

COPYRIGHT

STATUTES

Copyright is a creature of statute. The statute regulating copyright is the Copyright Act, 98 of 1978, read together with the Copyright Regulations of 1978, promulgated thereunder. The Copyright Act of 1978 came into effect on 1 January 1979. The Copyright Act of 1978 has been amended by the Copyright Amendment Act, 56 of 1980, the Copyright Amendment Act, 66 of 1983, the Copyright Amendment Act, 52 of 1984, The Copyright Amendment Act, 39 of 1986, the Copyright Amendment Act, 13 of 1988, the Copyright Amendment Act, 61 of 1989, the Copyright Amendment Act, 125 of 1992, the Intellectual Property Laws Amendment Act, 38 of 1997, and the Copyright Amendment Act, 9 of 2002

Copyright was previously dealt with in the Copyright Act, 63 of 1965, which came into effect on 11 September 1965 and, prior to that, by the Patents, Designs, Trade Marks and Copyright Act, 9 of 1916.

RETROSPECTIVE OPERATION OF THE ACT

The Act applies in relation to works made before the commencement of the Act as it does to works made thereafter, subject to two provisos:

- (a) Save in the case of cinematograph films, nothing in the Act affects the ownership, duration or existence of any copyright which subsisted under the Copyright Act of 1965.

- (b) No retrospective copyright is created in any type of work in which copyright could not subsist prior to 11 September 1965.

In broad terms this means that when a work was made prior to 1979 one must have regard to the Act which was in force at the time of the works' making in order to determine whether copyright subsists and the ownership and duration of that copyright; in regard to the infringement of copyright one has regard to the current Act.

INTERNATIONAL ARRANGEMENTS

South Africa is a signatory to the Berne Convention for the Protection of Literary and Artistic Works, Brussels text of 1948, and acceded thereto on 1 August 1951. There are currently more than 70 members of the Berne Convention. South Africa is also a member of the World Trade Organisation (WTO) and is thus party to the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement). The R

The effect of these agreements is that South Africa and the other signatories grant reciprocal protection to each other's works. Each member country is bound to give foreign works so-called "national treatment". Foreign works emanating from Berne Convention or WTO countries thus enjoy copyright entirely in terms of the South African Act and South African works enjoy copyright in these foreign countries vice versa.

RATIONALE OF COPYRIGHT

Article 1 s. 8 Clause 8 of the Constitution of the United States of America empowers Congress *"to promote the progress ofuseful arts, by securing for limited times to authors.....the exclusive right to their respective writings"*.

This simple clause sums up in a few words the philosophy and underlying principles of copyright law. It seeks to create a system whereby the creator of an original work is afforded a qualified monopoly in the use or exploitation of his work in order, firstly, to compensate and reward him for the effort, creativity and talent expended and utilized in the creation of the work, and, secondly, to act as an incentive to for him to use his talents and efforts to create more and better works in the future. In so doing the creator of the works benefits all and serves the public interest.

WORKS ELIGIBLE FOR COPYRIGHT

The following works are eligible for copyright protection:

1. Literary works;
2. musical works;
3. artistic works;
4. cinematograph films;
5. sound recordings;
6. broadcasts;
7. programme-carrying signals:
8. published editions, i.e., the first print, by whatever process, of a particular typographical arrangement of a literary or musical work;

9. computer programs.

MEANING OF THE WORDS "AUTHOR" AND "PUBLISH"

(a) The word "author" is defined in the Act as:

- (i) in relation to a literary, musical or artistic work (besides a photograph), the person who first makes or creates the work;
- (ii) in relation to a photograph, the person who is responsible for the composition of the photograph;
- (iii) in relation to a sound recording, the person by whom the arrangements for the making of the sound recording were made;
- (iv) in relation to a cinematograph film, the person by whom the arrangements for the making of the film were made;
- (v) in relation to a broadcast, the first broadcaster;
- (vi) in relation to a programme-carrying signal, the first person emitting the signal to a satellite;
- (vii) in relation to a published edition, the publisher of the edition;
- (viii) in relation to a computer program, the person who exercised control over the making of the computer program;
- (ix) in relation to a literary, musical or artistic work or a computer

program which is computer generated, the person by whom the arrangements necessary for the creation of the work were undertaken.

