights existed at all. However, the difficulty which arises is that, as has been shown in Chapter IV, there was a Roman-Dutch common law copyright in published works to which no reference is made in the Fourth Schedule despite the fact that the issue of common law rights was addressed. The question must be asked; did this common law copyright qualify for substituted rights? It is submitted that this question must be answered in the affirmative as these rights were "copyright" and the purpose and intent of the Act of 1916 was to recognize any existing copyright but to transform it into copyright provided for in the Act of 1916. Moreover, the definition of *"copyright"* in the Fourth Schedule states that it *"includes common law copyright in unpublished works (if any)"* and it is thus capable of being interpreted as

being not exhaustive of the various forms of copyright comprised in the term in question.

There is no immediately obvious reason for the South African Schedule omitting the savings provision in respect of rights of publication of essays etc. in a separate form. The relevant rights under the Copyright Act of 1842 which were being preserved existed in South Africa to the same extent that they existed in Britain and one would have thought that the rights in question were equally deserving of being preserved in South Africa. However, unlike in Britain, in South Africa copyright conferred upon British literary works by the Act of 1842 existed in tandem with copyright conferred by the Provincial Copyright Acts on South African works and these Provincial Acts contained no similar provisions.

Before going on to analyze in detail which copyrights passed through the South African 1917 Gateway it must be emphasized that the criterion for an "old" copyright to qualify for a "new" or "substituted" copyright under the Act of 1916 was that the "old" copyright must have subsisted on 31 December 1916 under the law from which it was derived. The owner of the substituted right was the owner of the "old" right which subsisted on 31 December 1916 and that was in turn determined by the law from which the "old" right was derived. Generally speaking in all other respects the substituted copyright, having once arisen, was regulated by the Act of 1916.

B. BRITISH AND SOUTH AFRICAN COPYRIGHT WHICH PASSED THROUGH THE 1917 GATEWAY

Neither Section 151 of the Act of 1916 nor the Fourth Schedule thereto confined a substituted right under the Act

of 1916 to any province or any other area to which the corresponding "old" right might have been limited by virtue of the law from which it was derived. As the 1916 Act was part of the process of consolidation of the laws of the former colonies and one of the purposes of such process was to do away with distinctions and differences between the laws of the various colonies it must be assumed that no matter what the origin of an "old" right might have been, the substituted right extended throughout the Union of South Africa. This would have been in keeping with the policy of the British Act of 1911 which was to recognize the existence of an "old" right and its ownership and to transform it into a "new" right having the content, ambit and force of the copyright provided for in the Act of 1911. In other words, the shell of the "old" right was taken, drained of its contents, remodelled and replenished with the content of the copyright provided for in the Act. There was certainly no suggestion that copyright as conferred by the British Act of 1911 in Britain was in any way limited territorially and in terms of the Fourth Schedule to the Act of 1916 the substituted right which was granted was that of the copyright conferred by the British Act of 1911. In other words, the effect of the South African 1917 Gateway was, for instance, to take a Cape copyright and transform it into a copyright as conferred by the British Act of 1911 having force and effect throughout South Africa.

In dealing below with the copyrights which passed through the 1917 Gateway it must be emphasized that a substituted copyright could only be conferred upon a work if that work had met all the requirements, both substantive and formal, for the enjoyment of an "old" copyright under the relevant legislation.

(1) <u>Literary Works</u>

In pre-1917 South Africa literary works derived protection from a number of different sources, namely, the British Act of 1842, the Cape Act of 1873, the Natal Act of 1896, the Natal Act of 1897, the Transvaal Act of 1887 and Roman-Dutch common law. As British common law copyright in unpublished literary works neither applied in South Africa nor did substituted rights granted under the British Act of 1911 in respect of such copyrights fall within the ambit of Section 147 of the 1916 Act, no British copyrights in unpublished literary works passed through the 1917 Gateway. The Transvaal Act of 1887, however, granted copyright in unpublished works without any limitation as to the origin of such works and thus unpublished works qualified for passing through the 1917 Gateway on this account. "Old" copyright under each of the aforementioned laws which qualified for substituted rights under the 1916 Act will be dealt with *seriatim* below.

(a) Roman-Dutch Common Law Copyright

Roman-Dutch common law copyright subsisted in published literary works and was perpetual. In the Cape, Natal and the Transvaal the common law copyright was effectively repealed in respect of literary works by the Cape Act of 1873, the Natal Acts of 1896 and 1897 and the Transvaal Act of 1887, respectively. After the passing of these Acts common law copyright ceased to apply in respect of literary works. In the Orange Free State no copyright legislation was enacted with the result that the common law copyright continued unabated until 1917.

A work published in the Orange Free State any time after 1854[39] enjoyed copyright on 1 January 1917 and such

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39. The date of the Constitution of the Orange Free State Republic which made provision for the existence of Roman-Dutch law.

copyright passed through the 1917 Gateway and was superseded by a substituted right.

(b) British Act of 1842

This Act protected literary works for the lifetime of the author and a period of seven years after his death, or forty-two years from publication, whichever was the longer. Accordingly, provided it enjoyed protection in South Africa under this Act,[40] any work published after 1 January 1875, or any work the author of which died on or after 1 January 1910, enjoyed copyright on 1 January 1917 and such copyright passed through the 1917 Gateway and was superseded by a substituted right.

It must be remembered, however, that a work first published in a British dominion in South Africa could only qualify for protection in Britain (and therefore also in South Africa) by virtue of the British Act of 1842, read together with the International Copyright Act of 1886, if such first publication took place after 1886.[41]

(c) The Cape Act of 1873

This Act granted protection for the lifetime of the author and five years after his death, or for a period of thirty years, whichever was the longer. Accordingly, provided it enjoyed copyright under the Act,[42] any work published after 1 January 1887 or any work the author of which died on or after 1 January 1912 enjoyed copyright on 1 January 1917 and such copyright passed through the 1912 gateway and was superseded by a substituted right.

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40. See p 230 *supra*.
41. See p 143 *supra*.
42. See p 238 *supra*. The Act only applied to the works of Cape authors or works first published in the Cape.

(d) The Natal Acts of 1896 and 1897

The earlier Act provided for a term of copyright of the lifetime of the author and five years after his death or a period of thirty years from first publication, whichever was the longer, while the later Act provided for a term of copyright of the lifetime of the author and seven years after his death or a period of forty-two years after first publication, whichever was the longer. The 1896 Act applied to works published prior to 31 August 1897 while the 1897 Act applied to works made thereafter. Thus in the case of a work first published in Natal, any work first published after 1 January 1887 or any work the author of which died on or after 1 January 1912, in the case of a work made prior to 31 August 1897, and 1 January 1910, in the case of a work made subsequent to 31 August 1897, enjoyed copyright on 1 January 1917 and such copyright passed through the 1917 Gateway and was superseded by a substituted right.

The Act of 1897 only conferred copyright on works first published in Natal whereas the Act of 1896 conferred copyright on works no matter where they were published, including in other territories of South Africa and indeed overseas.[43] In the case of a work first published somewhere else besides in Natal any work published after 1 January 1887 or any work the author of which died on or after 1 January 1912 enjoyed copyright on 1 January 1917 (provided in both instances the first publication took place prior to 31 August 1897) and such copyright passed through the 1917 Gateway and was superseded by a substituted right. The aforegoing was obviously subject to a particular work qualifying for protection under the Act in question.[44]

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43. See p 257 *supra*.
44. See p 256 *supra*.

(e) The Transvaal Act of 1887

In terms of this Act a work published by means of printing was required to be registered and the date of first issue of printed copies of the work was to be stated in the application for registration. The work must have been printed in the Transvaal or in another recognized territory. A certificate of registration was thereafter issued stating the date of first issue of copies of the work. The term of copyright was a period of fifty years from the date of issue so stated in the certificate of registration or, if the author was still alive after the expiration of that period and had not assigned the copyright, the duration of the author's life. If a work had been published by means of printing prior to 1887, registration was required within six months of the coming into operation of the Act. The date of first issue of printed copies was to be stated in the application. The term of copyright in respect of such a work was a period of fifty years from the date of first issue of copies as stated in the registration. In all instances registration was a condition precedent for the subsistence (or continued subsistence) of copyright. The Act came into operation on 1 June 1887.

In the event that a work was not published by means of printing the copyright endured for the lifetime of the author and for thirty years after his death. The formalities regarding registration did not apply to such works.

In the case of a work published by means of printing, provided the formalities of registration were complied with, any work first published by means of printing after 1 January 1867 enjoyed copyright on 1 January 1917 and such copyright passed through the 1917 Gateway and was superseded by a substituted right. Works meeting all the above require-

ments and published prior to 1 January 1867 could also be the subject of subsisting copyright on 1 January 1917 if the author was still alive and had not assigned the copyright. In the case of a work not published by means of printing any work the author of which died on or after 1 January 1887 enjoyed copyright on 1 January 1917 and such copyright passed through the 1917 Gateway and was superseded by a substituted right.

(2) Dramatic Works

In the case of dramatic works a distinction must be drawn between the reproduction and publication right, on the one hand, and the performing right, on the other hand.

(a) Reproduction Right

Dramatic works insofar as their reproduction and publication were concerned, were treated by the various laws in exactly the same way as literary works. Accordingly, what is said above in regard to literary works applies equally to the reproduction and publication of dramatic works.

The aforegoing is subject to the provisions of 147(1) of the 1916 Act. It will be recalled that in terms of this Section British copyright in dramatic, musical and artistic works[45] also passed through the South African 1917 Gateway. The copyrights involved included pre-1912 copyrights which had passed through the British 1912 Gateway and copyrights in post-1912 works which enjoyed copyright in Britain under the British Act of 1911. In the case of pre-1912 copyrights the

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45. By this is meant works of these types which enjoyed copyright in Britain by virtue of British copyright legislation, which thus included not only domestic British works but also all foreign works which were entitled to protection under British law.

critical dates must be calculated in accordance with the British 1912 Gateway. In dealing with the British Act of 1842 above under "Literary Works" the critical dates were calculated on the basis of the South African 1917 Gateway because the British Act of 1842 continued in existence until 1 January 1917 and continued to regulate copyright in British works in South Africa until that date notwithstanding its repeal in Britain in 1912. Section 147(1) of the Act of 1916 did not apply to literary works and consequently a British literary work could only pass through the South African Gateway of 1917 as a result of protection which it derived from the application of the British Act of 1842 in South Africa and not because of the protection which it derived from that Act in Britain together with the 1911 Act. The position was, however, different in regard to dramatic, artistic and musical works and copyrights in these works passed through the South African 1917 Gateway via a South African route and a British route.

Insofar as the reproduction right in works which enjoyed copyright **in Britain** by virtue of British law is concerned, the term of such rights under the British Act of 1842 was as described under Literary Works in Chapter III above[46] and, calculating the critical dates in terms of the 1912 British Gateway, any work published after 1 July 1870 or any work the author of which died on or after 1 July 1905 enjoyed copyright (i.e. the reproduction right) in Britain on 1 July 1912. Such copyright passed through the 1912 Gateway and was superseded by a substituted right. It must be remembered, however, that a work first published in a British dominion only enjoyed "British" copyright in Britain under the British Act of 1842 (read together with the International

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46. See p 128 *supra*.

Copyright Act of 1886) if such first publication took place after 1886. Accordingly, the aforementioned dates, while being applicable to works first published in the motherland and in a foreign country to which the operation of the Act of 1842 by virtue of the International Copyright Act of 1886 had been extended, are only applicable to works first published in a British dominion in South Africa after 1886.[47]

The Natal Play Rights' Act, 1898, while dealing primarily with performing rights in dramatic and musical works also granted the right to control the conversion or adaptation of any dramatic or musical work into any form, whether dramatic or otherwise.[48] In terms of the Fourth Schedule to the Act of 1916 these rights would have been a component of the "copyright" as opposed to the "performing right" and the holder of these adaptation rights would have been entitled to obtain the full substituted right of "copyright" provided for in the British Act of 1911 (Third Schedule to the 1916 Act). The effect of the Fourth Schedule was that any right of modern "copyright" which was not a "performing right" was a component of "copyright" and it could be substituted for full copyright, excluding the performing right, in the case of a dramatic or musical work, under the British Act of 1911 (Third Schedule to the 1916 Act).

The Natal Play Right Act, 1898, protected dramatic works which were first produced in Natal (as distinct from the Natal Act of 1897 which protected works first published in Natal) provided they were registered. The term of copyright was the life of the author and seven years after his death or forty-two years from the date of registration, whichever

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47. See p 143 *supra*.
48. See Section 2(b) of the definition of "play right" and p 282 *supra*.

was the longer. Accordingly, any work registered after 28 March 1899 (when the Act came into operation) or any registered work the author of which died on or after 1 January 1910 enjoyed a right of adaptation on 1 January 1917. Such right passed through the 1917 Gateway and was superseded by a substituted full copyright.

(b) Performing Right

Performing rights were not protected by the Roman-Dutch common law. They were, however, protected by the British Act of 1842, the Natal Act of 1898 and the Transvaal Act of 1887. Each of these Acts will be dealt with *seriatim* below.

(i) The British Copyright Act of 1842

Performing rights granted by this Act also passed through the South African 1917 Gateway via two routes, namely, the direct route applicable to British literary works (i.e. directly through the South African 1917 Gateway by virtue of the extra-territorial operation of the British Act of 1842) and the indirect route through the British 1912 Gateway and Section 147(1) of the Act of 1916, which route was also applicable to reproduction rights in dramatic works.

In the case of both routes the term of the performing right in a dramatic work published in manuscript form was the life of the author and seven years after his death, or a period of forty-two years from the date of the first performance of the work, whichever was the longer. Accordingly, via the direct route a performing right in a work first performed publicly after 1 January 1875 or the author of which died on or after 1 January 1910 were protected on 1 January 1917 and, having passed through the 1917 Gateway, was superseded by a substituted right, i.e. a performing right under the copyright conferred by the Act of 1916. Via the indirect route through the British 1912 Gateway a performing right in

a work first performed publicly after 1 July 1870 or the author of which died on or after 1 July 1905 was substituted on 1 July 1912, and having passed through the British 1912 Gateway, was superseded by a substituted right, i.e. a performing right under the copyright conferred by the British Act of 1911. From there the performing right passed through the South African 1917 Gateway by virtue of the provisions of Section 147(1) of the Act of 1916. In both instances, however, it must be remembered that works first performed in a British dominion in South Africa could only obtain British copyright under the Act of 1842 if such first performance took place after 1886.

(ii) Natal Act of 1898

As stated above,[49] this Act conferred primarily a performing right in dramatic works although it also conferred a right of adaptation. The performing right was treated in exactly the same way as the right of adaptation which has been described above[50] and what is said in relation to the right of adaptation is equally applicable to the performing right save that the substituted right which was granted after passage through the 1917 Gateway was a "performing right" as contemplated in the Fourth Schedule to the 1916 Act and not a "copyright".

(iii) Transvaal Act of 1887

This Act protected the performing right in dramatic works in principle in exactly the same way as it protected literary works. Accordingly, what is said above in connection with the protection of literary works under this Act[51] is equally applicable to the performing right in dramatic works save

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49. See p 282 *supra*.
50. See p 345 *supra*.
51. See p 342 *supra*.

that the duration of the terms of protection of the two different types of works differed.

For works published in printing the term of the performing right was ten years from the date stated in the certificate of registration provided the performing right had been reserved at the time of first publication; in the case of works not published in printing the term of the copyright was the lifetime of the author and thirty years after his death. Accordingly, performing rights in dramatic works published with reservation of rights and registered on or after 1 January 1907, and performing rights in unpublished dramatic works of which the author died on or after 1 January 1887 were protected on 1 January 1917 and, having passed through the 1917 Gateway, were superseded by substituted rights, i.e. performing rights under the copyright conferred by the Act of 1916.

(3) Musical Works

The position of musical works was the same as that of dramatic works and what is said above in regard to dramatic works applies *mutatis mutandis* to musical works. It must be borne in mind, however, that the Transvaal Act of 1887, while protecting musical works per se in respect of reproduction and publication, only protected dramatic-musical works in respect of performing rights. Accordingly only musical works which formed component parts of operas, musical productions, etc. were eligible for substituted performing rights under the Act of 1916.

(4) Artistic Works

(a) British Legislation

Copyrights in artistic works which passed through the British 1912 Gateway were discussed in Chapter III above.[52] They are briefly engravings published after 30 June 1884; sculptures published after 1 July 1898 or of which the author was still alive on 1 July 1898 and had not assigned his copyright (provided first publication took place after 1 July 1884); and paintings, drawings or photographs of which the author was alive on or after 1 July 1905, and if the work was sold or disposed of after 29 July 1862 and was not made pursuant to a commission, the copyright was expressly reserved by the author at the time of first sale of the work.

Artistic works of South African origin could in certain circumstances have qualified for protection in Britain under British legislation and copyrights in such works would thus have passed through the British 1912 Gateway provided the aforementioned requirements were met. The circumstances in which works of South African origin enjoyed British copyright were discussed in Chapter IV above.[53]

All copyrights whether in works of South African origin, British origin or foreign origin which passed through the British 1912 Gateway as aforementioned, passed through the South African 1917 Gateway in terms of Section 147 of the Act of 1916.

(b) Roman-Dutch Common Law

Roman-Dutch common law copyright protected artistic works against being published in printing and the copyright was perpetual. However, this common law copyright was repealed

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52. See pp 150 *et seq supra*.
53. See p 232 *supra*.

in the Cape, Natal and Transvaal by the Acts mentioned below. Roman-Dutch common law copyright continued to operate in the Orange Free State until 1917 and all artistic works published in printing made in the Orange Free State after 1854[54] enjoyed copyright on 1 January 1917. These copyrights passed through the 1917 Gateway and were superseded by substituted rights.

