South Africa

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Introduction to Software Protection under South African Law

Body of Law

The law affecting rights and control over computer programs is essentially statutory. Rights in software in South Africa arise primarily from the Copyright Act[1]. Historically South African copyright legislation and judicial interpretation of copyright legislation have been influenced by British law. Software is in theory not patentable in South Africa[2], but since South Africa registers patents without substantive examination patents over software have been registered[3]. Although these patents are in principle void it is necessary to approach a court to declare them void thus they have some effect in practice.

Apart from copyright and patent legislation rights to computer programs are most affected by the common law of contract. South Africa is a Roman Dutch common law jurisdiction[4] in which the principles underlying the common law of contract and property are based upon the 'ius civilis'in a way analogous to Scotland. It is worth noting that South Africa has a fully justiciable Bill of Rights which includes socio-economic rights and enables the enforcement of fundamental rights against non-State actors. The Constitutional Court has refused to recognize a right to intellectual property as a fundamental right.[5]

Copyright Act: Object of Protection

Computer programs are the subject of copyright protection as a specifically designated category of work. A computer program is defined as a set of instructions which when used directly or indirectly in a computer, directs its operation to bring about a result'[6]. Both subject and object code therefore fall within the definition of computer program. A program need not function correctly to be

[1]Copyright Act No. 98 of 1978

[2]The Patents Act of 57 of 1978 stipulates in Section 25 (2) "Anything which consists of— … (f) a program for a computer; ..shall not be an invention for the purposes of this Act."

[3]Bob Joliffe 'The word-processing patent - a sceptical view from a person having ordinary skill in the art' South African Computer Journal (2005) 25, 2

[4]The other Roman Dutch common law jurisdictions are Lesotho, Botswana, Swaziland, Zimbabwe and Sri Lanka.

[5]Certification of the Constitution of the Republic of South Africa, [1996] ZACC 26 §75

[6]Computer Programs are defined in section 1 of the Copyright Act 98 of 1978: LDQUOLSQUOcomputer programLSQUO means a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result; (d) a computer program includes - (i) a version of the program in a programming language, code or notation different from that of the program; or (ii) a fixation of the program in or on a medium different from the medium of fixation of the program;RDQUO

eligible for copyright protection[7]. The definition of literary works explicitly excludes computer programs. However preparatory materials such as flow charts do not fall within the definition of computer program and are therefore protected as literary works. Other categories of works such as cinematographic films are defined so as to exclude computer programs[8].

To be eligible for copyright a computer program must be reduced to material form[9]. Recording as 'digital data' meets the requirement. Copyright is regarded as an immovable intangible[10].

Copyright Holders

The holder of the exclusive rights of copyright is referred to as the owner in the Copyright Act.

The author of a computer program is the person who exercised control over the making of the computer program[11]. Copyright in software vests in the person regarded as the author[12] except when it vests in the employer of the author because it is regarded as taking place in the course of employment. Co-creators are joint-authors and usually joint-owners. A computer program made *in the course of the author's employment* vests in the employer[13]. This has been interpreted very broadly. A person who was not employed to write code who nevertheless wrote code using his own time and computer resources but who used the code in his work duties, and modified it to be compatible with software used by his employer and as requested by fellow employees was held by a court to have acted in the course of his employment[14]. The default rule on employee created software may be modified by contract[15]. The statutory provision that copyright in a computer program made by an employee vests in the employer does not apply to contractors. However the definition of author as the person who exercise control over the making of a program has been interpreted so that an independent contractor who planned and wrote code was not regarded as the author, instead the person who contracted him and

[7]Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd. and Others (118/05) [2006] ZASCA 40 §24

[8]Section 1 of the Copyright Act

[9]Section 2 (2) of the Copyright Act stipulates: "A work, except a broadcast or programme-carrying signal, shall not be eligible for copyright unless the work has been written down, recorded, represented in digital data or signals or otherwise reduced to a material form"

[10]Gallo Africa Ltd v Sting Music (Pty) Ltd 2010 (6) SA 329 (SCA)

[11]Section 1 of the Copyright Act: LDQUOLSQUOauthorRSQUO, in relation to - (i) a computer program, the person who exercised control over the making of the computer programRDQUO

[12]Section 21 (1) (a) of the Copyright Act

[13]Section 21 (1) (d) of the Copyright Act stipulates "Section 21 (d) Where in a case not falling within either paragraph (b) or (c) a work is made in the course of the author's employment by another person under a contract of service or apprenticeship, that other person shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4."