- (b) The Act states that a work shall be taken to have been published if copies of the work have been issued with the consent of the owners of the copyright in sufficient quantities to satisfy the reasonable requirements of the public, having regard to the nature of the work.

REQUIREMENTS FOR THE SUBSISTENCE OF COPYRIGHT

Unlike other intellectual property rights, there is no system whereby copyright can be registered in South Africa, other than copyright in cinematograph films. In order that a work might enjoy copyright protection in South Africa however, certain requirements must be met:

- (a) The work must be **original**. Originality in copyright law simply means that the author must have expended some skill and labour in the creation of the work. It does not mean that the work must be novel or unique.
- (b) The work must be reduced to a **material form**, save in the case of a broadcast or programme-carrying signal.
- (c) The authorship or **first publication** of the work must comply with certain conditions, namely the following:
 - (i) the author, or in the case of a work of joint authorship any one author, must, at the time of the work's creation, have been a "qualified person". A "qualified person" is defined as, in the case of an individual, a person who

- is a citizen of, domiciled in or a resident of the Republic of South Africa or a foreign country to which recognition has been granted, in the case of a juristic person, a body incorporated under the laws of the Republic of South Africa or a recognized country; or alternatively
- (ii) the work must, in the case of a literary, musical or artistic work, a sound recording, a cinematograph film, a published edition or a computer program, have been first published in the Republic of South Africa or a recognized country or, in the case of a cinematograph film, a broadcast or a computer program, have been made in the Republic of South Africa, or in the case of a programme-carrying signal, have been emitted to a satellite from a place in the Republic of South Africa.

FIRST OWNERSHIP OF COPYRIGHT

The author of the work will, in most cases, be the first owner of the copyright. There are, however, four exceptions to this rule, namely:

- (a) Where a literary or artistic work is made by an author in the course of his employment with the publisher of a newspaper, magazine or similar periodical under a contract of service, and the work is made for the purpose of publication in a newspaper, magazine or similar periodical, the publisher shall be the owner of the copyright in the work insofar as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, but in all other respects the author shall be the owner of the copyright subsisting in the work;
- (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 cinematograph film or the making of a sound recording, and pays, or agrees to pay, for it in money or money's worth, the person who commissioned the work shall own the copyright

- subsisting therein;
- (c) in any other case where a work is made in the course of the author's employment by another person under a contract of service or apprenticeship, the employer shall be the owner of any copyright subsisting in the work;
 - (d) where a work is made under the direction or control of the State, the copyright is owned by the State.

DURATION

The term of copyright is, in the case of:

- (a) a *literary or musical work or artistic work*, other than a photograph, the life of the author and fifty years from the end of the year in which the author dies; provided that if before the death of the author there has been no publication of the work, no performance of the work in public, no offer for sale to the public of records thereof and no broadcasting of the work, the term of copyright shall continue to subsist for a period of fifty years from the end of the year in which the first of the aforesaid acts is done;
- (b) a *cinematograph film, photograph or a computer program*, fifty years from the end of the year in which the work is made available to the public with the consent of the copyright owner or after the work is first published, whichever is the longer, or failing such an event within fifty years from the making of the work, fifty years from the end of the year in which the work is made;
- (c) a *sound recording*, fifty years from the end of the year during which the recording is first published;

- (d) a *broadcast*, fifty years from the end of the year in which the broadcast first takes place;
- (e) a *programme-carrying signal*, fifty years from the end of the year in which the signal is emitted to a satellite;
- (f) a *published edition*, fifty years from the end of the year in which the edition is first published.

In the case of a work of joint authorship, the reference to the death of the author refers to the author who dies last.

RIGHTS GRANTED BY COPYRIGHT

1. Economic Rights

Copyright grants the owner the exclusive right to do, or authorise the doing of any of the following acts, known as "**restricted acts**":

- (a) *Literary or musical work* - reproducing the work in any manner or form, publishing the work, performing the work in public, broadcasting the work, causing the work to be transmitted in a diffusion service, making an adaptation of the work and doing, in relation to an adaptation of the work, any of the acts set out above;
- (b) *Artistic work* - reproducing the work in any manner or form, publishing the work, including the work in a cinematograph film or television broadcast, causing a television or other programme which includes the work to be transmitted in a diffusion service, making an adaptation of the

work and doing, in relation to an adaptation of the work, any of the acts set out above;