(c) The Cape Act of 1905

This Act protected various types of works of art[55] for the following terms: paintings and sculptures - the life of the initial owner of copyright and thirty years after his death; engravings not published in, or forming part of, a book and photographs - thirty years after the end of the year in which the work or any copy thereof was first offered for sale, delivered to a purchaser or advertised or exposed as ready for sale to the public or for delivery to a purchaser, or was registered, whichever happened first; and engravings published in or forming part of a book - the same term as for books under the Act of 1873.

Accordingly, copyrights in works of art passed through the 1917 Gateway in the following circumstances: paintings and sculptures - the initial copyright owner was still living on or after 1 January 1887; engravings not published in or forming part of a book, and photographs - the works were first offered for sale, delivered to a purchaser or advertised or exposed as ready for sale to the public or for delivery to a purchaser, or was registered on or after 1 January 1887; and engravings published in or forming part of a book - the author was alive on or after 1 January 1912 or the work was first published after 1 January 1887.

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54. See footnote 39 *supra* on p 339.
55. See p 247 *supra*.

(d) The Natal Acts of 1896 and 1897

The Act of 1896 granted a term of copyright in an artistic work of the lifetime of the author and five years after his death. Although the Act made provision for registration, registration was not a condition precedent for the subsistence of copyright. The Act of 1897, on the other hand, granted copyright for a term of the lifetime of the author and for seven years after his death and prescribed registration as a condition precedent for the subsistence of copyright.[56] The Act of 1897 only conferred copyright on works made after it came into operation; it preserved the copyright in works which had been conferred by the Act of 1896.

Accordingly, a work which was made prior to 1897 and of which the author died on or after 1 January 1912 enjoyed copyright on 1 January 1917 and such copyright passed through the 1912 Gateway and was superseded by a substituted right. This was the case irrespective of whether the work had been registered. On the other hand, a work made after 1897 of which the author died on or after 1 July 1910 and which was registered enjoyed copyright on 1 January 1917 and such copyright passed through the 1917 Gateway and was superseded by a substituted right.

(e) The Transvaal Act of 1887

This Act protected artistic works in exactly the same manner in which it protected literary works and consequently what is said above in regard to copyrights in literary works which passed through the 1917 Gateway applied equally to artistic works.[57]

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56. See pp 258, 260, 268 and 275 *supra*.
57. See p 342 *supra*.

(5) Cinematograph Films

Cinematograph films were not protected as such in either British pre-1911 registration nor in South African pre-1916 legislation. In both the aforementioned categories of legislation they were regarded as series of photographs, each individual frame being a photograph and thus an artistic work, their musical scores were treated as musical works and their scripts were treated as dramatic works. Accordingly, what is said above regarding these types of works applies equally to the relevant component parts of cinematograph films.

It must, however, be remembered that in Britain from 12 July 1912 cinematograph films which had an original dramatic character were protected as such as a species of dramatic work and such dramatic work/cinematograph film passed as such through the 1917 South African Gateway by virtue of the provisions of Section 147 of the Act of 1916. Accordingly, "British" dramatic works/cinematograph films made after 12 July 1912 were protected as such in South Africa (via the 1917 Gateway) while other dramatic works/ cinematograph films were only protected as such if made after 1 January 1917.

(6) Sound Recordings

The Act of 1916 granted protection retrospectively to sound recordings as a species of musical work. Accordingly, sound recordings made prior to 1 January 1917 were granted copyright by the Act of 1916, no matter when they were made.[58] As in the case of cinematograph films, however, it

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58. As long as the term of copyright prescribed for these works in the Act of 1916 (i.e. fifty years after the making of the master version) had not yet expired, which was an extremely remote possibility.

must be remembered that "British" sound recordings made prior to 12 July 1912 had already been clothed with actual existing copyright from that date and copyrights in such sound recordings passed as such through the South African 1917 Gateway by virtue of the provisions of Section 147(1) of the Act of 1916. This factor is not without significance because the British Act of 1911 provided that copyright would not be conferred retrospectively in a sound recording made prior to the coming into operation of the Act if the making of that sound recording infringed the copyright in another sound recording. This disqualification did not apply under the 1911 Act which means that a "British" sound recording made after 12 July 1912 and before 1 January 1917 would not have been disqualified from enjoying copyright even though its making had infringed the copyright in another sound recording, while any other sound recording made during this period would have been subject to such a disqualification.

C. ASSIGNMENTS OF PRE-1917 WORKS

The provisions of the British Act of 1911 in regard to assignments of "old" copyright was discussed above in Chapter III.[59] It will be recalled that, if the term of a substituted right exceeded the term of the "old" copyright, and the "old" copyright had been assigned for the full term thereof prior to that copyright passing through the Gateway, upon the expiry of the "old" term, the substituted copyright reverted to the author or his heirs for the balance of the term of the "new" copyright. Certain vested rights were created in favour of the person who was the copyright owner

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59. See p 164 *supra*.

immediately prior to the reversion of ownership taking place. The reversion did not occur where the "assignee" had acquired ownership of the "old" copyright by means other than an express Deed of Assignment nor did it apply where there had been an express agreement to the contrary between the author and the assignee.

The position as set out in Chapter III and as summarized briefly above applied equally to pre-1917 assignments under the Act of 1916. In general the same vested rights were created in the Act of 1916 as were created in the British Act of 1911. There was, however, one exception to this general rule. Whereas the First Schedule to the 1911 Act provided that in the case of an essay, article or portion forming part of and first published in a review, magazine and other periodical or work of a like nature, the substituted right conferred by that Act was subject to any right of publishing the essay, article or portion in a separate form to which the author was entitled at the commencement of the Act or would have been entitled in terms of Section 18 of the Copyright Act, 1842, if the 1911 Act had not been passed, the Fourth Schedule to the Act of 1916 contained no such provision. The vested right created in the British Act in terms of this provision was thus not created in the Act of 1916. As the works in question were literary works and were thus not covered by the provisions of Section 147(1) of the Act of 1916, the British provision did not even apply indirectly to "British" works which passed through the South African 1917 Gateway in terms of that Section.

It could have happened that a copyright in a British dramatic, musical or artistic work passed through the British 1912 Gateway and a substituted copyright was conferred upon an assignee who was the then current owner of the "old" copyright and thus of the substituted right; sub-

sequently, and prior to 1 January 1917, the term of the "old" copyright expired and the ownership of the "new" copyright reverted to the author or his heirs with a vested right being granted in favour of the person who was the copyright owner immediately prior to the reversion taking place. On 1 January 1917 in terms of Section 147(1) of the Act of 1916 that copyright owned by the author or his heirs passed through the South African Gateway and was superseded by a substituted right under the South African Act. That South African substituted right would have been owned by the author and his heirs free of any vested right in favour of the owner of the British substituted right immediately prior to the reversion taking place because the South African Act made no provision for perpetuating the aforementioned vested right in these circumstances. The position of "British" copyrights which passed through the South African 1917 Gateway was greatly complicated by the five year time difference between the British 1912 Gateway and the South African 1917 Gateway and the fact that "old" British copyright passed successively (with a time lag) through both these Gateways.

D. INFERIOR SUBSTITUTED RIGHTS

While generally speaking the substituted rights granted in the Act of 1916 were superior to those granted under the "old" laws, more particularly, in that the scope of the 1916 copyright was wider than the "old" copyright and the term of copyright was longer, there were some instances where the substituted rights were inferior to the "old" rights.

Under the 1916 Act the term of copyright in a photograph was fifty years from the making of the negative. This term was shorter than the term granted under the old British legisla-

tion and under the so-called "Provincial Statutes" and the Roman-Dutch common law. Indeed, as the Roman-Dutch common law granted a perpetual term of copyright in published works the substituted right granted in lieu of Roman-Dutch copyright was inevitably inferior insofar as duration was concerned. Insofar as pre-1912 "British" works qualified for substituted rights under the Act of 1916 the inferiorities of substituted rights granted in lieu of British copyrights which passed through the British 1912 Gateway[60] applied equally to substituted rights in respect of copyrights in such works granted by the Act of 1916.

The Transvaal Act of 1887 provided for a term of copyright in works published by means of printing of fifty years after first publication. Such publication could take place posthumously and consequently the term of the substituted right generally granted under the Act of 1916, namely, fifty years after the death of the author, was shorter than that which would have been enjoyed by a work published posthumously under the Transvaal Act.

4. COPYRIGHT IN FOREIGN WORKS

A. COPYRIGHT UNDER PRE-1916 LEGISLATION

Prior to 1917 foreign works enjoyed copyright in South Africa basically in two ways, namely, as a result of South African legislation and British legislation.

(1) South African Legislation

The Natal Act of 1896 granted copyright in literary, dramatic, musical and artistic works published anywhere in

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60. See p 161 *supra*.

the world prior to 31 August 1897.[61] The Transvaal Act of 1897 granted copyright in the same categories of works which had not been published in print without any qualification as to the country of origin of the works. Accordingly, foreign works which qualified for protection of this nature under the aforementioned Acts qualified for substituted rights under the Act of 1916 in the same way as domestic works and such substituted copyrights enjoyed the full term of protection under the Act of 1916. Section 151 of the Act of 1916, which makes provision for the South African 1917 Gateway refers simply to *"any person"* who is entitled to an "old" copyright in South Africa without in any way qualifying the national status of such person.

For the rest the South African Provincial Statutes made no provisions for protection of foreign works in South Africa save that the Transvaal Act of 1887, as amended in 1895, made provision for the State President to issue proclamations conferring protection in the Transvaal upon works first printed in some other state or colony provided reciprocal protection was given to works first published in the Transvaal. No record can be found of any such proclamations having been issued and the acquisition of Transvaal copyright by foreign works in this manner can be discounted.

(2) British Legislation

The British Copyright Act of 1842 and the International Copyright Act of 1886 had force and effect in territories in South Africa which were British dominions. After 1900 this meant all four of the colonies which were to become provinces of the Union of South Africa in 1910. The effect of this was that books (i.e. literary, dramatic, and musical

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61. See p 257 *supra*.

works) and performing rights in dramatic and musical works not only of British origin but also originating from countries with which Britain had entered into copyright relations prior to 1912 enjoyed copyright in South Africa. The terms of copyright of non-British foreign works was, however, limited to the terms of copyright enjoyed by works in their own countries of origin.[62] Any British and foreign copyrights which were still in existence on 1 January 1917 on this basis also passed through the South African 1917 Gateway and were granted unqualified substituted rights. The foreign works which enjoyed copyright in Britain prior to 1912 were described in Chapter III above.[63]

The fact that the British Copyright Act of 1842 and the International Copyright Act of 1886 were repealed in Britain on 12 July 1912 had no effect on the foreign copyrights which existed in South Africa by virtue of these Acts because, as stated above,[64] these two British Acts remained in force in South Africa notwithstanding their repeal in Britain until 1 January 1917 when they were repealed by the Act of 1916.

By virtue of the provisions of Section 147(1) of the Act of 1916, musical, dramatic and artistic works of British origin and of foreign origin which on 1 January 1917 enjoyed protection under the British Act of 1911 and the Orders in Council in respect of foreign works issued under that Act qualified for substituted rights under the South African Act of 1916. These substituted rights were also unqualified. The foreign countries involved were effectively countries which had prior to 1917 subscribed to the Berne Convention. In

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62. See p 140 *supra*.
63. See p 137 *et seq supra*.
64. See p 235 *supra*.

terms of the international provisions of the British Act of 1911 those foreign works did not enjoy copyright of any longer duration in the United Kingdom than they enjoyed in their countries of origin. However, this qualification would have been cured or removed as far as South Africa was concerned when the copyright in question passed through the 1917 Gateway because substituted rights granted in respect of works which passed through the 1917 Gateway were not qualified in any way as to duration. It must be appreciated that foreign and British **literary works** did not qualify for substituted rights in this way.

Works originating from prior to 1917 from British dominions were in a slightly different category to other British or foreign works. Prior to 12 July 1912 such work qualified for protection in Britain under British copyright laws in exactly the same way as works originating from South Africa qualified for protection in Britain under those laws. Copyrights subsisting in Britain in this way prior to 12 July 1912 passed through the British 1912 Gateway and were superseded by substituted British rights. After 1912 a distinction must be drawn between self-governing dominions and non-self-governing dominions. Works originating from non-self-governing dominions enjoyed protection in Britain under the Act of 1911 in the same way as works originating from the motherland. For all practical purposes and for the purposes of this discussion such works can be regarded as "British" works. In regard to the self-governing British dominions, i.e. Australia, New Zealand, Newfoundland and Canada, the position is somewhat more complicated.

As discussed in Chapter III[65] works originating from the self-governing dominions after 12 July 1912 did not automat-

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65. See p 156 *et seq supra*.

ically enjoy protection in Britain. It was necessary that notification to this effect must first have been given by the British Secretary of State. Prior to 1 January 1917 such notification was given in the case of all the self-governing dominions save Canada. In the case of Canada this only occurred in 1923. Accordingly, while post-1912 works originating from the self-governing dominions save Canada enjoyed British copyright on 1 January 1917, this was not the case with Canadian works.

In terms of Section 147(1) of the Act of 1916 copyrights subsisting under the Act of 1912 in dramatic, musical and artistic works (but not literary works) originating from British dominions (save for post-1912 Canadian works) passed through the South African 1917 Gateway and were granted unqualified substituted rights under the Act of 1916.

B. COPYRIGHT UNDER THE ACT OF 1916

Section 145 of the Act of 1916 conferred upon the Governor-General the power to extend the Act to any British dominions to which the British Act of 1911 did not itself automatically extend, while Sections 29 and 30 of the British Act of 1911 read together with Section 144(g) of the Act of 1916 empowered the Governor-General to extend the Act to foreign countries. The Berlin Revision of the Berne Convention was adopted on 13 November 1908. An Additional Protocol thereto was adopted at Berne on 20 March 1914. Britain acceded to both the Berlin Revision and the Berne Additional Protocol on behalf of South Africa.

The Act was immediately with effect from 1 January 1917 applicable to Britain, Australia, Canada, New Zealand and British India (subsequently India and Pakistan). In 1920 the Governor-General issued a Proclamation which made the

Act applicable to works originating from the then member countries of the Berne Convention.[66] More particularly, the Proclamation provided that the Act would apply to works first published in a Berne Convention country, to authors who at the time of the making of works were subjects of a Berne Convention country or authors who were resident in a Berne Convention country, in the same way as it applied to works first published in South Africa, works made by British subjects within the Union and persons resident in the Union, as the case may be. The Proclamation was retrospective in effect as it was construed as forming part of the Act of 1916. In regard to "sound recordings" the critical date for the assessment of the ownership of the copyright in "sound recordings" made in the past and for disqualifying a "sound recording" from protection if its making infringed the copyright in another "sound recording" was the date of the Proclamation, i.e. 3 May 1920, and not 1 January 1917. In the case of all foreign works the reversionary right of the author or his heirs after the expiry of the term of "old" copyright came into operation on the date of the Proclamation and not on 1 January 1917.

The most important qualification made to the protection conferred upon foreign works originating from Berne Convention countries was that the term of copyright granted to such works in South Africa did not exceed the term of copyright conferred upon such works by their countries of origin.

The Proclamation repealed any Orders in Council which the British Government had previously made extending copyright

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66. Belgium, Denmark and the Faroe Islands, France, Germany, Haiti, Italy, Japan, Liberia, Luxemburg, Monaco, that part of Morocco under French protection, the Netherlands with the Netherlands East Indies and the Colonies of Surinam and Curacao, Norway, Portugal, Spain, Sweden, Switzerland and Tunis. See Proclamation No. 1048 dated 3 May 1920.

protection in South Africa to foreign works. This repeal was, however, made subject to the preservation of vested rights under any such Proclamation.

By virtue of the fact that the Proclamation was retrospective in effect, it was possible that certain acts which at the time they had been done had been lawful retrospectively became unlawful. The Proclamation catered for this situation by providing that where, before the commencement of the Proclamation any person who had taken any action whereby he had incurred any expenditure or liability in connection with, or for the purpose of, or with a view to, the reproduction or performance of any work which at the time was lawful or would have been lawful but for the passing of the Proclamation, the Proclamation did not diminish or prejudice any rights or interests arising from or in connection with such action which were subsisting and valuable at the date of commencement unless the relevant copyright owner agreed to pay compensation in an amount determined by agreement or in accordance with the provisions of the Act. A vested right was thus granted in favour of third parties.

After 1920 certain countries were added to the list of Berne Convention countries, works originating from which were protected in South Africa. In 1936 a further major Proclamation was passed. The Rome version of the Berne Convention had in the meantime been adopted in 1928 and South Africa had acceded to that Convention on 27 May 1935.

The purpose of the 1936 Proclamation was to apply the provisions of the Rome text of the Berne Convention. The 1936 Proclamation repealed the earlier Proclamation but preserved the vested rights which had been acquired under those Proclamations.

The 1936 Proclamation, like the 1920 Proclamation, operated retrospectively as though it had formed part of the Act in 1916. Certain of the provisions of the Proclamation were, however, made applicable to foreign countries at different dates.[67] The critical dates for the assessment of the ownership of the copyright in "sound recordings" and the disqualification for protection on account of a "sound recording" reproducing a previous "sound recording", as well as for the operation of the reversionary right in favour of the author or his heirs at the expiration of the term of "old" copyright was the date stipulated for a particular country and as given in footnote 67.

As in the case of the 1920 Proclamation, the vested rights of persons who had taken steps which retrospectively became unlawful by virtue of the Proclamation were protected unless they were compensated.