[14]King v South African Weather Services [2008] ZASCA 143

[15]Section 21 (1) (e) of the Copyright Act

decided how he wanted the software modified was regarded as the author[16]. One consequence is that an independent contractor might be the author and owner of the preparatory materials of a computer program and of literary, artistic, musical and cinematographic outputs of a computer program while the person who commissioned the contractor might be regarded as author and owner of the computer program.

However when an independent contractor agrees to create a computer program which is clearly specified beforehand and without further instructions albeit periodic review then the independent contractor will likely be the author[17]. There is no statutory provision to enable variation by agreement of the default rule that apart from employment relationships the person deemed to be author is owner, however an agreement to assign copyright in a computer program that hasn't yet been written is valid[18].

Copyright in computer programs made under the direction or control of the State or an international organization vests in the State or international organization[19]. Copyright in software that is produced under the direction or control of South African government departments vests in a state held company; the State Information Technology Agency (Pty) Ltd.[20]. If a literary, musical, artistic work or a computer program is computer generated then the person who made the arrangements for the creation of the work is regarded as the author [21]. The category of computer generated computer program is confined to machine generated code and doesn't include use of software tools such as editors or compilers.

Exclusive Rights

According to section 11B of the Copyright Act the owner of copyright in a computer program has the exclusive rights (following the sub-paragraph designation in the Act) of: -

"(a) reproducing the computer program in any manner or form; (b) publishing the computer program if it was hitherto unpublished[22] (c) performing the

[16]Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd. and Others (118/05) [2006] ZASCA 40 §41; 2006 (4) SA 458 (SCA)

[17]Roux de Villiers 'Computer Programs and Copyright: The South African Perspective' (2006) SALJ 123 315-337 at 324

[18]Section 22(5) of the Copyright Act

[19]Section 5(2) states that works made under direction or control of the State or prescribed international organization can be eligible for copyright while section 21 (2) states that copyright shall vest in the State or prescribed international organization.

[20]Section 21 of the State Information Technology Agency Act No.88 of 1998.

[21]Section 1 definition of 'author' (h) of the Copyright Act

[22]The term publication is defined in section 1(5) of the Copyright Act to include issuing the work to the public in sufficient quantities to reasonably meet the needs of the public. Depending on how 'diffusion service' is interpreted it might also cover online distribution but since publication is defined so as to exclude transmission in a diffusion service a finding that online distribution is transmission in a diffusion service would have the result that online distribution is not publishing.

computer program in public; (d) broadcasting the computer program; (e) causing the computer program to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the computer program, and is operated by the original broadcaster; (f) making an adaptation of the computer program; (g) doing, in relation to an adaptation of the computer program, any of the acts specified in relation to the computer program in paragraphs (a) to (e) inclusive; (h) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer program."

Reproduction in any manner or form includes digital forms. Reproducing a substantial portion of a computer program is regarded as reproduction and the same approach is taken to all the exclusive rights[23]. An adaptation of a computer program is defined to include a version of the program in a different programming language, code or notation different or fixed in a different medium[24]. Compiling or decompiling a program is regarded as making an adaptation. An adaptation must itself be a computer program, that is subject code or object code. An adaptation is always regarded as also a reproduction.[25]There is considerable overlap between the definitions of reproduction and adaptation. Thus if a user copies a computer program without significant modification he will be regarded as having reproduced the program while if he modifies it but retains a substantial portion then he will be regarded as having both reproduced and adapted the program. Someone who creates an adaptation may, absent use under an exception, require two licenses from the rightsholder in the prior program, a license to reproduce and a license to adapt. If the prior program has not been published then the person creating the adaptation will also require a publication license in order to distribute the program. An adaptation that is sufficiently original will constitute an original computer program , even if it infringes the first computer program [26].