- (c) *Cinematograph film* - reproducing the film in any manner or form, causing the film to be seen or heard in public, broadcasting the film, causing the film to be transmitted in the diffusion service, making an adaptation of the film, doing in relation to an adaptation of the film, any of the acts set out above, and letting, offering or exposing for hire by way of trade, directly or indirectly, a reproduction or adaptation of the film;
- (d) *Sound recording* - making, directly or indirectly, a record embodying the sound recording; letting, or offering or exposing for hire by way of trade, directly or indirectly, a reproduction of the sound recording; broadcasting the sound recording; causing the sound recording to be transmitted in a diffusion service, communicating the sound recording to the public (the three last mentioned restricted acts are generally collectively referred to as "needletime");
- (e) *Broadcast* - reproducing the broadcast in any manner or form, rebroadcasting the broadcast and causing the broadcast to be transmitted in diffusion service;
- (f) *Programme-carrying signal* - undertaking, or authorising, the direct or indirect distribution of such signal by any distributor to the general public;
- (g) *Published edition* - making or authorising reproductions of the edition in any manner.

- (h) *Computer program* - reproducing the work in any manner or form, publishing the work, performing the work in public, broadcasting the work, causing the work to be transmitted in a diffusion service, making an adaptation of the work and doing, in relation to an adaptation of the work, any of the acts set out above; and letting or offering or exposing for hire by way of trade, directly or indirectly, a copy of the work.

Two terms which frequently occur among the restricted acts are 'reproduction' and 'adaptation'. Both these terms are defined in section 1 of the Act. There is a fine distinction between them. Both amount to copies of a work. The difference lies in the degree of differentiation from the copyright work. There is a continuum commencing with an exact replica or clone (a clear reproduction), and progressing with diminishing similarity to culminating in a distant version (a possible adaptation). The precise point of transition from a reproduction to an adaptation is difficult to determine.

A reproduction is essentially a replication or a conversion of the work, while an adaptation essentially amounts to creating a new original work based on another work. Generally, there is no 'originality' in a reproduction – the maker contributes no creative effort in making it and no new independent original work enjoying a separate copyright comes into existence. On the other hand, the making of an adaptation generally does involve the expenditure of creative effort giving rise to another original work, enjoying its own copyright, albeit that, as a derivative work, it is a copy in the broad sense of the parent work.

A translation of a literary work into another language is a good example of an adaptation. The translator, who creates a new original work, expends

considerable skill and effort in choosing the right words, syntax etc., to convey the original authors message correctly and accurately. The translation qualifies as a new copyright work, but if unauthorized, can constitute an infringing adaptation of the parent work

2. Moral Rights

The author has the following rights irrespective of whether he is the copyright owner:

- (a) Right of Paternity – the right to claim authorship of the work.
- (b) Right of Integrity – the right to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author.

INFRINGEMENT

The Act provides for two types of infringement, that is, primary or direct infringement on the one hand, and secondary or indirect infringement on the other.

Primary or direct infringement occurs when any person, not being the owner of the copyright in the work, and without the licence of the owner, does, or causes to be done, any of the acts which the owner of the copyright is authorised to perform, i.e., the "restricted acts". Lack of knowledge or intention on the part of the infringer is no defence to such an action.

Copyright is infringed when any of the restricted acts are performed in relation to the

whole work or **any substantial part** of the work. What in any given situation constitutes any substantial part of a work depends on the circumstances. The courts have held that the test as to what constitutes a substantial part of a work is a qualitative and not a quantitative one. Taking a small but essential part of a work can constitute taking a substantial part of that work.

For infringement by means of reproduction or adaptation to occur actual **copying** must take place. Making a similar work or even an identical work does not constitute infringement if the later work is not produced by copying the earlier work but is produced independently. Reproduction takes place not only when a copy is made from the work itself but also when what is copied is an intervening reproduction of the work; so called "indirect copying". Reproduction includes making a three-dimensional version of a two-dimensional work and vice versa.

Secondary or indirect infringement occurs when any person, without the licence of the owner of the copyright, imports an article into the Republic of South Africa for a purpose other than his private and domestic use, sells, lets or by way of trade offers or exposes for sale or hire in the Republic any article, or distributes in the Republic of South Africa, any article for the purposes of trade or any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected thereby, if, to his knowledge, the article is an infringing copy, i.e. the making of that article constitutes an infringement of the copyright or would have constituted such an infringement if the article had been made in the Republic; in the case of a computer program a further secondary act of infringement can occur when someone acquires an article relating to a computer program which is an infringing copy. So-called "guilty knowledge" is a prerequisite for an indirect copyright infringement. Importing and trading in so-called parallel imports can constitute an indirect act of copyright infringement.