The 1936 Proclamation too granted no longer term of copyright to foreign works than that which was conferred upon such works by the laws of the country of origin.

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67. The countries which enjoyed the benefit of the Proclamation and the relevant dates for certain of the provisions are as follows:
    (a) Belgium, Denmark, France, Germany, Haiti, Italy, Japan, Luxemburg, Monaco, Morocco (French Zone), Netherlands, Netherlands East Indies and Curacao, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Tunis - operative date 1 May 1920;
    (b) Austria, Brazil, Bulgaria, Czecho-Slovakia, Free City of Danzig, Greece, Hungary, Poland - operative date 6 July 1923;
    (c) Estonia, Finland, French Colonies and Protectorates under the authority of the French Ministry of the Colonies, Liechtenstein, Korea, Formosa, Japanese Saghalien, and Kwantung Leased Territory, Portugese Colonies and Spanish Colonies, Roumania, Siam, Syria-Lebanon, Yugo-Slavia - operative date 13 April 1934;
    (d) Morocco (Spanish Zone), Vatican City - operative date 14 February 1936.

See Government Gazette No. 2335 dated 14 February 1936.

Subsequent to 1936 further Proclamations were issued in respect of particular countries and works originating from these countries were by and large granted protection under the same conditions and circumstances as the 1936 Proclamation.[68]

As America was never a member of the Berne Convention, South Africa entered into an agreement with it in terms of which reciprocal protection was granted in each country to works originating from the other country. American works were protected on the same basis as works originating from Berne Convention countries save that in addition American works were required to have complied with the formalities for protection in the United States of America laid down by United States law. In practice this amounted to registration at the Library of Congress in Washington. The Proclamation extending protection to works originating from the United States of America, which was dated 13 June 1924, was not repealed by the aforementioned 1936 Proclamation.

It must be remembered that all the aforementioned international Proclamations applied the Act of 1916 to foreign works originating from the relevant countries. In doing so they effectively applied the 1917 Gateway to such works. This was done subject to the replacement of the critical date for the operation of the author's reversionary interest and the saving of vested rights in favour of third persons being the date of the relevant Proclamation and nōt 1 January 1917. For a work of foreign origin made before 1917

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68. Protection was extended to works originating from the following countries on the following dates: Letland - 5 May 1939; Sarawak and North Borneo - 26 July 1940. Works originating from Haiti were disallowed protection from 20 August 1923.

to enjoy an "old" copyright and therefore qualify for a substituted right it must have enjoyed copyright under pre-1917 legislation which was operative in South Africa. Alternatively, in the case of dramatic, musical and artistic works, it could have enjoyed copyright in Britain under the Act of 1911 on 1 January 1917. Copyrights which meet these conditions have been discussed above. However, such copyrights passed through the 1917 Gateway of their own accord in any event and did not require any international Proclamations under the Act of 1916 to do so. Section 151(1) states

> *"where* **any person** *is immediately before the commencement of this Chapter entitled to any such right in any work as is specified in the first column to the Fourth Schedule to this Act, or to any interest in such a right, he shall as from that date be entitled to the substituted right set forth in the second column of that Schedule, or to the same interest in such a substituted right ..."* (emphasis added).

The owner of a copyright in a work of foreign origin which subsisted in South Africa on 1 January 1917 was a person such as is contemplated in the aforementioned quotation. Furthermore, a right which passed through the 1917 Gateway was superseded by a substituted right free of any qualifications such as to duration of the term of the "old" copyright in contrast to both the position under the old law (whether British or South African) and under the international Proclamations issued under the Act of 1916. This was, however, subject to the qualification that in the case where the author had assigned the "old" copyright for the whole term, the ownership of the copyright would have reverted to him or his heirs after the expiry of the normal term of the particular "old" copyright, which being in respect of a work of foreign origin would have been of no longer duration than under the law of the country of origin of the work.

Subject to what is said below, there appeared to be no circumstances in which a work of foreign origin made before 1917 qualified for a substituted right under the Act of 1916 by virtue of an international Proclamation issued under the Act of 1916. Accordingly, the effects of the international Proclamations were retrospective only to the extent that, no matter when they were passed, they conferred protection in South Africa on works of foreign origin made on 1 January 1917 or thereafter. The exception to this rule was the case of "sound recordings" which were retrospectively granted protection by the Act of 1916. This exception did not, however, apply to American works because the 1924 Proclamation which conferred copyright on American works required that the works must meet the formalities prescribed by American law (i.e. registration) and American law did not protect sound recordings at that time which meant that no American sound recording could comply with such requirement.[69] The provisions in the various proclamations which dealt with the author's reversionary right and the preservation of vested rights in favour of third parties accordingly only had relevance in relation to foreign works made prior to 1 January 1917 to "sound recordings" of foreign origin (except those of American origin).

In dealing with the operation of the 1917 Gateway in respect of works of foreign origin a distinction must be drawn between, on the one hand, literary works which enjoyed protection under British legislation, and on the other hand, dramatic, musical and artistic works which enjoyed protection under British legislation. As stated above, foreign dramatic, musical and artistic works made prior to 1917

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69. Melville B. Nimmer and David Nimmer, **Nimmer on Copyright**, paragraph 2.10[B].

could have enjoyed substituted rights under the British Act of 1911 (if made prior to 12 July 1912) or copyright *de novo* under that Act (if made after 12 July 1912) and such copyright could have passed through the South African 1917 Gateway generally speaking free of any limitation, by virtue of the provisions of Section 147(1) of the Act of 1916. On the other hand, literary works [which were not dealt with in Section 147(1)] of foreign origin which enjoyed protection in Britain (and in South Africa) by virtue of the Copyright Act of 1842 and the International Copyright Act of 1886 could only qualify for substituted rights under the Act of 1916 if they passed directly through the South African 1917 Gateway, whereafter the substituted rights generally free of any qualifications, were conferred upon them. The International Copyright Act of 1886 only conferred copyright on works originating from countries which subscribed to the original text of the Berne Convention, as varied by the Additional Protocol of Paris, and Austria-Hungary, and not on countries which acceded to the Berne Convention after the adoption of the Berlin text. This was in contrast to the position under the Act of 1911. Furthermore, unpublished foreign literary works enjoyed copyright under the "old" British law by virtue of the British common law, and the Act of 1842 only protected published foreign works. As British common law copyright did not apply in South Africa, the only foreign literary works which would have qualified for substituted rights under the South African 1917 Gateway by virtue of the British Act of 1842 and the International Copyright Act of 1886 were **published** literary works. This factor was mitigated to some extent by the fact that the Transvaal Act of 1887 granted protection to all unpublished literary works (including foreign works) for a limited duration and certain unpublished literary works of foreign origin could have gained access to the 1917 Gateway via this route. Of course, dramatic and musical (but not artistic)

works of foreign origin could in addition have gained direct access to the South African 1917 Gateway via the British Act of 1842 and the International Copyright Act of 1886 over and above the access which they gained through passing through the British 1912 Gateway and then the South African 1917 Gateway.

Prior to 1917 American works only enjoyed copyright in the United Kingdom to a very limited extent.[70] Generally speaking very few, if any, American dramatic, musical or artistic works would have passed through the British 1912 Gateway and gained access to the South African 1917 Gateway in this manner. Accordingly, broadly speaking American works made prior to 1917 could only have gained access to the South African 1917 Gateway via laws which operated in South Africa prior to 1917 e.g. the Natal Act of 1896 and the Transvaal Act of 1887 (in regard to unpublished works).

5. PROTECTION OF VESTED INTERESTS IN THE ACT OF 1916

Generally speaking the Act of 1916, like the British Act of 1911, contained provisions protecting vested interests held by third parties whenever it granted copyright retrospectively or whenever it granted a greater measure of protection than had been granted under previous legislation.

The scope of the substituted rights which emerged from the 1917 Gateway was in certain respects broader than the scope of the corresponding "old" rights. To compensate for this Section 151(1)(b) of the Act of 1916, which was the equivalent of Section 24(1)(b) of the British Act of 1911, pro-

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70. See p 155 *supra*.

vided that where a person prior to 1 January 1917 took any action whereby he incurred any expenditure or liability in connection with the reproduction or performance of any work in any manner which was at the time lawful, or had taken any lawful preparatory action to making such reproduction or performance, the Act could not prejudice any rights or interest arising from such action which were subsisting and valuable at the specified date, unless the person who became the owner of the rights in question paid compensation in an agreed amount, or failing agreement, as determined by arbitration. These provisions were discussed above in Chapter III.[71] Substantially the same savings provisions applied where substituted rights were conferred upon musical, dramatic or artistic works made prior to 1917 which enjoyed copyright in Britain on 1 January 1917 and thus qualified for substituted rights in terms of Section 147(1) of the Act of 1916.

Vested rights were also preserved where works of foreign origin were retrospectively granted protection in terms of an International Proclamation or an International Proclamation repealed an earlier International Proclamation.

6. WORKS NOT PROTECTED IN THE ACT OF 1916

The following types of works eligible for copyright under the South African Copyright Act, 1978, did not enjoy protection under the Act of 1916:

(a) Drawings and other artistic works which embodied designs capable of being registered under Chapter II of

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71. See p 162 supra.

the Act, save where such designs, though being capable of being registered as such, were not used nor intended to be used as models or patterns to be multiplied by any industrial process.

(b) Works of craftsmanship of a technical nature.

(c) Cinematograph films as such, although each frame of a cinematograph film was protected as a photograph and *"any cinematograph productions where the arrangements or acting form of the combination of incidents represented give the story an original character"* were protected as dramatic works; documentary films were not treated as "dramatic works" on this basis.

(d) Broadcasts.

(e) Programme carrying signals.

(f) Published editions.

In view of the provisions of Section 43 of the Act of 1978, which generally speaking caused the Act of 1978 not to grant copyright retrospectively to works made during or before the currency of the Act of 1916 the fact that the abovementioned categories of works did not enjoy protection under the Act of 1916 is of considerable significance.

CHAPTER VI

COPYRIGHT UNDER THE COPYRIGHT ACT, NO. 63 OF 1965

1. INTRODUCTION

(1) Historical Developments

During the first half of the 20th Century considerable technical innovation which had a profound effect on communications and the media took place. These innovations created new opportunities for the creators of intellectual property, particularly in the field of entertainment and dissemination of information. Cinematograph films and sound recordings which were in their infancy at the time of the passing of the British Act of 1911 became well established "art" forms and their exploitation enjoyed considerable commercial success. Broadcasting, both in the media of television and sound, also came to the fore and not only provided vehicles for exploitation of existing art forms such as literary, dramatic and musical works but also provided opportunities themselves for the expression of creative works.

The Berne Convention, which had become the fountainhead of copyright throughout the developed world, underwent major revisions at Rome in 1928 and Brussels in 1948. Moreover, a further International Copyright Convention sponsored by the United States of America, which had refrained from subscribing to the Berne Convention because its system of registration of copyright was incompatible with the requirement of the Berne Convention that there should be no formalities for

the enjoyment of copyright, namely the Universal Copyright Convention dating from 1952, was brought into being.

All these factors contributed to the necessity for the revision of British copyright law and in 1956 a new copyright law was passed. The Act of 1956 repealed the British Act of 1911 and, subject to its having been amended from time to time, is still in force today.

Nine years after the passing of the British Copyright Act of 1956, the South African legislature followed suit and passed the Copyright Act 63 of 1965.

(2) Repeal of Previous Legislation

The Copyright Act, 1965, came into operation on September 11, 1965,[1] and it repealed Sections 149 to 160 (i.e. Chapter IV) of the 1916 Act, as well as the Third Schedule to that Act, provided that any Proclamation, Regulation or Rule having effect under a provision of the 1916 Act continued in force as if it had been made under the 1965 Act pending amendment or repeal by fresh regulations or other subordinate legislation.[2] The Copyright International Convention's Proclamation, 1966, published in Government Gazette No. 1402 dated March 18, 1966 repealed all previous regulations dealing with the extension of the effect of the 1916 Act to other countries, save in the case of the United States of America. The 1924 proclamation relating to the United States of America was repealed in Proclamation No. R231, 1973, published in Regulation Gazette 1850 dated October 5, 1973. The 1965 Act was very closely modelled on

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1. See Proclamation No. 224 contained in Government Gazette No. 1223 of September 10, 1965.
2. Section 48(2) of the 1965 Act.

the British Copyright Act of 1956. Unlike the 1916 Act, however, the 1965 Act did not actually declare the 1956 British Act to be in force in South Africa; it did no more than adopt the form and a substantial part of the language of the 1956 British Act.

(3) Transitional Provisions

The transitional provisions of the 1965 Act were dealt with in Section 48, read together with the Sixth Schedule to that Act. In terms of Section 41(1) of the Sixth Schedule, the provisions of the 1965 Act applied, except insofar as was otherwise expressly provided in that Schedule, in relation to things existing at the commencement of the Act in 1965 in the same way as they applied in relation to things which came into existence after 1965. In other words, it was envisaged under the 1965 Act that no reference, or very little reference, was necessary to the 1916 Act and that the law of copyright was regulated, both in regard to existing and future works, by the provisions of the 1965 Act. In essence, however, the essential provisions of the 1916 Act, particularly those relating to the subsistence, duration and ownership of copyright, were embodied in the 1965 Act, read together with the provisions of the Sixth Schedule. It was virtually a case of the relevant provisions of the 1916 Act being re-enacted in the 1965 Act for application to pre-1965 works.

In general terms the Act of 1965 embodied the same principles and general policies as the Act of 1978. On the whole, the law as regulated by the Act of 1965 differed from the law as regulated by the Act of 1978 only as to matters of detail. In general terms the principles of South African copyright law set forth in Chapter II of this thesis apply

equally to the Act of 1965 save to the extent where specific differences are discussed below.

In terms of Section 43 of the Act of 1978 the law as regulated by the Act of 1965 must be analyzed primarily to ascertain which works enjoyed copyright and the duration and ownership of those works. The Act of 1978 preserved these elements of the law in respect of works made prior to 1 January 1979. It is also necessary to analyze to what extent the Act of 1965 created copyright retrospectively in works made prior to 1965 and in what respect it did not. Furthermore, the question of what vested rights derived from the Act of 1916 were protected in the Act of 1965 and what vested rights were created by the Act of 1965 must be examined. The discussion of the 1965 Act which follows will be focused on these issues.

2. CLASSES OF WORKS PROTECTED

The Act distinguished between so-called *"original works"*, i.e. literary, dramatic, musical and artistic works, and so-called *"other subject matter"*, i.e. sound recordings, cinematograph films, broadcasts and published editions. Nothing turned on this distinction and it was abolished in the 1978 Act. In this thesis no such distinction will be made and all the aforegoing will be dealt with as "works".

(1) Literary Works

The 1965 Act conferred copyright upon all original literary, dramatic, musical[3] and artistic works,[4] and upon

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3. Section 3.
4. Section 4.

sound recordings,[5] cinematograph films,[6] television and sound broadcasts,[7] and published editions[8] of works. As compared to the 1916 Act, television broadcasts and sound broadcasts, and published editions of works were *res nova*, while cinematograph films and sound recordings were recognized as *sui generis* categories of work.

In terms of Section 47(4) a literary, dramatic, musical or artistic work was not made, or did not come into existence, until it was reduced to writing or some other material form.

The term *"literary work"* was defined in the 1965 Act as *"includ[ing] any written table or compilation"*.[9] If this definition is compared with the definition of *"literary work"* in the Third Schedule to the 1916 Act, it will be observed that *"maps, charts, plans"* were omitted from the definition in the 1965 Act. These types of works were, however, included in the definition of *"drawing"* in the 1965 Act,[10] and the term *"drawing"* was incorporated in the definition of *"artistic work"* in the 1965 Act.[11] In other words, in the 1965 Act these works were changed from being *species* of the *genus* "literary work" to *species* of the *genus* "artistic work". Nothing really turns on this change as the conditions for the subsistence of copyright, and the substance of copyright, in literary and artistic works both under the 1916 Act and under the 1965 Act were essentially the same. However, this change must be borne in mind when interpreting assignments etc. executed under the 1916 Act.

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5. Section 13.
6. Section 14.
7. Section 15.
8. Section 16.
9. Section 1(1).
10. Section 1(1).
11. Section 1(1).

(2) Dramatic Works

The term *"dramatic work"* was defined to

> *"include[s] a choreographic work or entertainment in dumb show if reduced to writing in the form in which the work for entertainment is to be presented, but exclude[s] cinematograph film as distinct from a scenario or script for a cinematograph film".*[12]

Save for the exclusion of *"cinematograph productions"* and *"any piece for recitation"* from the corresponding definition in the 1916 Act, this definition was substantially the same as the definition of *"dramatic work"* in the 1916 Act. While cinematograph films as such were excluded from the category of *"dramatic work"*, the scenario or script was retained as a *"dramatic work"*.

(3) Musical Works

As under the 1916 Act, there was no definition of *"musical work"* in the 1965 Act and this term must thus be given its ordinary meaning. The 1965 Act, however, in contra-distinction to the 1916 Act, did not deem sound recordings to be musical works and protected such works as a *sui generis* category.

(4) Artistic Works

The term *"artistic work"* was defined in the 1965 Act to mean -

> *"(a) paintings, sculptures, drawings, engravings and photographs irrespective of the artistic quality thereof;*
>
> *(b) works of architecture, being either buildings or models for buildings; or*

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12. Section 1(1).