The output generated by a computer program that is discernible by the public is not a computer program but rather a literary, artistic work, cinematographic film or sound recording. Performance is defined by reference to 'any mode of visual or acoustic presentation'[27]. It is therefore not clear what amounts to performing a computer program in public, especially if there is no output.

There is no specific right of distribution[28].

Exceptions to Exclusive Rights

Lawful possessors of computer programs can use the single exception specific to computer programs to make copies reasonably necessary for back up, exclusively

[23]Section 1 (2A) of the Copyright Act

[24]Section 1 (1) definition of adaptation (d), the Copyright Act goes on to define a copy of a computer program as including an adaptation.

[25]Section 1 (1) definition of reproduction of the Copyright Act

[26]Section 2 (3) of the Copyright Act

[27]Section 1(1) definition of performance of the Copyright Act

[28]The rights of publication and transmission in a diffusion service affect distribution

for personal or private purposes. The copies must be destroyed when possession of the computer program ceases to be lawful[29].

The Copyright Act lists a number of exceptions for literary and artistic works. For each other category of work, including computer programs a different selection from the list is applied, in so far as they can be applied. For computer programs these include

- fair dealing for purposes of criticism or review,
- fair dealing in a broadcast or cinematographic film,
- use in judicial proceedings,
- quotation compatible with fair practice,
- illustration for teaching compatible with fair practice,
- reproduction in preparation for broadcast,
- use in a broadcast where use in a cinematographic film has been authorized[30].

Precisely how many of these exceptions apply in practise to computer programs is unclear. The validity of provisions purporting to restrict use of the exceptions has not been ruled on but they are likely to be ruled invalid as 'contra boni mores' and defeating the purpose of copyright legislation.

Moral Rights

Moral rights were introduced into South African copyright law in order to comply with the Berne Convention, and there is no history nor legal theory animating the rights. Computer programs are listed as one of the type of works in which moral rights vest. The author of a computer program has the moral rights, regardless of transfer of the copyright in the program, to claim authorship of the computer program, and to object to any distortion, mutilation or other modification prejudicial to his honour or reputation but may not prevent changes absolutely necessary on technical grounds or for the purpose of commercial exploitation[31]. Even though the inclusion of clauses purporting to transfer or waiver moral rights in copyright agreements is common practice there is no provision enabling the assignment or waiver of moral rights in the authorising legislation.

Term of Protection

The same term applies to computer programs, cinematographic films and photographs; fifty years. The fifty years is calculated from the end of the year in

[29]Section 19B(2) of the Copyright Act
[30]Section 19B (1) read with Section 12 (1) (b) and (c), (2), (3), (4), (5), (12) and (13)
[31]Section 20.

which the computer program is first published or made available to the public, or if neither has taken place then fifty years from the making of the program.

Copyright Assignment

Copyright may be transferred by assignment or in a will [32]. An assignment or an exclusive license must be in writing and signed[33]. The writing requirement can be met by a digital format[34]. The signature requirement can only be met by an 'advanced digital signature' facilitated by a registered provider[35]. Any of the exclusive rights can be assigned or licensed separately, and assignment can be limited to a specific geographic area or to part of the copyright term.

Non exclusive licenses do not require any formalities and may be oral or inferred from conduct but can be revoked at any time unless the non exclusive license is granted by means of a contract which governs revocation. It is not necessary for a license to use the term irrevocable for it to be construed as irrevocable, however for a license to be irrevocable it must be a contract, and whether it is irrevocable will be depend on how the contract as a whole is construed. A contract may specify in what circumstances, if any, a license may be revoked[36]. A contractual license may specify that it is irrevocable except for breach, and allow for automatic termination on breach, termination on notice and reinstatement. Generally a contract is created in South African law when two or more persons with the power to contract engage in conduct that demonstrates an intention to be legally bound. Although usually analyzed as an 'offer' and an 'acceptance' all that is required is an objective 'consensus ad idem'; that is a meeting of the minds apparent from conduct of the parties. Consideration is not required to form a binding contract in the South African common law of contract.