In either case, the copyright owner is entitled to an interdict and delivery-up of

infringing copies or plates. Damages are available except where the defendant can show that he was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work. The court is empowered to compute damages by way of determining a reasonable royalty which would have been payable under the circumstances by a licensee or sub-licensee in respect of the exercise of the relevant rights of copyright by some other person. The Act also provides for an award of punitive or additional damages in circumstances where the court, having regard to all considerations including the flagrancy of the infringement and any benefit shown to have accrued to the defendant by reason of the infringement, is satisfied that effective relief would not otherwise be available to the plaintiff.

CRIMINAL INFRINGEMENT

It is a criminal offence, when copyright subsists in a work, to make articles by way of trade, or to import, sell, hire, distribute or trade in articles with knowledge that such articles are infringing copies of the work. The Act also makes provision for certain other forms of criminal copyright infringement.

A person convicted of any of the foregoing 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 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.

EXEMPTIONS FROM INFRINGEMENT

The Copyright Act makes provision for a number of exemptions from copyright

infringement. 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. The exemptions are brought about by creating exceptions to copyright owners' exclusive rights.

It must be appreciated that these exemptions are all predicated on the assumption that in principle an act of infringement has been committed and this act is then excused by the exemption. For instance, in the case of the making of an unauthorised reproduction of a work, a substantial part of the work must have been reproduced – only once this has occurred do any of the exemptions relating to reproduction come into play. If less than a substantial part is reproduced, then there is no infringement, and the availability of an exemption is irrelevant.

Copyright creates a qualified monopoly in the use of original works. The exclusive rights held by the copyright owner curtail the opportunities of the public to make free use of works. On the one hand the purpose of copyright is to enable creative people to exploit their works for gain. On the other hand, the general public have a need to have works freely available in affordable circumstances. A balancing of these two divergent interests is necessary. By means of creating exceptions to copyright protection the legislature seeks to achieve a balance which is fair and reasonable to both parties. The exceptions represent those circumstances in which the legislature considers that it is in the public interest that the copyright owners' monopoly should not prevail.

In practice, when viewed internationally, there are essentially two different approaches to providing for copyright exceptions in legislation, namely, so called "fair dealing" and "fair use". Fair dealing encompasses listing a closed collection of specifically detailed exceptions in the legislation. No exceptions lie outside the collection specified. On the other hand, fair use entails granting a discretion to the judge to create exceptions to meet the circumstances of particular cases. The contentious use is then labelled as

being 'fair use' of the work in question and legitimised.

The fair dealing approach has the merit of creating certainty in that the legislation specifies in detail when exceptions are applicable. Both copyright owners and users know where they stand. Moreover, the legislator can take policy considerations into account when providing for exceptions, and being enshrined in legislation, public accountability is catered for. The disadvantage of this approach is that it is inflexible and new exceptions can only be created by the legislative process.

Fair use in essence amounts essentially to judge-made law. Since judges are given wide latitude in creating exceptions, there is considerable uncertainty surrounding the availability of exceptions. Exceptions can be granted on an ad hoc basis. Whether or not particular conduct on the part of a user qualifies for an exception is only finally determined once the final appeal has been exhausted in litigation, a process that may in practice take years from the date of the contentious conduct. Both copyright owners and users are in considerable doubt as to what conduct will be deemed to be unlawful. On the other hand, the advantage of this approach is that there is flexibility in the creation of new exceptions.

An important factor in assessing when and how exceptions are created is the so-called "three-step test." This stems from the Berne Convention. The principle was also taken up into the TRIPS Agreement and is binding on all member countries. In terms of this test, exceptions to copyright infringement may only be granted by member countries when, and provided, the following conditions are met:

The conduct in question on the part of a user must

- Constitute a certain special case
- Not conflict with the normal exploitation of the work
- Not be unreasonably prejudicial to the legitimate interests of the rights holder.

Policy considerations come into evaluating whether particular conduct meets these

conditions. The legislature is probably better placed to make a proper evaluation than the court.