(c) works of artistic craftsmanship, not falling within paragraphs (a) or (b)".[13]

The term *"drawing"* was defined as *"includ[ing] any diagram, map, chart or plan".*[14] The term *"engraving"* was defined as *"includ[ing] any etching, lithograph, wood cut, print or similar work, but does not include a photograph".*[15] The term *"photograph"* was defined as *"any product of photography or of any process akin to photography, but does not include any part of a cinematograph film".*[16] The definition of *"photograph"* approximated to the corresponding definition under the 1916 Act, save that, as previously mentioned, under the 1916 Act, a cinematograph film could be protected as a sequence of photographs.

The definition of *"artistic work"* in the 1965 Act was substantially the same as the corresponding definition under the 1916 Act, save that the amplifying phrase, *"irrespective of the artistic quality thereof"* used in connection with category (a) of the definition of *"artistic work"* in the 1965 Act did not form part of the definition of *"artistic work"* in the 1916 Act.

(5) Sound Recordings

The term *"sound recording"* was defined in the 1965 Act as meaning *"the aggregate of the sounds embodied in and capable of being reproduced by means of a record of any description, other than a soundtrack associated with a cinematograph*

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13. Section 1(1).
14. Section 1(1).
15. Section 1(1).
16. Section 1(1).

film".[17] The term "*record*" was also defined in the Act and meant:

> "*any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable of being automatically reproduced therefrom with or without the aid of some other instrument; and references to a record of a work or other subject matter shall be construed as references to a record as herein defined by means of which it can be performed*".[18]

Musical works which constituted "*sound recordings*" under the 1916 Act were regarded as sound recordings as defined in the 1965 Act, and Section 13 of the 1965 Act, which dealt with sound recordings, was, subject to certain qualifications, applicable to sound recordings made during the currency of the 1916 Act. Section 13 of the Sixth Schedule, however, specifically provided that copyright did not subsist in a sound recording made before 1 January 1917, unless a substituted right had been granted to the work in question by virtue of Section 19(8) of the Third Schedule to the 1916 Act. In other words, for pre-1917 "sound recordings" one must have regard to the 1916 Act to ascertain whether copyright subsisted in the work, but for sound recordings made after 1917 one has regard to the 1965 Act and not to the 1916 Act.[19] Such sound recordings were retrospectively given the *sui generis* status of sound recordings and under the 1965 Act and were no longer treated as "musical works".

(6) Cinematograph Films

The term "*cinematograph film*" was defined in the 1965 Act as

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17. Section 1(1).
18. Section 1(1).
19. See Section 13 of the 1965 Act, read together with Sections 11-13 of the Sixth Schedule.

> *"any sequence of visual images recorded on material of any description (whether translucent or not) so as to be capable, by the use of that material - (a) of being shown as a moving picture; or (b) of being recorded on other material (whether translucent or not) by the use of which it can be shown".*[20]

Section 14 of the 1965 Act, read together with Sections 14-16 of the Sixth Schedule, provided that the *sui generis* status of cinematograph films provided for in the 1965 Act did not apply to "cinematograph films" made prior to 1965. Such "cinematograph films" retained their status as dramatic works and fell within the provisions of the 1965 Act relating to dramatic works. The author of the "cinematograph film" for purposes of the 1916 Act, (i.e. the author of the dramatic work) was deemed to be the author of the "dramatic work" protected under the 1965 Act. The photographs comprised in a pre-1965 film continued to be protected as photographs under the 1965 Act, notwithstanding the fact that the 1965 Act excluded single frames of cinematograph films from the definition of *"photograph"*.[21] A cinematograph film included the sounds embodied in any soundtrack associated with the film.[22]

Laddie, Prescott and Vitoria contends that the definition of *"cinematograph film"* in the British Act of 1956, which definition corresponds with the above definition, includes a recorded video tape.[23] It is submitted that the question is not beyond doubt but that the learned authors are probably correct.

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20. Section 1(1).
21. Section 16 of the Sixth Schedule.
22. Section 14(9).
23. See **The Modern Law of Copyright**, p 277.

(7) Broadcasts (Television and Sound)

The term *"television broadcast"* was defined in Section 1 of the 1965 Act as *"visual images broadcast by way of television, together with any sounds broadcast for reception along with those images"*; the term *"sound broadcast"* was defined as *"sounds broadcast otherwise than as part of a television broadcast"*; and the term *"broadcasting"* was defined as *"broadcasting by means of a broadcasting service as defined in Section 1 of the Radio Act, 1952 (Act No. 3 of 1952)"*. As mentioned, television broadcasts and sound broadcasts were a new category of work created by the 1965 Act. In terms of Section 15, read together with Section 17 of the Sixth Schedule, the 1965 Act did not apply to broadcasts made prior to 1965. Such broadcasts were thus not the subject of copyright although, of course, certain of the material covered by such broadcasts, e.g. musical works, literary works, dramatic works, etc. could be the subjects of copyright.

(8) Published Editions

The 1965 Act contained no definition of the term *"published editions of works"*. Section 16(1) of the Act, however, stated that copyright subsisted in every published edition of any one or more literary, dramatic or musical works provided that no copyright was conferred upon an edition which reproduced the typographical arrangement of a previous edition of the same work or works. Consequently, it is obvious that a published edition was constituted by an original typographical arrangement (i.e. involving fresh typesetting) of a literary, dramatic or musical work. In contrast with all the other categories of works which were the subject of copyright, published editions were not dealt with specifically in the Sixth Schedule to the 1965 Act. Consequently, in terms of Section 16 of the 1965 Act, read together with

Section 41(1) of the Sixth Schedule, published editions made prior to 1965 were granted copyright retrospectively. In practice, this retrospective protection only extended back to 1940 since, as we shall see below, the term of copyright granted to a published edition was twenty five years from the date of publication, which means that works published earlier than 1940 would in any event have been out of copyright in 1965 even though copyright was granted retrospectively by the 1965 Act.

(9) Industrial Designs

It will be recalled that Section 22 of the Third Schedule to the 1916 Act provided that copyright would not subsist in designs capable of being registered under Chapter II of the 1916 Act. This position was perpetuated in the case of pre-1965 works in Section 8(2) of the Sixth Schedule to the 1965 Act. The 1965 Act itself adopted a different approach to artistic works, designs corresponding to which were registrable as designs. Like the 1916 Act, the intent of the 1965 Act was to prevent there being an overlap in protection for an artistic work/design under both designs legislation and the Copyright Act. The 1965 Act, however, did not provide that no copyright subsisted in artistic works which were capable of registration as designs but rather imposed limitations on the right of the owner of the copyright in a relevant artistic work to sue for infringement of copyright in certain circumstances. These circumstances were set out in Section 11 of the 1965 Act read together with the First Schedule to that Act. In terms of this Section copyright continued to subsist in the artistic work but that copyright became partially unenforceable. In a long series of British cases culminating with, and summed up in, **British Leyland Motor Corporation & Others v. Armstrong Patents Company Ltd**

& Others,[24] the British courts held that the "forfeiture" of protection which occurred as aforementioned did not apply where a corresponding design would not have been registrable under the designs legislation. This point was never specifically decided by the South African courts although the indications are that they would have followed the approach of the British courts.[25] As will be shown below the difference in the treatment of artistic works which embodied designs registrable as such under designs legislation in the Act of 1965 as compared with the Act of 1911 is of considerable importance to the protection of this type of work made prior to 1979 conferred by the Act of 1978.

In the cases **Pan African Engineers (Pty) Limited v Hydro Tubes (Pty) Ltd & Another**[26] and **Ehrenberg Engineering (Pty) Ltd v Topka, t/a Topring Manufacturing & Engineering**[27] the court enforced copyright in drawings embodying functional designs, while in **Weetabix Ltd v Eet-Rite Natural Foods (Pty) Ltd**[28] the court applied the provisions of the aforementioned Section 11 and held that the relevant part of the copyright had become unenforceable. The **Weetabix** case did not, however, deal with drawings embodying a registrable design which had been copied in a three-dimensional form but rather with a photograph which was applied in a two-dimensional form to the outer surface of a package (in the nature of a label) which was found by the court to be a registrable design notwithstanding the exclusion of the

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24. 1986 FSR 221.
25. See for instance **Scaw Metals Ltd v. Apex Foundry (Pty) Ltd & Another**, 1982 (2) SA 377 (D), at 385D.
26. 1972 (1) SA 470 (W).
27. Case No. I 8652/77 in the TPD - unreported.
28. 1974 (1) SA 230 (T).

registration of certain designs provided for in regulations issued under the Designs Act, 1967.

(10) Reconciliation of 1916 and 1965 Acts as to Works Protected

In general, and save to the extent specifically dealt with, the effect of the provisions of the 1965 Act, read together with the Sixth Schedule, was that works as defined in the 1965 Act, but made prior to 1965, were protected under the 1965 Act. Insofar as any definition under the 1965 Act might have been broader in scope than a corresponding definition under the 1916 Act, the 1965 Act retrospectively created copyright in any works falling within the broader definition in the 1965 Act and falling outside the narrower definition in the 1916 Act, but applied the provisions of the Sixth Schedule (effectively the 1916 Act) to those works. In other words the Act retrospectively protected such works but proceeded on the assumption that they had been protected under the 1916 Act.

3. CONDITIONS FOR SUBSISTENCE OF COPYRIGHT

A. PRELIMINARY CONCEPTS

Before going on to deal with the conditions for the subsistence of copyright under the Act of 1965 it is necessary to discuss the concepts of "qualified person" and "publication" under that Act.

(a) Qualified Person

A so-called "qualified person" under the 1965 Act was - (a) in the case of an individual, a person who was a citizen of

or was domiciled or resident in South Africa or a country to which the operation of the 1965 Act had been extended; and (b) in the case of a body corporate, a body which was incorporated under the laws of South Africa or of a country to which the operation of the Act had been extended.[29] For the purposes of a qualified person in relation to a pre-1965 photograph or "sound recording", in the case of a corporate body, the definition was extended to include a corporate body which had established a place of business in the relevant place.[30]

(b) Publication

Publication under the 1965 Act took place, generally speaking, when reproductions of the work were issued to the public but no regard was taken of such issuing of reproductions to the public as was merely colourable and not intended to satisfy the reasonable requirements of the public.[31] The copies issued to the public must have been of the work as a whole and not merely of a substantial part of the work.[32] Specifically in regard to a cinematograph film, publication meant the sale, letting on hire or offer for sale or hire of copies of the film to the public.[33]

The performance or the issue of records of a literary, dramatic or musical work, the exhibition of an artistic work, the construction of a work of architecture and the

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29. See definition of *"qualified person"* in Section 1(1) read together with Section 32 and the Regulations published thereunder in Proclamation No. R73, 1966 in Government Gazette No. 1402 dated March 18, 1966 - the so-called *"Copyright International Conventions Proclamation"*.
30. Section 37(4) of the Sixth Schedule.
31. See Section 47(2)(b) and (c).
32. Section 47(1).
33. See definition of *"publication"* in Section 1(1).

issue of photographs or engravings of a work of architecture or a sculpture did not constitute publication of such works.[34] Publication in South Africa and another country was considered to be simultaneous if the two publications took place within thirty days of each other.[35]

For purposes of publication, if copyright subsisted in the unpublished work then no account was taken of an unauthorized publication, which meant an act done otherwise than by or with the licence of the owner of the copyright; if the work did not enjoy copyright as an unpublished work, then no account was taken of any unauthorized publication which meant an act done otherwise than by or with the licence of the author or his successor in title.[36]

B. CONDITIONS FOR CLASSES OF WORKS

(1) Literary, Dramatic, Artistic and Musical Works

In the case of literary, dramatic, artistic and musical works copyright subsisted therein in the following circumstances:[37]

(a) In the case of an unpublished work, the author was a qualified person at the time when the work was made or, if the making of the work extended over a period, for a substantial part of that period.

(b) In the case of a published work, -

(i) the first publication of the work took place in South Africa or in a country to which the operation of the Act had been extended; or

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34. Section 47(2)(a).
35. Section 47(2)(d).
36. Section 47(3).
37. Section 3(1) and Section 4(1).

(ii) the author of the work was a qualified person at the time when the work was first published; or

(iii) if the author had died before the first publication of the work, he was a qualified person immediately before his death.

It is important to note that a published work could not continue to enjoy copyright simply by virtue of the fact that the circumstances of paragraph (a) above applied; it was necessary that in addition the circumstances of paragraph (b) should apply. Sub-paragraphs (b)(ii) and (iii) above did not apply to pre-1965 works.[38] This brought the provisions for subsistence of copyright in the 1965 Act, read together with the Sixth Schedule, into conformity with the position which obtained under the 1916 Copyright Act. Paragraph (b)(i) only applied to pre-1917 works if a substituted right applied to those works under the 1916 Act.[39]

In regard to dramatic or musical works made prior to 1917 Section 35 of the Sixth Schedule laid down specific provisions relating to the situation where there had been a splitting of the copyright into one component comprising the right to perform the work in public and another component comprising the balance of the normal copyright. The effect of this paragraph of the Schedule was that in any given case the copyright subsisting in a pre-1917 dramatic or musical work by virtue of Section 3 of the 1965 Act could be a partial copyright.

(2) Sound Recordings

Copyright subsisted in every sound recording which was made in South Africa or in a country to which the operation of

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38. See Section 1 of the Sixth Schedule.
39. See Section 34 of the Sixth Schedule.

the Act was extended or of which the maker or author was a qualified person at the time when the recording was made.[40] Copyright did not subsist by virtue of Section 13 in a "sound recording" made prior to 1917 unless Section 19(8) of the Third Schedule to the 1916 Act had granted copyright to that sound recording.[41] The principle of reciprocity was, however, applied to the protection of foreign sound recordings.[42]

(3) Cinematograph Films

Copyright subsisted in every cinematograph film, whether published or unpublished, of which the maker or author was a qualified person for the whole or a substantial part of the period during which the film was made, or in every cinematograph film which had been published and of which the first publication took place in South Africa or in a country to which the operation of the Act had been extended.[43] As stated previously, the provisions of the Act relating to cinematograph films as a *sui generis* type of work, did not apply to pre-1965 films. Such films were dealt with by the 1965 Act as dramatic works.

(4) Broadcasts

Copyright subsisted in every television or sound broadcast made by the SABC.[44] As previously stated, the copyright granted in this category of work did not apply to pre-1965 works.

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40. Section 13(1).
41. Section 13 of the Sixth Schedule.
42. See p 399 *infra*.
43. Section 14(1).
44. Section 15(1).

(5) Published Editions

Copyright subsisted in every published edition of a literary, dramatic or musical work if the first publication of the edition took place in South Africa or in a country to which the operation of the Act had been extended or if the publisher or the author of the edition was a qualified person at the date of first publication.[45] As stated previously, copyright was granted retrospectively to published editions first published prior to 1965. As in the case of sound recordings, the principle of reciprocity was, however, applied to the protection of foreign published editions.[46]

4. AUTHORSHIP AND INITIAL OWNERSHIP OF COPYRIGHT

(1) The Author

The 1965 Act, read together with the Sixth Schedule, provided that the maker of a literary, dramatic, musical or artistic work was the author of that work. The position was different in the case of cinematograph films, being dramatic works, made prior to 1965, and photographs. The author of a dramatic work, being a pre-1965 cinematograph film, was deemed to be the author of that cinematograph film. The author of a photograph, in keeping with the equivalent provision of the 1916 Act, was designated as being *"the person who at the time when the photograph is taken, is the owner of the material on which it is taken"*.[47] The maker of a sound recording was designated as being the author of that

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45. Section 16(1).
46. See p 400 *infra*.
47. See the definition of *"author"* in Section 1(1).

sound recording.[48] This was in conformity with the position under the 1916 Act. Similarly, the maker of a cinematograph film was designated as being the owner of the copyright in that cinematograph film.[49] The *"maker"* of a cinematograph film was defined as *"the person by whom the arrangements necessary for the making of the film are undertaken"*.[50] The 1965 Act contemplated that only the South African Broadcasting Corporation would make broadcasts which would be the subject of copyright.[51] Thus the author of a broadcast was invariably the SABC. The publisher of a published edition was designated as the author of that category of work.[52]

(2) Initial Ownership of Copyright

The general rule applicable to the first ownership of copyright under the 1965 Act was that the author or maker of the work was initially entitled to the copyright.[53] This rule was, however, subject to certain exceptions, namely, the following:

(a) Where a literary, dramatic or artistic work was made by the author in the course of his employment by a media publishing business under a contract of service or apprenticeship and was made for the purpose of publication in written media, the media publishing business owned the copyright in the work in regard to publishing it in any written media, but the author owned the copyright in all other respects.[54]

(b) Where a person commissioned the taking of a photograph, the painting or drawing of a portrait, the making of a

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48. Section 13(3), read together with Section 13(6).
49. Section 14(3).
50. See definition of *"maker"* in Section 1(1).
51. See Section 15(1) and (2).
52. Section 16(1) and (2).
53. Section 5(1), 13(3), 14(3), 15(2) and 16(2).
54. Section 5(2).

gravure, the making of a cinematograph film or the making of a sound recording and paid or agreed to pay remuneration for the making of the work, and the work was made pursuant to that commission, the person giving the commission was the first copyright owner.[55]

(c) Where in a case not falling within either (a) or (b), a work (i.e. a literary, dramatic, musical or artistic work and not the other categories of works) was made in the course of the author's employment by another person under a contract of service or apprenticeship, that other person was the first copyright owner.[56]

All the aforementioned exceptions could be varied or excluded by agreement between the parties.[57] The exceptions did not apply to works made prior to 1965 but the provisions of Section 5(1) of the Third Schedule to the 1916 Act continued to apply.[58] The effect of the provisions of the aforesaid Section of the Third Schedule to the 1916 Act was substantially the same as the aforementioned provisions, although the types of works to which they applied differed to some extent from the equivalent provisions under the 1965 Act. The upshot was that the 1965 Act preserved ownership of copyright existing under the 1916 Act. It must be appreciated that none of the aforementioned exceptions altered the identity of the author of the work - what they did was to vest the ownership of the copyright initially in someone else besides the author.