Technical Protection Measures and Anti-Circumvention

There are no provisions defining technical protection measures or prohibiting circumvention of technical protection measures in South African copyright law. However provisions of the Electronic Communications and Transactions Act 2003 may operate as anti-circumvention measures[37]. The Act creates a number of statutory criminal offenses; intentionally accessing, or modifying, deleting or

[32]Only copyright, that is the exclusive economic rights vesting in a copyright holder, may be transferred according to section 22 of the Copyright Act, moral rights remain vested in authors "notwithstanding the transfer of copyright" (section 20)

[33]Section 22(3) of the Copyright Act

[34]Section 1(1) of the Copyright Act: LDQUOLSQUOwritingRSQUO includes any form of notation, whether by hand or by printing, typewriting or any similar processRDQUO and section 12 of the Electronic Communications and Transactions Act No.25 of 2002 stipulates "A requirement in law that a document or information must be in writing is met if the document or information is- a. in the form of a data message; and b. accessible in a manner usable for subsequent reference."

[35]Section 13(1) of the Electronic Communications Transactions Act No.25 of 2002.

[36]Section 22(4) of the Copyright Act

[37]Tana Pistorius 'Developing countries and copyright in the information age – the functional equivalent implementation of the WCT' (2006) 2 *Potchefstroom Electronic Law Journal* 1-21

de-activating data without authority or permission are criminal offenses[38]. A copyright license constitutes permission to access or modify data, while accessing or modifying data that falls within a copyright exception would be authorized. The definition of the offenses is so vague that the provision may be unconstitutional. Production, distribution and possession of a computer program designed primarily to overcome security measures for the protection of data is also a criminal offense.

Enforcement

Copyright in a computer program is infringed by anyone who without permission, and absent an exception, commits one of the acts reserved for the copyright holder. Parallel import of copies of a program legally available in other jurisdictions can also be infringing in certain circumstances. Knowingly importing (other than for private and domestic use), selling, letting, distributing for trade or acquiring a computer program produced outside South Africa without the permission of the rights holder in South Africa is also an infringement[39]. As a result of the requirement of knowledge a rightsholder who had authorized production and distribution of a computer program outside South Africa would thus have to give notice to recipients in South Africa of the copies of the program legitimately produced elsewhere in order to render future dealing with the copies infringing.

In addition to civil infringement of copyright certain commercial activities have been criminalized. It is a criminal offense knowingly and without permission from the copyright owner to:

- make for sale or hire;
- sell or let for hire;
- exhibit in public by way of trade;
- import into the Republic other than for private or domestic use;
- distribute for purposes of trade or to such an extent so as to prejudice the owner;

infringing copies of a computer program. The owner of copyright in South Africa may require the customs authorities to treat imported copyright goods as prohibited goods[40].

The Counterfeit Goods Act[41] definition of counterfeiting includes manufacturing, producing or making whether in South Africa or elsewhere copyright infringing copies that are substantially identical to copyright protected goods without

[38] Electronic Communications and Transactions Act 25 of 2002 section 86.
[39] Section 23(2) of the Copyright Act
[40] Section 28 of the Copyright Act.
[41] Counterfeit Goods Act 37 of 1997

the permission of the exclusive rights holder in South Africa. Dealing in counterfeit goods is a criminal offense, and alleged counterfeit goods may be seized by the police or customs authorities.

Unprotected software and public domain software

Computer programs are treated as a distinct category of work, defined as instructions that direct the operation of a computer. Computer programs are treated in a very similar way to cinematographic films, sound recordings, broadcasts and programme carrying signals in respect of authorship, terms and exclusive rights. Cinematographic films, sound recordings, broadcasts and programme carrying signals are technical works in which only the precise embodiment is protected. Abstract aspects of these works are not protected by these categories although they may be protected as literary, artistic or musical works. This suggests that computer programs are also technical works and that abstract aspects such as the architecture and the *look and feel* of a program fall outside the definition of a computer program.