It is doubtful whether the fair use approach to creating exceptions is compatible with the three-step test, in particular the first step. The criterion of **certainty** is difficult to reconcile with an ad hoc determination by the court.

The Copyright Act embraces the fair dealing approach to the making of exceptions. A resume of the more important specific exceptions provided for in it is given below:

Certain Special Cases

Any fair dealing with a literary, musical or artistic work, or with a broadcast or a published edition, does not infringe that copyright when it is –

- (a) for the purpose 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.

Paragraphs (b) and (c) apply also to a cinematograph films, sound recordings and computer programs. In the case of all works fair dealing in terms of paras (b) and (c)(i) must be accompanied by appropriate acknowledgement, more particularly the source of the work must be mentioned as well as the name of the author if it appears on the work.

The concept 'fair dealing', in the strict sense used above, is a somewhat vague and indefinite one, perhaps deliberately so in order to enable the court to take all the circumstances of the potentially infringing act into account. All the following factors should be taken into consideration and be given due weight in the court in determining whether in any given situation a potentially infringing act constitutes a 'fair dealing' in the work in question:

- (a) the purpose and character of the use;
- (b) the nature of the copyrighted work;
- (c) the amount and substantiality of the portion used;
- (d) the effect upon the plaintiff's potential market.

Quotation

The copyright in a literary or musical work, a cinematograph film, sound recording, broadcast or computer program 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.

Illustrations for Teaching

The copyright in a literary, musical or artistic work, cinematograph film, sound recording, broadcast, published edition or computer program 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.

Works Delivered in Public

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.

Reproductions in Press or Broadcast

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.

Official Texts, Political Speeches, News of the Day

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.

Reproduction Permitted by Regulations

The copyright in any work is not infringed by reproducing that work if such reproduction is permitted by regulations made under s 13 of the Copyright Act and is not in conflict with a normal exploitation of the work and is not unreasonable prejudicial to the legitimate interests of the copyright owner. The section essentially requires that the exceptions created must be in compliance with the three-step test. To date, the Minister of Trade and Industry has, in terms of s 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, for use in educational institutions and by local authorities in the case of building plans.

The facility for the Minister to grant exceptions in regulations goes some way towards compensating for the inflexibility of the fair dealing approach to exceptions. The Minister can at short notice create additional exceptions where the circumstances require and justify them. Furthermore, it detracts from the arguments in favour of the fair use approach.

Back-up Copies of Computer Programs

The copyright in a computer program is not infringed by a person who is in lawful possession of that computer program or an authorized copy thereof if he makes copies to the extent reasonably necessary for back-up purposes, provided such a copy is intended exclusively for personal or private purposes and is destroyed when the possession of the computer program in question, or the authorized copy, ceases to be lawful. In essence this exception allows a licensed user of a computer program to make and retain back-up copies of that program for as long as he remains a licensed user.

Reverse Engineering of Products

The copyright in an artistic work, of which three-dimensional reproductions have been made available, whether inside or outside the Republic of South Africa, to the public, by or with the consent of the copyright owner, is not infringed by any person who, without the consent of the owner, makes or makes available to the public, three-dimensional reproductions or adaptations of the authorised reproductions, provided that the authorised reproductions primarily have a utilitarian purpose and are made by an industrial process. This exception was introduced by the Copyright Amendment Act of 1988 and came into operation with retrospective effect from 25 September 1987. The effect of this exception is that the protection granted to technical drawings and works of craftsmanship of a technical nature is for all practical purposes, negligible.

Licence Granted by Copyright Tribunal

The copyright in any work is not infringed if the Copyright Tribunal for which provision is made in Chapter III of the Copyright Act grants a compulsory licence to do an act in relation to such work and the act is done pursuant to such a compulsory licence.

The Copyright Tribunal is empowered to grant any licence in respect of any type of work. It is empowered to grant licences in basically two types of situations, namely, first

where a licence is sought in terms of a licence scheme operated by a licensing body or other persons from whom licences are required, either by an individual or by an organisation claiming to be representative of a group of persons to which the scheme relates, or secondly, where a person claims that he requires a licence in a case not covered by a licence scheme. The Tribunal will grant a licence where the refusal to do so by the copyright holder is unreasonable.