5. DURATION OF COPYRIGHT

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55. Section 5(3), 13(3) and 14(3).
56. Section 5(4).
57. Section 5(5), 13(3) and 14(3).
58. Section 3 of the Sixth Schedule.

Copyright in a literary, dramatic or musical work subsisted until the end of a period of fifty years from the end of the calendar year in which the author of the work died.[59] The same term applied to artistic works besides photographs. In the case of a photograph, the copyright subsisted until the end of the period of fifty years from the end of the calendar year in which the photograph was first published.[60] The aforementioned provisions did not apply to pre-1917 works unless a substituted right had been granted under the 1916 Act. In the absence of such a substituted right having been granted, no copyright subsisted in such works.[61] In the case of pre-1965 photographs the aforegoing provisions relating to photographs did not apply and the term of copyright in such a photograph subsisted until the end of the period of fifty years from the end of the calendar year in which the photograph was taken.[62] The copyright in a sound recording, whether made before or after 1965, subsisted until the end of the period of fifty years from the end of the calendar year in which the recording was made.[63] The copyright in a cinematograph film subsisted, in the case of a film which had been approved by the censorship authorities, until the end of the period of fifty from the end of the calendar year in which it was so approved, and in the case of a film which had not been so approved, until the film was published and thereafter until the end of the period of fifty years from the end of the calendar which included the date of the first publication, or if copyright

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59. Section 3(3).
60. Section 4(3).
61. Section 34 of the Sixth Schedule.
62. Section 2 of the Sixth Schedule.
63. Section 13(2) read together with Section 11 of the Sixth Schedule.

in the film subsisted by virtue only of it having been first published in South Africa, as from the date of first publication until the end of the period of fifty years from the end of the calendar year which included that date.[64] Pre-1965 films were, as previously stated, treated as dramatic works and the term of the copyright in such works was thus determined by the provisions of the 1965 Act relating to dramatic works.

The copyright in a television or sound broadcast subsisted until the end of the period of fifty years from the end of the calendar year in which the broadcast was first made.[65] This provision did not apply to sound or television broadcasts made before 1965, which broadcasts were not the subject of copyright.

The copyright in a published edition of a literary, dramatic or musical work subsisted until the end of the period of twenty five years from the end of the calendar year in which the edition was first published.[66] As previously stated, this provision applied to pre-1965 published editions as well.

6. TRANSMISSION OF COPYRIGHT

Copyright subsisting under the 1965 Act was transmissible by assignment, by testamentary disposition, or by operation of law as personal or movable property.[67] An assignment could

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64. Section 14(2).
65. Section 15(2).
66. Section 16(2).
67. Section 36(1).

be limited so as to apply to one or more, but not all, of the classes of acts comprised in the copyright; to any one or more, but not all, countries in relation to which the copyright subsisted; or to part, but not the whole, of the period of copyright; the assignment could also be limited to any combination of two or more of the aforegoing. Any assignment which did not relate to the full copyright in a work, was termed a partial assignment.[68] In order to be valid, an assignment must have been in writing and it must have been signed by or on behalf of the assignor.[69] Assignments and bequests made prior to 1965, will be dealt with below.

In contrast to the position under the 1916 Act, under the 1965 Act an assignment of copyright could be entered into in respect of future copyright not held by the assignor at the date of the execution of the assignment. Such an assignment could be in respect of the full copyright or it could be partial. When the copyright came into existence, if the assignor would in normal circumstances have been the copyright owner, then the copyright vested immediately in the assignee or his successor in title.[70] This provision did not apply to assignments made prior to 1965.[71] Where copyright came into existence after the death of a person, if the ownership of that copyright would have vested in that person if he was still alive, the copyright devolved as if it had subsisted immediately before his death and he had

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68. Section 36(2). In regard to partial assignments see **Kinekor Films (Pty) Ltd v Parade Home Movies; Kinekor Films (Pty) Ltd v Botma** 1976 (1) SA 647 (W).
69. Section 36(3).
70. Section 37(1).
71. Sections 27(1) and (2) of the Sixth Schedule.

been the owner of the copyright.[72] This provision applied to situations which occurred prior to 1965.[73]

Where, under a bequest, a person was entitled to the manuscript of a literary, dramatic or musical work, or to an artistic work, and the work was not published prior to the death of the testator, unless the testator had provided to the contrary, the bequest included the copyright in the work insofar as the testator was the owner of the copyright immediately before his death.[74] This provision did not apply where a person died prior to 1965 and in that situation the provisions of Section 17(2) of the Third Schedule to the 1916 Act applied as if they had been re-enacted in the 1965 Act.[75]

7. WORKS MADE FOR THE STATE

Section 39 of the 1965 Act contained provisions relating to works made by or under the direction or control of the Government. The Section provided, firstly, that even when copyright would not normally have subsisted in any literary, dramatic, musical or artistic work, sound recording or cinematograph film, because it did not meet the requirements laid down in the Act for subsistence of copyright, copyright was conferred upon such a work purely and simply because it was made by or under the direction or control of the Government; secondly, that the copyright in any literary,

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72. Section 37(2).
73. Unlike in the case of Section 37(1), the Sixth Schedule did not specifically state that this sub-section would not apply.
74. Section 38.
75. Section 28 of the Sixth Schedule. See p 323 *supra*.

dramatic, musical or artistic work, sound recording or cinematograph film made by or under the direction or control of the State vested in the State; and, thirdly, that the State was the owner of the copyright in every literary, dramatic, musical or artistic work first published in South Africa where such first publication was undertaken by or under the direction or control of the State. The aforegoing provisions were also applicable to pre-1965 films both as dramatic works and as sequences of photographs.[76] The provisions of Section 39 relating to the initial ownership of copyright were subject to variation by agreement between the State and the author of the work in question and such agreement could provide that the copyright would vest in the author or maker or in some third party. The Government Printer was designated by the State President as the officer in whom copyright owned by the State vested for administrative purposes.[77]

In terms of Section 39, the term of copyright in respect of State owned copyright as set out above was as follows:

(a) In the case of an unpublished literary, dramatic or musical work, the copyright subsisted so long as the work remained unpublished.

(b) In the case of a published literary, dramatic or musical work, the copyright subsisted until the end of the period of fifty years from the end of the calendar year in which the work was first published.

(c) In the case of an artistic work, other than an engraving or a photograph, copyright subsisted until the end

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76. Section 30(2) of the Sixth Schedule.
77. Section 39(8). The proclamation referred to was not revoked during the currency of the 1965 Act.

of the period of fifty years from the end of the calendar year in which the work was made.

(d) In the case of an artistic work, being an engraving or a photograph, the copyright subsisted until the end of the period of fifty years from the end of the calendar year in which the work was first published. This provision did not apply to photographs, either individually or as part of a cinematograph film, made before 1965. The term provided for in paragraph (c) above applied to such photographs.[78]

(e) In the case of sound recordings and cinematograph films copyright subsisted for the normal period. This did not, however, apply to pre-1965 cinematograph films; insofar as such films were dramatic works under the 1916 Act, paragraphs (a) and (b) above applied and insofar as such a cinematograph film was a sequence of photographs, paragraph (c) above applied.[79]

Paragraphs (a), (b) and (c) above applied also to pre-1965 works, save where otherwise indicated.

8. ANONYMOUS, PSEUDONYMOUS AND JOINT WORKS

Section 12, read together with the Second and Third Schedules of the 1965 Act, dealt with the questions of the duration of copyright in anonymous and pseudonymous works and with works of joint authorship.

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78. Sections 29 and 30(2)(c) of the Sixth Schedule.

79. Section 30(2) of the Sixth Schedule. Section 30(1) of the Sixth Schedule purports to make an exception in the case of the term of a pre-1965 sound recording but the alternative period specified in that section is the same period specified in Section 13 of the 1965 Act to which Section 39(5) of the 1965 Act refers.

The term *"work of joint authorship"* was defined in the Act as *"a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors"*.[80] For the purposes of the subsistence of copyright in a work of joint-authorship it was sufficient if any one of the joint authors was a qualified person.[81]

Special provisions applied to the duration of copyright in works of joint-authorship and/or works of anonymous or pseudonymous authors. A work was considered to be pseudonymous if the author had adopted a pseudonym or, if he had used more than one name in relation to the work, all the names were pseudonyms. If he used a pseudonym and his own name then the work was not pseudonymous. For these purposes a work could not be considered to be anonymous or pseudonymous if at any stage before the expiration of the term of copyright for anonymous or pseudonymous works it became possible for a person without previous knowledge of the facts to ascertain the identity of the author by reasonable enquiry.[82] The term of copyright for this type of literary, dramatic, musical and artistic works was, notwithstanding other terms provided in the Act for normal works, a period of fifty years from the end of the calendar year in which the work was first published.[83] Save in the case where one or more of the authors of a work of joint authorship was anonymous or pseudonymous, the term of copyright for a work of joint-authorship was determined by the death of the author who died last.[84] Where a work of joint-authorship was

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80. See definition of *"work of joint authorship"* in Section 1(1).
81. Section 1 of the Third Schedule.
82. Sections 2 and 3 of the Second Schedule.
83. Section 1 of the Second Schedule.
84. Section 2 of the Third Schedule.

partially pseudonymous (i.e. one or more of the authors were pseudonymous but at least one of the authors used his actual name, or if all of the authors were pseudonymous but it became possible to ascertain the identity of one or more of them without previous knowledge of the facts but pursuant to reasonable enquiry) the term of copyright was determined by reference to the death of the known author or if the identity of two or more of the authors was known, by the death of the one who died last.[85]

The aforegoing applied to pre-1965 works as well save that, in terms of Section 10(1) of the Sixth Schedule, copyright did not subsist in a literary, dramatic, musical or artistic work which was a work of joint authorship if it was first published prior to 1965 and the period of copyright enjoyed by that work under the 1916 Act had expired before September 11, 1965. The *"period of copyright"* referred to was the longer of the following periods: - i.e. the life of the author who died first and a term of fifty years after his death, or the life of the author who died last.[86] The aforementioned *"period of copyright"* conformed with the term of copyright conferred upon a work of joint authorship under the 1916 Act.[87]

9. INTERNATIONAL COPYRIGHT

Section 32 of the 1965 Act made provision for the State President to provide by way of Proclamation in the Government Gazette that protection under the Act could be

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85. Section 3 of the Third Schedule.
86. Section 10(2) of the Sixth Schedule.
87. Sections 16 and 17 of the Act of 1916.

extended to works emanating from specified other countries. The State President provided in Proclamation No. R73, 1966, published in Government Gazette No. 1402 dated March 18, 1966, the so-called *"Copyright International Conventions Proclamation"*, inter alia, that the provisions of the Act would apply to literary, dramatic, musical or artistic works, cinematograph films or published editions first published, and sound recordings first made, in the specified countries as they applied in relation to such works first published or first made, as the case may be, in South Africa; to persons who at a material time were citizens or subjects of, or were domiciled or resident in, the specified countries as they applied in relation to persons who at such time were nationals of, or domiciled or resident in, South Africa; and to bodies incorporated under the laws of the specified countries as they applied in relation to bodies incorporated under the laws of South Africa.

There were certain provisos to these general provisions, of which mention can be made that in the case of sound recordings and published editions, protection was only granted to foreign works to the extent that protection in the nature of, or related to, copyright was granted under the laws of the foreign country to sound recordings first made, or published editions first published, in South Africa; and no such foreign work would enjoy any wider protection in South Africa than was enjoyed in that country by a South African sound recording or published edition, as the case may be.

In **Gramophone Co Ltd v Music Machine (Pty) Ltd**[88] the court was required to interpret the meaning of the aforementioned

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88. 1973 (3) SA 188 (W).

proviso as it applied to sound recordings. The sound recordings in question were of British origin. The court examined British law and concluded that in terms of an Order-in-Council issued under Section 12(1) of the British Act of 1956 South Africans were regarded as "qualified persons" under British law and therefore South African sound recordings were protected under British law. British law provided that a sound recording **first published** in a Berne Convention country enjoyed copyright in the United Kingdom to the same extent as a sound recording **first published** in Britain. On the other hand the South African Proclamation provided that a sound recording **made** in a Berne Convention country enjoyed copyright to the same extent as a sound recording **made** in South Africa. It was contended on behalf of the Respondent that South African sound recordings would not enjoy protection in Britain because Britain protected sound recordings (as an alternative to those made by a "qualified person") on the basis of the place of first publication of sound recordings and not on the basis of the making of sound recordings. In other words it was contended that the making of a sound recording in South Africa would not under British law have been sufficient to cause that sound recording to enjoy copyright in the United Kingdom. The court held that it was sufficient for sound recordings to meet the reciprocity requirements of the South African Proclamation if both countries protected sound recordings emanating from the other country on the basis that the makers were qualified persons. The fact that the sound recordings did not also meet the requirements of making and first publication, respectively, was of no consequence. In this regard Moll J said the following:

> *"The words 'only to the extent that' in the first part of the proviso and the words 'any wider protection' in the second part thereof are of importance, and I agree*

with the submission made by counsel for the applicant in his reply, that in each case where one seeks to invoke the provisions of the Proclamation one must, regard being had to the said words in their context, ask the question 'to what extent do the laws of the country of origin of this recording protect a recording first made in South Africa?' From what I have said above the answer in the present case would be only to the extent that it is made by a South African qualified person or company. A United Kingdom recording, therefore, only enjoys protection to the extent that it is made by a United Kingdom qualified person or company. It, therefore, does not enjoy 'any wider protection' than is enjoyed in the United Kingdom by a recording first made in the Republic."[89]

The Copyright International Conventions Proclamation repealed the equivalent Proclamations issued under the 1916 Act, but provided that copyright which subsisted in a work in terms of such a repealed proclamation, and was not conferred once again under paragraph 3 of the new Proclamation, continued to subsist notwithstanding the repeal of the Proclamation under which it was derived.[90] Here the 1965 Act recognized a vested right.

The Copyright International Conventions Proclamation, 1966, specified the member countries of the Berne Copyright Union as at 1966 as being the countries to which the operation of the 1965 Act was extended. Those countries were listed in the First Schedule. This list was subsequently extended in

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89. At p 203 line F.
90. Section 5 of the Copyright International Conventions Proclamation.

later Proclamations as further countries joined the Berne Copyright Union.[91] The Second Schedule to the Proclamation listed those countries to which the operation of the 1916 Copyright Act had been extended, together with the dates upon which such extension had taken place. Sections 37(2) and (3) of the Sixth Schedule to the 1965 Act provided that the effect of the extension of the operation of the Act to a certain country on a specified date was retrospective. In other words, to take the example of Austria, the Second Schedule specified the date 6 July 1923 as the relevant date; as from 6 July 1923 the operation of the 1965 Act was extended to Austrian works made before that date and after that date.

In relation to any work made before the commencement of the Proclamation, the provisions of the Act applied by virtue of the Proclamation subject to certain modifications specified in the Second Schedule to the Proclamation.[92] The only modification which is relevant to the present discussion is that contained in Section 4 of the Second Schedule. This section dealt with sound recordings made prior to the commencement of the Proclamation, i.e. 18 March 1966. It will be recalled that in terms of Section 19(8) of the British Act of 1911 (the Third Schedule to the Act of 1916) the retrospective protection granted to "sound recordings" under the Act of 1916 did not apply where the making of a sound recording prior to 1 January 1917 would have infringed the copyright in another sound recording - one could refer to such a disqualified sound recording as a "non-original" sound recording. Section 13 of the Sixth Schedule of the Act

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91. Proclamations Nos. R155 of 1966, R171 of 1966, R165 of 1968, R331 of 1970.
92. Section 3 of the Copyright International Conventions Proclamation.

of 1965, in consistency with the aforementioned provisions of the Act of 1916, did not retrospectively create copyright in non-original sound recordings made prior to 1 January 1917. The effect of Section 4 of the Second Schedule to the International Proclamation, read together with the table incorporated in that Schedule, was that, in the case of foreign sound recordings, the critical date in respect of which the Act of 1965 did not retrospectively create copyright in non-original sound recordings was the date specified in the table for works originating from a particular country and not 1 January 1917. In other words, to take the example of Austria once again, non-original Austrian sound recordings made prior to 6 July 1923 did not retrospectively become clothed with copyright by virtue of the Act of 1965. This was in keeping with the provisions of the Act of 1916 and its subordinate legislation because in terms of the International Proclamations issued under that Act the same critical date was prescribed in the relevant Proclamation. In other words the 1966 Proclamation did no more than perpetuate the position which existed under the Act of 1916 and its subordinate legislation. In relation to foreign sound recordings which had never enjoyed copyright under the Act of 1916 and its subordinate legislation (because the Act of 1916 had never been extended to works of the country of origin) the Second Schedule provided that the critical date for the Act of 1965 not conferring copyright retrospectively on non-original sound recordings was the date of the proclamation itself, i.e. 18 March 1966. This was consistent with the principle applicable under the Act of 1916 and perpetuated under the Act of 1965 and the 1966 Proclamation, as aforementioned.