There is no provision in the copyright legislation that enables an exclusive rights holder to dedicate a computer program to the public domain. This does not mean that it is not possible to do so. South African common law permits both abandonment of property, and waiver of rights. Waiver of rights must take place through an unequivocal act by the holder of the rights showing that he knew his rights and intended to give them up. A written deed dedicating a computer program to the public domain would seem to meet these criteria. Although a signature on the deed would not be a formal requirement it would strongly indicate that a rights holder knew he was giving up rights.

Analysis of FOSS under South African law

A user who made substantial changes to copyleft code would require a license from the rightsholder of the first version of the code since making the changes would be an adaptation and a copy of the first version of the code. Although South African copyright law permits a bare copyright license without requiring a contract, the only way to ensure that a non-exclusive license is not revocable at will is through incorporating the license in a contract that governs revocation[42]. The general rule is that a person accepting an offer to contract must communicate acceptance to the person making the offer. However it is very well established that when the offer to contract itself sets out a means of acceptance which does not require communication with the person making the offer then acting in the manner prescribed constitutes acceptance[43]

FOSS licenses can therefore be construed as contracts; use of a computer program as permitted by the FOSS license, and adherence to the requirements of the

[42]Section 22 (4) of the Copyright Act.

[43]Bloom v American Swiss Watch Co. 1915 AD 100 and Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) [2008] ZASCA 131

license constitute acceptance sufficient to create a binding agreement. Anyone who uses FOSS licensed software in a way which requires copyright permission but does not adhere to the license has thus failed to accept the offer constituted by the license, has no permission and therefore, if an exception does not apply to the use, infringes the copyright in the software. If a license contains a copyleft clause then a user of the software would have to comply with the copyleft clause, including sharing changes under the same or equivalent license in order to properly accept the contract under which he gained permission. Failure to comply with the copyleft clause would vitiate the formation of a contract and thus render a non-compliant user liable for copyright infringement. Alternatively if there were sufficient initial compliance with the terms of the FOSS license to evidence an intention to be bound by the license then the terms of the license would govern a breach.

It is not necessary to construe adherence to the terms of a FOSS license as constituting consideration.

Copyrights

When two or more authors collaborate to produce a computer program in which contributions of each author are not separable from the contribution of others the result is regarded as jointly authored. If the results are separable, for example modules of a program, then each constitutes a computer program for legal purposes even if it cannot function without the other modules. The issue is not whether parts can function separately but whether the contribution of skill, effort and judgement of an author can be distinguished from others. The unique definition of author of a computer program in South African copyright law may make issues of joint authorship in FOSS projects less problematic than in other jurisdictions since the author is regarded as the person who exercises control over the making of the program, as a result only someone with commit authority in a FOSS project can be regarded as an author. If a project is set up so that a few contributors are each responsible for a module or modules then each module may be regarded as a separate program authored by that contributor. Contributers of only a few lines of code will not be regarded as authors. Only those who have authority to decide what is included in a version of a program, or portion of a program will be authors.

The definition of authorship does however pose problems for FOSS in two situations. Computer programmers who customize FOSS which they have created for use in their workplaces run a risk that a court may regard their work as vesting in their employers. The risk can be reduced by contributors who are employees using FOSS without modification in their workplaces or alternatively by stipulating clearly in employment agreements that code shall be open source. Independent contractors who customize FOSS for clients also face a risk that the client will be regarded as having exercised control over the making of the computer program and will be regarded as the author. Independent contractors wishing to avoid that outcome should carefully limit the control exercised by

the client and in any case require agreement that whatever code is written shall be distributed under the chosen FOSS license regardless of who owns it.

Later versions of a FOSS program and forked FOSS code are reproductions for as long as they contain substantial portions of the originating program. They are also adaptations of the originating program, but only if they can be regarded as including a substantial portion of the originating program.