Statutory Licence in respect of "Needletime" Right for Sound Recording

The Copyright Act makes provision for a form of licence of right in respect of the "needletime" right comprised in the copyright in a sound recording. A collecting society will exercise the granting of licences in respect of the "needletime" right and such licences will be subject to the payment of a royalty. If agreement cannot be reached between a copyright owner or a delegated collecting society and the user in regard to the amount of the royalty which should be paid, that dispute may be referred to the Copyright Tribunal for the determination of the amount of the royalty. The sound recording "needletime" right must be licensed in conjunction with a similar right in favour of performers under the Performers' Protection Act.

DISPOSITION OF COPYRIGHT

Copyright in respect of a particular work comprises in effect a monopolistic right to a number of different acts. The sum total of these rights constitutes a whole copyright. The scope of the copyright in the different types of works varies from class to class, depending upon the restricted acts applicable to a particular class. The copyright in each category of works in fact consists of a 'bundle of rights'. Copyright, or a portion thereof,

may be transmitted to or conferred upon another person. Copyright may be apportioned in the following ways or a combination of two or more of these ways:

1. 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.
2. As to the country or geographical area in respect of which the copyright subsists.
3. As to the duration or term of the right granted.

One of the fundamental principles of disposition of rights of copyright is that no one can transfer greater rights to another than he himself holds. Thus, a person who owns or holds merely some of the rights comprised in the copyright in the work cannot transmit to another rights falling outside the scope of those which he holds.

Assignment

Copyright is transmissible by assignment, testamentary disposition or by operation of law. An assignment shall be of no effect unless it is in writing and signed by the assignor. It is possible to assign the copyright in a future work, or the copyright in an existing work in which copyright does not subsist but will come into being in the future; also where the assignor is not yet the owner of the copyright in a work but will in due course acquire ownership of it. It is also possible to assign some but not all the rights comprised in the copyright to another person.

Licences

A copyright owner can authorise or license a third party to exercise one or more of the rights held by the owner. A licence can be oral or in writing, or even inferred from

conduct. An exclusive licence or exclusive sub-licence, however, shall not be effective as such, unless it is in writing and signed by the licensor. Whereas non-exclusive licensees cannot enforce any rights against third parties, the Act specifically grants exclusive licensees and exclusive sub-licensees the same rights of action to sue for infringement as copyright owners. Although the Act makes provision for the granting of compulsory licences by a Copyright Tribunal, the Copyright Tribunal has seldom been approached.

Consideration for Disposition of Copyright.

Generally speaking, assignments and licences in respect of copyright require as a consideration the payment of remuneration to the rights holder. This can take the form a lump sum one-off payment, the payment of a regular periodic fee in the form of a royalty, or a combination of both. In general, the lump sum payment is most commonly used in the case of assignments, and royalty payments is the most common form of remuneration in the case of licenses. Royalties are usually computed on the basis of a percentage of profits or sales revenues accruing to the user.

GENERAL

Orphan Works

'Orphan works' is the term used to describe copyright works in respect of which the identity of the owner of copyright is unknown. The inability to identify the identity of the copyright owner can be problematic, particularly where the permission of the copyright owner is required for the purpose of performing a restricted act.

A potential licensee who is unable to obtain a licence in respect of an orphan work can be driven unwillingly to performing a restricted act without permission and thus

infringing copyright. In some countries provisions are comprised in copyright legislation enabling an appropriate licence in respect of an orphan work to be obtained from an official institution. No such provision is currently included in the Copyright Act.

'Droite de Suite'

Droite de Suite or Artists Resale Right (ARR) is a system incorporated in the copyright laws of some countries in terms of which the artist (or author) of a painting or other artwork is entitled to obtain a share of the onward sales price of his/her artwork paid for second and further sales of it. The duration of this right is often linked to the term of the copyright in the work. This right attaches to the author, notwithstanding any transfers of the copyright in the work, somewhat akin to the authors moral rights. The ARR is recognised in the Berne Convention, but it is not mandatory for members to adopt or implement it. It is not widely recognized in countries throughout the world. The Copyright Act currently makes no provision for this right.

In applying this right, it is important to recognise the distinction between the artwork *per se*, as a physical article, and the copyright subsisting in the artistic work embodied in it, i.e., the item of intellectual property. These are two entirely different items of property and different rules apply to them. The ARR in an artwork is likewise a different right separate and apart from the copyright in the associated artistic work. The subject matter of the ARR is the item of physical property, while that of the copyright is the intellectual property. The two classes of rights are separate and distinct from one another and must be treated as such.

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