In short, in terms of the 1966 Proclamation, subject to certain exceptions which have been discussed above, the Act

of 1965 applied to foreign works no matter when they were made with the qualification, however, that works made prior to 1966 were governed by the Act as varied by the Sixth Schedule. This had the important effect that the term of copyright in respect of foreign works was that provided for South African works. This brought about a change in the case of pre-1965 works because, as was shown above,[93] the International Proclamations under the 1916 Act provided that the term of copyright which applied to a foreign work was to be no longer than the term of copyright applicable to that work in its country of origin. In the case of countries which gave shorter terms than South Africa, the 1965 Act thus retrospectively lengthened the term of copyright. The position of foreign works made prior to 1917 will be discussed below.

The Copyright International Conventions Proclamation, 1966, did not repeal the United States Proclamation of 1924 (Proclamation No. 118 of 1924 which extended the operation of the 1916 Act to the United States of America). This Proclamation was, however, repealed and replaced by Proclamation No. R231, 1973, published in Regulation Gazette No. 1850 dated October 5, 1973. This Proclamation declared that the Copyright International Conventions Proclamation, 1966, would apply to the United States of America in the same manner as it applied to the countries listed in the First Schedule thereof provided that, inter alia, the term of copyright in the Republic of South Africa would not exceed that conferred by the law of the United States of America. The effect of this Proclamation was that as from October 5, 1973, all United States works made after 1

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93. See p 363 *supra*.

January 1917 were granted the copyright conferred upon foreign works by the Copyright International Conventions Proclamation, 1966. It will be recalled that the 1924 Proclamation required that American works should have complied with the formalities of United States law before they were entitled to protection under South African law. This requirement was dropped in the 1973 Proclamation and as it was retrospective it meant that American works which might have been disqualified from protection during the currency of the Act of 1916 because, although entitled in principle to protection in South Africa, they had not complied with the applicable American formalities, were now retrospectively granted protection.

The number of countries specified in the Copyright International Conventions Proclamation, 1966, and in subsequent Proclamations extending the operation of the 1965 Act to foreign countries exceeded the number of countries to which the 1916 Copyright Act had been extended. In the case of any country to which the 1916 Act had not been extended, but to which the 1965 Act had been extended, copyright was conferred retrospectively on works which were made during the currency of the 1916 Act. Works emanating from such countries are further instances where pre-1965 works enjoyed copyright under the 1965 Act but did not enjoy copyright under the 1916 Act.

The Copyright International Conventions Proclamation provided that where, before its commencement, any person had taken certain action which was lawful at the time that it was taken and but for the making of the Proclamation would have remained lawful, nothing contained in it would diminish or prejudice any rights which arose from or in connection with such action and which subsisted and were valuable

immediately before the commencement of the Proclamation, unless the copyright owner by virtue of the Proclamation paid compensation in an agreed amount, or failing such agreement, compensation determined by arbitration. The action contemplated was action which resulted in incurring any expenditure or liability in connection with, for the purpose of, or with a view to, the reproduction or performance of any work.[94] In this manner, vested rights in favour of third parties were created.

Section 33 of the 1965 Act empowered the State President to extend the operation of the Act to works made by, or under the direction or control of, specified international organizations. In terms of Section 26 of the Sixth Schedule any such extension of the operation of the Act would not apply to works made prior to 1965. However, the State President never utilized these powers at all during the currency of the 1965 Act. Similarly, the State President was empowered by Section 34 to extend the operation of the Act, insofar as it related to sound and television broadcasts, to such broadcasts made by persons other than the South African Broadcasting Corporation; these powers were never utilized by the State President during the currency of the 1965 Act either. Section 45 of the Act empowered the State President to disqualify the works of certain countries from protection under our Act if it appeared to him that the laws of the countries in question failed to give adequate protection to South African works. This power too was never utilized by the State President during the currency of the Act.

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94. Section 4 of the Copyright International Conventions Proclamation.

10. TRANSITIONAL PROVISIONS

As explained above, the 1965 Act repealed the copyright provisions of the Act of 1916 and those provisions no longer applied to works which were already in existence in 1966. The Act of 1965 applied to works no matter when they were made but its application to existing works were subject to the provisions of the Sixth Schedule which by and large had the effect of bringing about a continuation of the provisions of the law of 1916 applying to works made prior to 1966. In broad terms the Act of 1965 together with the Sixth Schedule re-enacted the provisions of the Act of 1916 for purposes of works made prior to 1966. For the major part these transitional provisions of the Act of 1965 have already been dealt with during the course of the above discussion on the Act of 1965. In what follows those relevant aspects of the transitional provisions which have not already been dealt with will be discussed.

Section 27 of the Sixth Schedule to the 1965 Act contained important provisions regarding the interpretation of assignments and licences entered into during the currency of the 1916 Act. Basically, the Section provided that documents executed under the 1916 Act and expressions used in such documents would have the same effect and meaning as they would have had under the 1916 Act. Two exceptions to this general rule were, firstly, in the case of sound recordings, references to copyright under the 1916 Act would be construed as references to the copyright under that Act in records embodying the recording and, secondly, in the case of cinematograph films, references to the copyright in such works would be construed as references to any copyright under that Act in the film insofar as it consisted of a

dramatic work accorded copyright by the 1916 Act, or to the copyright in photographs forming part of the film. This latter provision is interesting as it was nowhere specifically provided in the 1916 Act that a cinematograph film would be protected as a sequence of photographs, although this is perhaps a logical deduction from the fact that individual photographs were protected. The fact that a cinematograph film could be protected under the 1916 Act either as a sequence of photographs or as a dramatic work gave rise to the problem that the two different forms in which the work could be protected could have separate copyright owners. The author of the photographs would be the person who owned the negatives, while the author of the dramatic work would be the author in the normal sense of the word, who would not necessarily be the owner of the negatives. Moreover, in terms of Section 5(1)(a) of the Third Schedule to the 1916 Act, where the making of a photograph was commissioned, the person giving the commission was the first copyright owner. This provision did not apply to dramatic works and thus to cinematograph films as dramatic works.

There was a proviso to Section 27(1) of the Sixth Schedule which was to the effect that if a pre-1965 assignment was limited to a particular term, copyright in terms of the 1965 Act was only included in that assignment to the extent that the end of the term provided for in the assignment extended beyond the date of the commencement of the Act of 1965.

The following terms had different meanings under the Acts of 1916 and 1965 (albeit very slight differences in some instances): Copyright,[95] publication,[96] dramatic work (the

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95. Section 1(2); Section 24, read together with Schedule Four, of the 1916 Act and Section 1 of the 1965 Act.
96. Section 1(3) of the Third Schedule to the 1916 Act, Sections 1 and 47 of the 1965 Act.

1916 definition includes cinematograph films which are not included in the 1965 definition),[97] photograph (the 1916 definition covered cinematograph films while the 1965 definition excludes cinematograph films)[98] and performance.[99] These differences in meanings of terms must be borne in mind when interpreting assignments made prior to 1965.

It will be recalled that under the 1916 Act where the author of the work was the initial owner of the copyright and he had assigned that copyright, after the expiry of twenty five years from his death the ownership of the copyright reverted to his executor and heirs; any agreement entered into by the author in respect of that reversionary interest was null and void. The aforegoing provision did not apply to the assignment of the copyright in a collective work (i.e. the copyright in the composite work as distinct from the component works). Section 27(3) of the Sixth Schedule of the 1965 Act perpetuated this provision in respect of assignments entered into in respect of copyright derived originally from the Act of 1916. Section 27(6) of the Sixth Schedule introduced slight variations in the wording of the relevant provision but such variations had no material effect for the present purposes.

It will be recalled further that, in terms of Section 151 of the Act of 1916, if an author had prior to 1 January 1917 assigned his then subsisting copyright for the full term to

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97. Section 35(1) of the Third Schedule to the 1916 Act and Section 1 of the 1965 Act.
98. Section 35(1) of the First Schedule to the 1916 Act and Section 1 of the 1965 Act.
99. Section 35(1) of the Third Schedule to the 1916 Act and Section 1 of the 1965 Act.

another person, to the extent that the "new" copyright conferred upon the work of 1916 had a longer term than the "old" copyright which was superseded, the balance of the term of the "new" copyright which remained after the "old" copyright would have expired fell to the benefit of the author or his heir, in the absence of an express agreement to the contrary, and the ownership of the copyright reverted to them; the erstwhile copyright owner was granted certain residuary interests set out in the Section.[100] Section 36 of the Sixth Schedule to the 1965 Act perpetuated the aforementioned provisions and if the date for the coming into operation of the reversionary interest was after 11 September 1965 the ownership of the copyright nonetheless reverted to the author or his heirs. If the reversionary date occurred prior to 11 September 1965 the residuary interests created in favour of the erstwhile copyright owner in Section 151 of the 1916 Act were perpetuated. These residuary interests included the right of the erstwhile copyright owner to give notice to the copyright owner of his wish to take assignment of the copyright for the extended term. If the operative date of the residuary interest occurred or if the erstwhile copyright owner gave notice of his wish to exercise his option to acquire the copyright for the balance of the term prior to 11 September 1965, the position was exactly the same as it would have been under the 1916 Act.[101] If after 11 September 1965 any residuary interest was exercisable by the erstwhile copyright owner that interest remained exercisable under the 1965 Act.[102] If the operative date of the residuary interest was after 11 September 1965 the ownership of the copyright still reverted

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100. See p 353 *supra*.
101. Section 36(2) of the Sixth Schedule.
102. Section 36(3) of the Sixth Schedule.

to the author or his heirs. Any residuary interest which would, however, have existed by virtue of any document made prior to 1917 was however terminated.[103] The aforementioned residuary interests are thus vested rights preserved under the 1965 Act.

Section 34 of the Sixth Schedule specifically provided that, notwithstanding the retrospective effect of the 1965 Act, copyright would not be conferred upon a work made prior to 1 January 1917 by it unless a copyright derived from the 1916 Act subsisted on 11 September 1965. In other words if the substituted right conferred upon such a work by the 1916 Act had already expired by 11 September 1965 (and the work had thus fallen into the public domain) that copyright was not resuscitated by the 1965 Act. Of course, where a work made prior to 1 January 1917 had enjoyed no copyright under the Act of 1916 no copyright was retrospectively created. This point is relevant to foreign works because, as stated above,[104] the International Proclamations issued under the Act of 1916 could not retrospectively confer copyright on foreign works made prior to 1 January 1917. Whether foreign works made prior to 1 January 1917 qualified for substituted rights under the Act of 1916 depended entirely on the British and South African laws which were in force at that time and if a foreign work had not enjoyed protection in South Africa under any of those laws prior to 1917 no substituted copyright was granted in respect of that work by the Act of 1916 and nothing in the 1965 Act could serve to create that copyright retrospectively.

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103. Section 36(4) of the Sixth Schedule.
104. See p 366 *supra*.

It is contended in Laddie, Prescott & Vitoria **"The Modern Law of Copyright"**[105] that under the British Act of 1911 foreign works published prior to July 1912 could, if they enjoyed British copyright prior to 1912, qualify for a substituted right under the Act of 1911 but such substituted right was limited in duration to the term provided by the law of the country of origin. This came about by virtue of the provisions of proviso (vi) to Section 29(1) of the Act of 1911 which made provision for an Order-in-Council extending the protection of the Act to foreign works to provide for variations in the protection afforded to existing foreign works, thereby affecting the operation of Section 24 of the Act which provided for the British 1912 Gateway. It would appear that Order-in-Council No. 913 of 1912 made provision for such a limitation. Although by virtue of the provisions of Section 30(2) of the British Act of 1911 read together with Section 144(g) of the Act of 1916, similar provisions could be made in South African International Proclamation this did not happen with the result that foreign works which passed through the 1917 Gateway enjoyed an unqualified term of copyright as provided for in the Act of 1916.

The distinction drawn in the operation of the South African 1917 Gateway between copyright (excluding performing rights in musical and dramatic works) and performing rights in musical and dramatic works *per se* and the separate copyrights created in this respect was preserved by the 1965 Act in regard to works made prior to 1917. The ambit of the "performing right" was, however, extended to include performing an adaptation of the work in public, broadcasting

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105. At p 206, paragraph 4.87.

the work or an adaptation, or causing the work or an adaptation to be transmitted in a diffusion service.[106] Accordingly references to "copyright" in dramatic and musical works in deeds of assignment dating from prior to 1917 should be construed in accordance with the aforementioned distinction between "copyright" and the performing rights.

11. SAVING OF VESTED RIGHTS

Section 44(1) of the 1965 Act stated that nothing in the Act would affect any right or privilege of the State subsisting otherwise than by virtue of any law, or any right or privilege of the State or of any other person under any law not expressly repealed, amended or modified by it. For the reasons advanced in Chapter II in dealing with the provisions of Section 41(1) of the 1978 Act,[107] it is submitted that the Section must be interpreted so as to preserve rights in the nature of copyright which were not expressly repealed, amended or modified by the 1965 Act. Accordingly it is submitted that the effect of this provision was to preserve any vested rights in favour of third parties created under the 1916 Act.

The vested rights which existed under the 1916 Act which were preserved by the 1965 Act were the following:

(a) In terms of Section 147(2) of the 1916 Act, British copyrights in any musical, dramatic or artistic works passed through the 1917 Gateway. Copyrights were thus

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106. Section 35 of the Sixth Schedule.
107. See pp 94 *et seq supra*.

conferred retrospectively on works which had not necessarily enjoyed copyright in South Africa previously. Where a person prior to 1917 took any action whereby he incurred any expenditure or liability in connection with the reproduction of such a work in a manner which was at the time lawful, or had taken any lawful preparatory action to making such a reproduction, no rights or interests arising from such action were prejudiced unless the person who became the owner of the rights in question paid compensation in an agreed amount, or failing agreement, as determined by arbitration.[108]

(b) Section 151(1)(b) of the 1916 Act provided that where copyrights under legislation in operation in South Africa prior to 1917 passed through the 1917 Gateway similar vested rights to those described in the preceding paragraph were preserved.[109]

(c) In terms of Section 151(1)(a) of the 1916 Act where the reversionary right in respect of any longer term of copyright comprised in a substituted right as compared to the "old" right reverted to the author or his heirs, the erstwhile copyright owner was given an option to take assignment of the right subject to payment of a consideration or alternatively to obtain a form of compulsory licence. The erstwhile copyright owner thus had vested rights.[110]

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108. See p 369 *supra*.
109. See p 368 *supra*.
110. See p 164 *supra*.

(d) Where in terms of any of the International Proclamations issued under the 1916 Act copyright was conferred retrospectively on a work of foreign origin similar vested rights to those described in paragraph (a) above were granted to third parties.[111]

(e) The proviso to Section 3 of the British Copyright Act of 1911 created a form of compulsory licence in the case of published works twenty-five years after the death of the author in the case of works made during or after 1917, or thirty years after the death of the author in the case of works made prior to 1917.[112] These vested rights were preserved but subject to a modification. Section 9(3)(a) of the Sixth Schedule to the 1965 Act brought about changes in the operation of the aforementioned proviso. The 1916 Act had provided that for the purposes of this compulsory licence the relevant period in respect of a work of joint authorship was calculated from the death of the author who died last. In the case of a posthumous work the relevant period was calculated from the date of the first exploitation of the work. The aforementioned provision of the Act of 1965 provided that, in the case of a work of joint authorship the compulsory licence should become available after the expiration of the relevant number of years from the death of the author who died first or upon the death of the author who died last, whichever was the shorter.

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111. See p 362 *supra*.
112. The operation of this proviso must be read together with Section 16(1) and 17(1) of the British Act of 1911 as regards works of joint authorship and posthumous works.

12. CONCLUSION

The Act of 1965 had a life-span of a mere fourteen years and it was repealed by the Act of 1978. It is doubted whether such repeal was either necessary or justified. The corresponding British Act of 1956 has been successfully in operation for some thirty-two years and its repeal is only now being contemplated. Our legislation has shown too great a readiness in recent years to tamper with the law of copyright.

CHAPTER VII

COPYRIGHT UNDER THE COPYRIGHT ACT OF 1978

1. INTRODUCTION

(1) Historical Developments

The Berne Convention, the fountainhead of modern copyright, was revised in Stockholm in 1967 and Paris in 1971. Technological developments preceded apace after 1965 and yet further opportunities were opened up to creative people to manifest and exploit the fruits of their creativity in new types of media. A Convention for the Protection of Producers of Phonograms was adopted in Geneva in 1971 and this Convention supplemented the provisions of the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. A Convention relating to the Distribution of Programme Carrying Signals Transmitted by Satellite was adopted in Brussels in 1974.

In particular the desire on the part of the legislature to bring South African copyright law in conformity with the minimum provisions of the Paris Text of the Berne Convention and thus make accession to this text of the Convention possible prompted the decision to repeal the Act of 1965 and replace it with an up-dated statute. The Geneva Convention for the Protection of Phonograms and the Brussels Convention for the Protection of Programme Carrying Signals also exercised an influence because it was considered to be

expedient to have South African copyright law conform with the requirements of these Conventions and make accession to them possible as well.

The 1965 Act was considered generally to be excessively detailed and complicated and a simplification of the law of copyright was sought. This was particularly true of the complicated transitional provisions in the Sixth Schedule to the 1965 Act. All these considerations gave rise to the adoption of the Copyright Act 98 of 1978. As stated above,[1] the notion that the 1978 Act simplified the question of the copyright enjoyed by earlier works is fallacious notwithstanding superficial impressions created to the contrary. It is also doubted whether the repeal, as distinct from the amendment, of the 1965 Act was necessary or justified.

(2) Repeal of Earlier Legislation

The Copyright Act, 1978, repealed the Copyright Act, 1965, as amended, except for Section 46, which dealt with deposit requirements for various works with certain libraries. This Section was subsequently repealed and replaced by the Legal Deposit of Publications Act, Act No. 17 of 1982. The Copyright International Conventions Proclamation, 1966, as well as the subsequent Proclamations which extended its provisions to additional countries, with the exception of Proclamation No. R231, 1973, relating to the United States of America, were repealed and replaced by Proclamation No. R2565 dated December 22, 1978. The latter Proclamation was in turn repealed by Notice 704 dated 25 September 1987. Proclamation No. R231, 1973, dealing with the United States

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1. See p 113 *supra*.

of America, was repealed and replaced by Proclamation No. R566 of March 3, 1981. The 1978 Act and its subordinate legislation currently regulates the law of copyright in South Africa subject to the provisions of Sections 41 and 43.

(3) Reorganization of the Legislation

The 1978 Act did away with the distinction between so-called *"original works"* (i.e. literary, dramatic, artistic and musical works) and so-called *"other subject matter"* (i.e. cinematograph films, sound recordings, broadcasts and published editions) and simply regarded them all as *"works"* for the subsistence of copyright in which originality was required. Nothing turns on the abolition of the aforementioned two broad classifications of works under the 1965 Act.

Although bringing South African copyright law into a situation which would enable South Africa to accede to the aforementioned International Conventions was one of the objects of the 1978 Act, to date no steps have been taken to bring about such accession.

2. CLASSES OF WORKS PROTECTED

The provisions of the Copyright Act 1978 relating to the classes of works in which copyright can subsist, and the conditions for, duration and ownership of, copyright under the 1978 Act have been described in Chapter II of this work.[2] The reader is referred to the definitions of the var-

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2. See pp 13 *et seq.*

ious classes of works, which are, literary, musical and artistic works, sound recordings, cinematograph films, sound and television broadcasts, programme carrying signals and published editions. The definitions of these classes differ in some instances to the corresponding definitions under the 1916 and 1965 Acts.

The 1978 definition of a literary work is more elaborate than the corresponding definition under the earlier two Acts and it includes dramatic works as a *species* of the *genus*. Dramatic works were treated as a separate category to literary works under the earlier two Acts. However, it is submitted that nothing flows from this reorganization of the classes of works. The 1978 definition of literary work must thus be compared to the combined definitions of literary work and dramatic work under the previous two Acts. It is submitted that the class of work given the appellation *"literary work"* in the 1978 Act is no broader than the combined classes of works given the appellation *"literary work"* and *"dramatic work"* under the previous two Acts; it must be noted that the 1978 definition does not include cinematograph films as a type of dramatic work, as distinct from the scenario or script (this was the position under the 1965 Act as well). As in the 1965 Act, the 1978 definition of *"literary work"* does not include maps, charts and plans, which types of works are classed as artistic works in the 1978 Act.

As in the previous two Acts, there is no definition of *"musical work"* in the 1978 Act and the scope of this class of work thus remains unaltered.

The scope of the definition of *"artistic work"* in the 1978 Act has been extended as compared to the corresponding definitions under the previous two Acts. Under the 1965 Act, the descriptive phrase *"irrespective of the artistic quality thereof"* only applied to category (a) of the definition which comprised paintings, sculptures, drawings, engravings and photographs. This implied that the other two categories within the definition, namely works of architecture and works of artistic craftsmanship, required a modicum of artistic quality. Under the 1978 Act, this descriptive phrase relates to the entire definition of artistic work which means that even works of architecture and works of artistic craftsmanship are not required to have any artistic quality.[3] The definition of *"artistic work"* under the 1916 Act made no mention of whether or not artistic merit or quality was required of any of the categories of works within the definition.[4]

The Copyright Amendment Act, 1983, introduced a new category of works into the definition of *"artistic work"* under the 1978 Act. These works were called *"works of craftsmanship of a technical nature"*.[5] This amendment to the definition of *"artistic work"* also had the effect of broadening the scope

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3. In regard to the requirement of artistic merit for works of artistic craftsmanship under the 1965 Act, see **George Hensher Limited v. Restawhile Upholstery (Lancs) Limited**, (1975) RPC 31.
4. In **Klep Valves (Pty) Ltd v. Saunders Valve Co Ltd**, 1987 (2) SA 11(A), the Appellate Division held that artistic merit was not a requirement for a drawing to enjoy copyright under the 1916 Act.
5. In regard to this class of work see **Butt v. Schultz & Another**, 1984 (3) SA 568 (E); **Schultz v. Butt**, 1986 (3) SA 667 (A); **Bosal Afrika (Pty) Ltd v. Grapnel (Pty) Ltd & Another**, 1985 (4) SA 882 (C); **Kambrook Distributing v Haz Products & Others**, Case No 21810/84 in the WLD - unreported.

of the type of work designated as *"artistic work"* as compared to the earlier Acts.

The definition of *"cinematograph film"* read together with Section 2(1)(b) of the 1978 Act is extremely wide and is, it is submitted, broader in its scope than the corresponding definition under the 1965 Act. It is arguable whether the definition in the 1965 Act covered a film fixed for the first time on a video tape[6] and it did not, it is submitted, cover a micro chip such as one bearing the programme of a home video game.[7]

The definition of *"sound recording"* in the 1978 Act differs substantially from the corresponding definition in the 1965 Act but the scope of the two definitions appears to be the same.

In the category of work termed *"broadcast"* in the 1978, television broadcasts and sound broadcasts have been lumped together. The scope of the definition of *"broadcasts"* in the 1978 Act does not appear to be any broader or narrower than the scope of the aggregate of the definitions of television broadcasts and sound broadcasts under the 1965 Act.

Programme carrying signals are a new category of work for which provision has been made for the first time in the 1978 Copyright Act.

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6. See Laddie, Prescott & Vitoria, **The Modern Law of Copyright**, paragraph 7.18, footnote 6, in which it is argued that the corresponding definition under the United Kingdom Copyright Act of 1956 does cover video tapes. See also p 379 *supra*.
7. See page 18 *supra*.

The term *"published edition"* was not defined in the 1965 Act, but it would seem that the scope of this class of work as defined in the 1978 Act is the same as the scope of this class of work under the 1965 Act. While Section 16 of the 1965 Act made reference to published editions of literary, dramatic and musical works, and the definition of *"published edition"* in the 1978 Act makes reference only to literary and musical works, no difference in the scope of the class of work has been brought about by this change as *"dramatic works"* have been incorporated into *"literary works"* as a *species* of the *genus* in the 1978 Act.

3. THE AUTHOR

The identity of the *"author"* of the various classes of works under the 1978 Act has been discussed in Chapter II of this work.[8] In some instances, namely the following, different persons have been designated as the author of a class of work under the 1978 Act as compared to the 1965 Act:

(a) Under the 1978 Act, the author of a photograph is the person who is responsible for the composition of the photograph, while under the 1965 Act (and the 1916 Act), the author was the owner of the material on which the photograph was taken, e.g. the negative.

(b) Under the 1978 Act, the author of a sound recording is the person by whom the arrangements for the first fixing of the sound of a performance or of other sounds were made, while under the 1965 Act, the author of a

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8. See pp 27 *et seq supra*.

sound recording was the maker of that sound recording; these two persons could be the same but are not necessarily so.

4. INTERNATIONAL COPYRIGHT

The effect of the repeal of the Copyright Act, 1965, by the Copyright Act, 1978, the repeal of the Copyright International Conventions Proclamation 1966 by Proc R2565 of 22 December 1978, and the repeal of the latter proclamation by Notice No 704 of 25 September 1987 is that copyright regulated by the 1978 Act (and subject to Section 43 thereof) is conferred upon works emanating from all the countries listed in Schedule I to Notice No 704 dated 25 September 1987, and from the United States of America, irrespective of when a particular work was made. For instance, Egypt is listed in Schedule I to GN 704/1987 (and was also listed in Schedule I to proc R2565) but it was not listed in the First Schedule to the Copyright International Conventions Proclamation, 1966. Copyright protection to Egyptian works was thus granted for the first time on 22 December 1978 (the date on which proc R2565 came into operation). Notwithstanding this, Egyptian works made in, say, 1930 will nevertheless enjoy copyright provided such works were of a type now capable of being the subject of copyright at that time, i.e. 1930. This follows because, in terms of Section 43, the Act, as extended by GN 704/1987, applies to Egyptian works made prior to its commencement in the same way as it applies to Egyptian works made thereafter. Zimbabwe is listed in Schedule I to GN 704/1987 but was not listed in Schedule I to proc R2565/78. The same principle

applies and after 25 September 1987 Zimbabwean works will be protected whenever they were made.

Section 43(a)(ii) of the 1978 Act provides that, notwithstanding the fact that the 1978 Act is retrospective, it shall not *"be construed as creating any copyright which did not subsist prior to 11 September 1965"*. This disqualification applies also to foreign works but a distinction must be drawn between foreign works made prior to 1917 and foreign works made between 1 January 1917 and 11 September 1965.

A work made prior to 1917, whether of South African origin or of foreign origin, did not enjoy copyright under the Act of 1916 unless a pre-1917 copyright in that work passed through the South African 1917 Gateway and was superseded by a substituted right. By virtue of the provisions of Section 43(a)(ii) of the 1978 Act this position was not altered in regard to works of South African origin and nor could it be altered in the case of works of foreign origin. Accordingly a foreign work which did not enjoy copyright in South Africa on 1 January 1917 does not become the recipient of copyright by virtue of anything contained in the International Proclamations.

In regard to foreign works made after 1 January 1917 it is submitted that Section 43(a)(ii) must be interpreted to mean that the retrospectivity of the 1978 Act cannot confer copyright on any work which was **not of a type capable of being the subject of copyright** under the 1916 Act (read together with the retrospective provisions of the 1965 Act), for instance, a sound broadcast, but not to mean that it cannot confer copyright on a foreign work where the 1916 Act had not been extended to the country from which it emanates.

The alternative interpretation, namely, that the retrospectivity of the 1978 Act cannot create copyright in a particular work (e.g. an Egyptian literary work) where such copyright did not subsist prior to 1965 would, it is submitted, nullify the objectives of the international provisions of the 1978 Act and would place South Africa in breach of its obligations under the Berne Convention. For instance, Article 4(1) of the Berne Convention requires South Africa, as a signatory, to protect the works of authors of foreign member countries in the same way as we protect the works of South African authors. A literary work made by a South African author in 1930 would enjoy copyright in South Africa. Likewise we are, with effect from 1978, required to protect a literary work made by an Egyptian author in 1930. Certainly, the 1965 Act granted copyright to foreign works made before 1965 in cases where the 1916 Act had not been extended to a particular foreign country, but where the 1965 Act had been so extended. In this regard we refer to the provisions of Section 37(2) of the Sixth Schedule to the 1965 Act. This section read:

> *"Where at any time after the commencement of any provision of this Act, a provision which contains such a reference* (to countries to which the provision or extends or to qualified persons) *has not been applied in the case of any country by virtue of Section 32 of this Act, the reference shall, with respect to any time before the provision is so applied, be construed as if the provision did apply to that country."* (words in parenthesis added).

The provisions of Section 37(3) are to the same effect and they read:

> *"For the purpose of determining whether copyright subsists in any work or any other subject matter at a time*

when a provision containing such a reference has been extended to a country other than the Republic, the reference shall be construed, in relation to past events, as if that provision had always been in operation and had always extended to that country."

In accordance with my interpretation of the retrospectivity of the 1978 Act in regard to foreign works, read together with Section 43(a)(ii), it would follow that, in the case of United States works, only the current Proclamation extending the operation of the 1978 Act to works emanating from the United States would be relevant to present questions of copyright relating to United States works; the provisions of the preceding Proclamations would be irrelevant. The 1978 Act, as presently extended to United States works, regulates the copyright in works of American origin no matter when they were made (excluding works made prior to 1917), but subject to the provisions of Section 43(a)(ii) in regard to the type of work concerned. However, in **Barber-Greene Company & Others v Crushquip (Pty) Limited**[9] considerable discussion of the question of which American Proclamation was applicable to works made at various stages prior to 1979 took place. It was not necessary for the court to decide this issue but in the light of the above submissions the whole discussion was unnecessary as the only relevant Proclamation was the current Proclamation. In consequence, the discussion of the relative effects of the three United States Proclamations in the **Barber-Greene case**[10] would seem to have been of little consequence and of academic interest only.

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9. Case No 14752/83 in the WLD - unreported.
10. *Supra*.

5. APPLICATION OF SECTIONS 43 AND 41 OF THE 1978 ACT

This thesis has examined what copyright subsisted prior to 1917 and qualified to pass through the 1917 Gateway and under the 1916 and 1965 Acts (and what copyright did not subsist under these Acts), and the ownership, duration and continued subsistence of such copyright. Sections 41 and 43 of the Copyright Act 1978, i.e. the Sections of the Act which embody the transitional provisions and which regulate the manner in which the Act of 1978 applies to works made prior to 1979, must be interpreted against this background. Section 43 will be dealt with first.

A. SECTION 43

(1) Works Dating from Prior to 11 September 1965

In the case of a work made or published prior to September 11, 1965, one must have regard in the first instance to the 1916 Act in order to ascertain whether the work in question was a suitable subject for copyright under that Act.

In the case of works made prior to 1 January 1917 one must have regard to whether by virtue of pre-1917 South African copyright laws (including the Roman-Dutch common law of copyright), the British Copyright Act of 1842 read together with the British International Copyright Act of 1886, and in the case of dramatic, musical and artistic works, the British Act of 1911 read together with pre-1912 British copyright laws, that work qualified to pass through the South African 1917 Gateway. The ownership of the substituted

right under the Act of 1916 depends upon the ownership of the "old" copyright under the qualifying laws and the duration of the copyright under the qualifying laws is significant in the case of "old" copyrights which had been assigned because upon the hypothetical expiration of the "old" copyright the ownership of the "new" copyright reverted to the author or his heirs.

In the case of a work made or published after 1 January 1917 one must have regard to the conditions which had to be met for the subsistence of copyright under the 1916 Act, i.e. status of the author or maker of the work, place of making of the work and/or first publication.

If the work, being a pre-1917 work, in fact qualified for copyright under the 1916 Act, or being a post-1917 work, would have been a suitable subject for copyright under the 1916 Act, one must then look to the 1965 Act, and in particular the Sixth Schedule thereto, to ascertain the ownership, duration and continued subsistence or validity of the copyright. If the work, being a post-1917 work, did not qualify at the relevant time for copyright under the 1916 Act, one must nevertheless have regard to the retrospective provisions of the 1965 Act to see whether copyright was retrospectively conferred upon a work of that nature by the later Act; for instance, a published edition which did not enjoy copyright under the 1916 Act but was retrospectively granted copyright under the 1965 Act. In the event that a work enjoyed copyright because same was granted retrospectively under the 1965 Act, then obviously one must once again have regard to the 1965 Act in order to ascertain the ownership, duration and continued subsistence of the copyright. Should the work not be of such a nature that it

would have enjoyed copyright under the 1916 Act nor would have been granted copyright retrospectively by the 1965 Act, then no copyright will subsist in that work notwithstanding the retrospectivity of the 1978 Act. If the work, being a pre-1917 work did not enjoy copyright under the Act of 1916 then no copyright is created by any of the subsequent legislation.[11]

The aforegoing is subject to two exceptions, namely, in the case of cinematograph films, and, as to the duration of copyright in literary, musical and artistic works which were unexploited at the time of the death of the authors thereof. These exceptions will be discussed below.

(a) Cinematograph Films

As stated above, cinematograph films were treated as dramatic works under the 1916 Act and this treatment was perpetuated in the 1965 Act, as far as pre-1965 cinematograph films were concerned. Cinematograph films were, however, also treated in a somewhat secondary manner as sequences of photographs.[12] Section 43(c) brought about a change to this principle and it provided that pre-1965 films should be granted copyright retrospectively as the *sui generis* class of work first created in the 1965 Act and embodied in the 1978 Act. In other words, films which had been made in, say, 1940, and which had prior to 1979 enjoyed

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11. This follows from Section 34 of the Sixth Schedule to the 1965 Act, which provided that the 1965 Act did not confer copyright on any work made prior to 1 January 1917 unless an "old" copyright in that work passed through the 1917 Gateway, read together with Section 43(a)(ii) of the 1978 Act which provided that the 1978 Act did not create any copyright which did not subsist prior to 11 September 1965.
12. See p 379 *supra*.

copyright as dramatic works, both under the 1916 Act and the 1965 Act, with the copyright owner being the author of the dramatic work or his successor in title, were by the 1978 Act retrospectively granted a completely fresh copyright with the owner being the person responsible for making the arrangements for making the film, or his successor in title. The copyright owners of the two separate copyrights could well be different persons. Section 43(c) of the 1978 Act takes cognizance of this situation and makes certain arrangements as between the two separate copyright owners. Furthermore, it is of significance that the sub-section requires the author of the *"cinematograph film"* (i.e. the new work) to indemnify *"the user"*, who is presumably his licensee, against any claims made against him by the owner of the copyright in the film, i.e. the dramatic work. It would thus appear that, not only does the sub-section create a fresh copyright in the cinematograph film *per se*, but the effect of Section 43 as a whole perpetuates the copyright in the dramatic work. If this were not so, there would be no necessity for the author of the cinematograph film *per se* to give his licensee any indemnity against possible action against him by the owner of the copyright in the film *qua* dramatic work. There is nothing contained in the 1978 Act which terminates the copyright subsisting in a cinematograph film *qua* dramatic work under the 1965 Act, indeed all the indications are to the contrary. In consequence it is submitted that there are two parallel copyrights in pre-1965 cinematograph films. One of the implications of this state of affairs is that the copyright in the cinematograph film *per se* could expire (the duration in terms of the 1978 Act is 50 years after the end of the calendar year in which the film is first lawfully made available to the public) while the term of the dramatic work is still extant (the duration

of this term would be fifty years after the end of the calendar year in which the author of the "dramatic work" died). The aforegoing applies also to cinematograph films made prior to 1917.[13]

(b) Unexploited Literary, Musical or Artistic Works

In terms of Section 43(d) of the 1978 Act, although the term of the copyright in a pre-1965 literary, musical or artistic work (other than a photograph) might have expired under the 1965 Act, where such works have not been exploited as contemplated in Section 3(2)(a) of the 1978 Act, that copyright is resuscitated for the term for which provision is made in the said Section 3(2)(a). Section 3(2)(a) of the 1978 Act provides that where a literary, musical or artistic work (other than a photograph) had not during the lifetime of the author been published, performed in public, been embodied in records offered to the public, or broadcast, the term of copyright endures for a period of fifty years from the end of the year in which the first of any of these acts is done subsequent to the death of the author. This in effect provides for perpetual copyright to exist in the case of an unexploited work of the aforementioned type. This provision relates only to the term of copyright, i.e. the duration of copyright which otherwise exists or existed under the 1916 Act or the 1965 Act. For the reasons advanced above[14] this

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13. Section 43(a)(ii) of the 1978 Act which prevents the creation of copyright which did not subsist prior to 11 September 1965 and thus in principle prevents the retrospective creation of copyright in pre-1917 works which did not pass through the 1917 Gateway (by virtue of the provisions of Section 37 of the Sixth Schedule to the 1965 Act) is made subject to Section 43(c) which has the effect that the prohibition does not apply to the retrospective creation of copyright in cinematograph films provided for in paragraph (c) of that Section.

14. See footnote 13.

provision of the 1978 Act applies also to pre-1917 works provided they were the subjects of copyright which passed through the 1917 Gateway; if a substituted right came into existence the duration of that substituted right has been retrospectively extended.

It could happen that a copyright which existed under the Act of 1916 or was retrospectively granted under the Act of 1965 expired prior to 1979, whereupon the work fell into the public domain, but that copyright was subsequently resuscitated by Section 43(d). In that regard the Section provides that such resuscitation is subject to any rights acquired by a third person while the work was in the public domain. It is submitted that the effect of this is that any "infringement" of the copyright during the period that the work was in the public domain is exempted. Furthermore, the perpetuation after the resuscitation of the copyright of any activities begun while the work was in the public domain is also exempt from copyright. In other words, the "right" preserved by the Section is the right to carry out and continue carrying out any otherwise infringing activities undertaken by a third person while the work was in the public domain.

(2) Works Dating from Between 1965 and 1979

In the case of a work made or published prior to January 1, 1979, but after September 11, 1965, one must have regard to the relevant provisions of the 1965 Act in order to ascertain whether the work was of such a type as to be capable of being the subject of copyright under that Act and whether it met the conditions for subsistence of copyright under that Act, (i.e. the status of the author, place of first publication, the status of the author at the time of first publication and/or the place of making of the work).

The country of origin of a foreign work must, however, be viewed in the light of the international provisions of the 1978 Act and its Regulations, and the place of first publication and the "qualified person" status of the author must be assessed accordingly.[15]

If the work enjoyed copyright under the 1965 Act, then the ownership, duration and continued subsistence or validity of that copyright is determined by the 1965 Act. In the event that the work would not have enjoyed copyright under the 1965 Act, then one must have regard to whether copyright has been granted retrospectively to the work in terms of the 1978 Act. This could happen in the following circumstances:

(a) the definition of the class of work under the 1978 Act is wider than the equivalent definition under the 1965 Act and the work in question falls within the wider definition but not within the narrower definition. Examples of this are works of craftsmanship of a technical nature, works of artistic craftsmanship having no artistic quality, and micro-chips being cinematograph films.

(b) the work belongs to a class which was not capable of being the subject of copyright under the 1965 Act, but is capable of being the subject of copyright under the 1978 Act. An example of this type of work is a programme carrying signal.

Insofar as a particular work might be granted copyright retrospectively in terms of the 1978 Act, being a work which did not qualify for copyright under the 1965 Act, the ownership, duration and continued subsistence or validity of that

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15. See p 426 *supra*.

copyright will be determined by the 1978 Act, notwithstanding the fact that the work was made during the currency of the 1965 Act. This factor could make a difference to the work as, for instance, if it was to be decided that a cinematograph film first fixed in the form of a video tape in, say, 1970, would not have qualified for copyright under the 1965 Copyright Act, the duration of the copyright in that film would be determined by the 1978 Act and not the 1965 Act and the term of copyright for a cinematograph film could be different under the two Acts.

There are two classes of works which, by virtue of certain peculiarities, warrant special mention. They are artistic works of a technical nature and published editions. These two classes of works will be dealt with below.

(a) Artistic Works of a Technical Nature

Drawings of a technical nature are generally designs of articles intended to be reproduced in a three-dimensional form. It will be recalled that Section 22(1) of the Third Schedule to the 1916 Act stated that the Act did not apply to designs capable of being registered under Chapter II of the 1916 Act, except designs which though capable of being so registered were not used or intended to be used as models or patterns to be multiplied by any industrial process.[16] Accordingly, where a drawing of a technical nature was such that the design of the article depicted in the drawing was

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16. See p 328 *supra*. In the case of designs capable of being registered as such but not intended to be used as models or patterns to be multiplied by an industrial process, the relevant "intention" was that of the maker of the work at the time of such making. See **King Features Syndicate Inc v O and M Kleeman Limited** 58 RPC 207.

capable of registration as a design under the designs legislation, that drawing did not enjoy any copyright under the 1916 Act unless, even though the design was registrable, the article depicted in the drawing was not used or intended to be used as the basis for industrial multiplication.[17] If, however, the design of the article depicted in the drawing was such that it was incapable of registration under the designs legislation, because the design of the article was dictated solely by the function which it had to perform, copyright nevertheless subsisted in the drawing even though the drawing might have served as the basis for industrial multiplication. The subsistence or otherwise of copyright in the technical drawing thus was determined largely by whether the design of the article depicted in the drawing was capable of being registered as a design.

The 1965 Act perpetuated the position as described above regarding technical drawings made prior to 1965.[18] As stated above, the 1965 Act also sought to prevent there being an overlap in the protection available to designs under design legislation and copyright legislation. This Act, however, sought to achieve this objective in a different way to the 1916 Act. It did not provide that technical drawings depicting articles capable of being registered as designs did not enjoy copyright; instead, it provided that in certain circumstances, certain aspects of the copyright in the drawings would not be enforceable. These circumstances were provided for in Section 11 of the 1965 Act, which Section corresponded basically with Section 10 of the 1956 British

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17. See **Klep Valves (Pty) Ltd v. Saunders Valve Co Ltd**, 1987 (2) SA 1(A).
18. See p 381 *supra*.

Copyright Act. The British courts in a line of cases commencing with **Dorling v. Honnor Marine**[19] and culminating in **British Leyland Motor Corporation and Others v Armstrong Patents Co Ltd and Others**[20] held that the "forfeiture" of the enforceability of the copyright in a technical drawing only applied where the design of the article depicted in the drawing was capable of registration as a design; where the design of the article was dictated solely by the function which the article had to perform, the "forfeiture" did not take place. A similar interpretation was given to Section 11 of the South African 1965 Act in the **Scaw Metals case.**[21] It is submitted that the "forfeiture" of the enforceability of part of the copyright in technical drawings in terms of Section 11 of the 1965 Act did not in any way affect the validity or continued subsistence of the copyright per se in the drawings in question. What happened was that that part of the copyright which would have fallen within the scope of a corresponding registered design became unenforceable but the balance of the copyright continued to subsist and could be assigned, enforced, etc. In essence, the "forfeiture" of the enforceability of certain parts of the copyright in a technical drawing in terms of Section 11 of the 1965 Act was in the nature of a statutory defence to a claim of copyright infringement which could be relied upon by a defendant in the given circumstances. This "forfeiture" also did not create a vested "right" in favour of third parties in the sense of the vested rights discussed in Chapters V and VI above. In all those instances the legislation specifically

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19. 1964 (RPC) 160
20. 1986 FSR 221.
21. **Scaw Metals Ltd v Apex Foundry (Pty) Ltd & Another**, 1982 (2) SA 377 (D).

created a right in favour of a third party and that third party was required to have met certain requirements before the right was available to him. No such provisions are contained either in Section 11 of the 1965 Act or in the 1978 Act. Accordingly, to sum up, the 1965 Act, unlike the 1916 Act, conferred copyright on a technical drawing irrespective of whether the design of the article depicted in the drawing could have been registered as a design.

The manner in which the 1978 Act deals with copyright in technical drawings and works of craftsmanship of a technical nature and the enforceability of such copyright has been discussed in Chapter II of this work.[22] Although the amendment of the definition of *"drawing"*, and thus of *"artistic work"*, so as to introduce a specific reference to drawings of a technical nature was only introduced in the Copyright Amendment Act, 1983, this was done by way of clarification and it had already been held in a number of cases that the definition of *"artistic work"* has always included drawings of a technical nature.[23] The amendment to the definition of "drawing" brought about by the Copyright Amendment Act, 1983, simply clarified existing case law.[24]

Under the 1978 Act, and taking cognizance of the provisions of Section 43, the copyright in technical drawings is regulated as follows:

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22. See p 49 *supra*. See also **"Copyright Amendment Act, 1983 - Protection of Industrial and Technical Works"** by O.H. Dean, De Rebus, March 1984, p.114 and **"The Great Copyright Controversy"** by OH Dean, De Rebus, July 1988, p 469.
23. See for instance **Scaw Metals v Apex Foundry (Pty) Ltd & Another**, *supra*.
24. See **Klep Valves (Pty) Ltd v Saunders Valve Co Ltd**, *supra*.

(a) If the work was made prior to September 11, 1965, one must determine whether the design of the article depicted in the technical drawings would have been registrable as a design in terms of Chapter 2 of the 1916 Act. If it was not registrable - the design was dictated solely by the function of the article - then copyright subsisted in the drawing. If the design was registrable, but it was not used or intended to be used as a pattern to be multiplied by an industrial process, copyright nevertheless subsisted in the drawings. If the design was registrable and was used or intended to be used as a model or pattern to be multiplied by an industrial process, then no copyright subsisted in the drawing. This position was preserved under the 1965 Copyright Act and by Section 43(a)(ii) of the 1978 Act.

(b) If the drawing was made after September 11, 1965, copyright subsisted in the drawing irrespective of whether the design was registrable under the designs legislation prevailing at the time; the fact that the copyright in the drawing was unenforceable in respect of designs which were registrable at the time, during the currency of the 1965 Act, is now irrelevant.

(c) The enforcement of the copyright in a drawing of a technical nature, irrespective of when it was made, is determined by the 1978 Act, in particular by those provisions of the 1978 Act which determine when part of the copyright becomes unenforceable.[25]

(b) Published Editions

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25. See pp 61 and 100 *et seq supra*.

The term of copyright subsisting in a published edition under the 1965 Act was twenty-five years.[26] The 1978 Act in its original form did not protect published editions, save that in terms of Section 43(b) it preserved the copyright which subsisted in a published edition under the 1965 Act for the remainder of the term granted to that work under the 1965 Act. This position was changed in the Copyright Amendment Act, 1984, and protection for published editions as a class of work was reintroduced. In terms of Section 43 of the 1978 Act, such protection was retrospective subject to the provisions of that Section. The term of copyright conferred upon published editions once this class of work had been reintroduced into the 1978 Act was fifty years.[27] It would appear as though the longer term of copyright does not apply to works made prior to January 1, 1979, in view of the provisions of Section 43(a)(i) of the 1978 Act. In terms of that sub-section, the term of copyright which subsisted under the 1965 Act, is to be unaffected by anything contained in the 1978 Act. While the intention of Section 43(a) was not to prejudice copyright owners rights under the 1965 Act, it would appear as though in this instance the effect of the provisions of Section 43(a)(i) is to disadvantage the owner of the copyright in a published edition under the 1965 Act as compared to the owner of copyright which subsists in a published edition in terms of the 1978 Act. It would thus seem that a published edition published before January 1 1979 enjoys a term of copyright of twenty-five years from the end of the calendar year in which the edition was first published, while a published edition published after that

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26. Section 16(2) of the 1965 Act.
27. See Section 3(2)(f) of the 1978 Act, as amended by the Copyright Amendment Act, 1984.

date enjoys a term of fifty years from the end of the year in which the edition is first published.

B. SECTION 41 - SAVING OF VESTED RIGHTS

As discussed above,[28] it is submitted that the effect of Section 41(1) of the 1978 Act is to preserve vested rights in favour of third parties created in the 1916 Act and preserved in the 1965 Act, and created in the 1965 Act, which were not specifically repealed, amended or modified in the 1978 Act.[29] These vested rights deriving from the earlier repealed copyright statutes continue in principle to operate today. It is of course possible that particular rights enjoyed by individuals under these provisions might have elapsed through the effluxion of time by virtue of the nature of the particular right itself but such rights have not been terminated on account of the repeal of the statute which granted them.

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28. See pp 94 *et seq supra*.
29. The vested rights in question are those discussed on p 368 and p 413.

CHAPTER VIII

C O N C L U S I O N

The law of copyright in South Africa has come a long way since 1803 when the Batavian Republic took the first tentative steps to introduce the law of copyright into the Netherlands including its provinces, inter alia the Cape. The footpath trodden by the legislature of The Netherlands, has in South Africa been joined by paths and ways coming from a variety of other directions and has now become a highway carrying a not-insubstantial amount of traffic. Progress along these various routes has been confused and complex and much of the journey has been undertaken in the dark. A stage has, however, now been reached where at least the road ahead is relatively straight and travelers equipped with a map can find their way. As far as possible the necessity for travelers to re-traverse routes behind them should be avoided.

In view of the automatic coming into being of copyright and the long term of subsistence of copyright in comparison with other intellectual property rights (which in most cases are created by registration in any event), whenever a new copyright act is passed the inevitable and indispensable transitional provisions cannot fail to introduce fresh complications and complexities. It is submitted that this thesis bears ample testimony of this situation. It is submitted further that this thesis also bears witness to the fact that the apparently straightforward approach of seeking to provide in a statute that the basics of copyright in existing works must be determined in the light of the law

which prevailed at the time of their production is grossly deceptive. This was the approach of the legislature in Sections 41 and 43 of the 1978 Act. The alternative approach, namely that of attempting to provide in a current statute detailed provisions regulating the copyright in works produced in the past, as was done in the 1965 Act, is fraught with problems and difficulties. This approach caused the statute to be excessively detailed and complicated and not to be susceptible to easy interpretation and comprehension. This gave rise to, and was partly responsible for, the perceived need to repeal the 1965 Act by the 1978 Act.

The aforementioned considerations are not only of academic importance. It has more than once been said that the provisions of the law of copyright relating to old works are so complicated and uncertain that it is not worth the while of the owner of copyright in such a work to endeavour to enforce his rights. The complications, risks and attendant costs are thought to be so high that copyright owners have in the past elected rather to forego their rights. A law which gives rise to this situation is failing in its purpose. The view that copyright is not worth enforcing because the law is too complicated is perhaps an extreme one and is not justified but nevertheless it exists amongst a substantial number of people.

It is perhaps significant that since the coming into operation of the 1978 Act there have been 36 known judgments delivered in copyright cases whereas over the previous century and more there were only 47 such cases. Copyright holders appear to be more willing to litigate and enforce their copyright under the 1978 Act than they were under any of the previous copyright laws. Of course this position may

well be influenced by other factors such as the greater scope and demand for the exploitation of works subject to copyright and thus the greater incentive to infringe such rights. Nevertheless the fact still remains that copyright enforcement under the 1978 Act is more viable than it has been at any stage throughout the history of copyright law in South Africa.

Let it not be thought that it is being contended that the 1978 Act is a perfect piece of legislation. This is far from the case and there is considerable room for improvement of the present Act. What is being contended is that in the 1978 Act the law of copyright has been cast in a reasonably acceptable and manageable form. Copyright law can be improved and adapted in the future within the framework of the 1978 Act so as to properly regulate the law of copyright both for the present and for the foreseeable future. At the present time there is no need to replace the 1978 Act with yet another Act which would inevitably have yet further transitional provisions to deal with then existing and past works. Such a development could not fail to further complicate the law of copyright and a consequence of this would perhaps be the inhibition of the enforcement of their rights by copyright holders.

At the present time the Government has expressed the desire and intention to consolidate all intellectual property statutory law in a single Act. This would involve the repeal of the Act of 1978 and its replacement by the envisaged consolidated Act. Such a step would amount to reverting to the position which obtained in the Act of 1916. Little if any need can be seen for such a step. Viewed from the perspective of the law of copyright it is not only unnecessary but

for the reasons advanced above it is also most undesirable. It would lead to unnecessary complication of the law of copyright to the probable prejudice of copyright owners whose interests the law of copyright seeks to protect and nurture. To bring about this situation in the interests of administrative tidiness (which appears to be the only conceivable purpose of such legislation), even assuming that there is such a need and that the new legislation would fulfill that need and achieve that purpose, is not sufficient justification for perpetuating into the future additional difficulties and complications of the nature which have been experienced in the past and which emerge from this thesis. Such a development would give additional cause to travelers along the present highway of copyright to have to turn around and re-traverse the difficult terrain behind them. This would be no service to the author.

The lesson to be learned from a study of the transitional provisions of the 1978 Act is that in copyright law, as in life in general, the past cannot be brushed aside or altered with the stroke of a pen. Nor can the record be easily rewritten. Copyright, like people and the society in which we live, is to a large extent a captive of the past.

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