Assignment of copyrights

Assignment of copyright in a FOSS contributor's agreement, such as the agreement used by the Free Software Foundation will require a paper copy be made and mailed, not because electronic documents are invalid but because only a paper and ink signature or an advanced electronic signature provided by a provider registered in South Africa will meet the signature requirement for a valid copyright assignment. Use of advanced electronic signatures is not widespread. On the other hand a contributor to a FOSS project can agree to a contributor agreement which grants non exclusive rights or licenses work directly under a FOSS license online where the contributor agreement or license is recorded digitally.

Moral Rights

A contributor to a FOSS project has moral rights to the computer program he has created. The right to object to modification does not extend to changes that are absolutely necessary for functioning. Beyond that the precise ambit of the moral rights as they apply to computer programs and whether they can be waived is not clear. However the nature of the work being created will influence what constitutes appropriate acknowledgement of the right of authorship and what constitutes a modification contrary to the author's honour. FOSS is by its nature a co-operative co-creation in which contributors agree concerning acknowledgement and what changes others may make through either contributor agreements or licences before committing code. It is therefore unlikely that a South African court would find copying and adaptations compliant with those commitments to infringe moral rights.

Enforcing FOSS Licences

Parties to License

The license must be issued by the owner or a licensee authorised to issue a FOSS license. In FOSS projects the owner is usually the author or authors, that is those contributors with authority to decide what is in a release version and their predecessors.

Contract

Rather than claiming breach of contract an author would simply claim copyright infringement, the alleged infringer would have to demonstrate compliance

with the terms of the license in order to show acceptance of the basis of permission. Alternatively if the user of the program demonstrated sufficient initial compliance with the license so that the creation of a contract must be inferred then the provisions of the license as a contract apply. If the license, such as the GNU GPL provides for automatic termination on breach then the license will be terminated by breach and further use will be infringing. If a user has demonstrated acceptance of the terms of a FOSS license which makes no provision for revocation but the user subsequently does not comply with the license the licensor may experience difficulties obtaining a court order requiring compliance with the other terms of the contract because South African courts prefer to award damages for breach of contract, rather than enforce performance of agreements.

Violation of License Terms

Generally failure to adhere to the conditions of the license indicates a refusal of the license construed as a contractual offer and thus no contract is formed, a copier is then liable for copyright infringement.

Waiver and Liability

There is no requirement arising from copyright legislation or common law that a person providing FOSS provide any warranty in respect of the software nor does any warranty arise automatically under copyright legislation or common law. Disclaimers and limitations of liability are valid under general principles of contract. However disclaimers and limitations of liability in favour of third parties cannot take effect unless one of the parties to the agreement accepts the benefit of the limitation on behalf of the third party. This usually takes place through a *stipulatio alteri* a provision in an agreement that a specified third party will enjoy a specified benefit, and that one of the parties will accept the benefit of behalf of the third party. For example a software vendor which holds a sub-license to software may include in an agreement with a customer a disclaimer of liability on part of the software creator which is not party to the agreement; the vendor would accept the benefit of the disclaimer on behalf of the software creator. A limitation of liability which can be construed as a unilateral waiver will not require acceptance of the benefit on behalf of the third party.

FOSS licenses do not fall under consumer protection legislation. However a transaction in which a service provider delivered goods and services to a natural person that included FOSS for consideration in the course of business would be subject to consumer protection legislation.

Cases

There have been no reported cases as yet (June 2014).

Legal Procedures

Only an owner or exclusive licensor can enforce the exclusive rights of copyright[44]. An owner can claim an interdict [45], damages, or reasonable royalties and delivery up of infringing copies[46]. If a work was joint-authored all the joint-authors must agree to an enforcement action for reasonable royalties or damages[47] because no rights holder is entitled to all of the damages. A joint-author may therefore apply for an interdict without the consent of the other joint-authors. Joint-authors can enter into an agreement that specifies what percentage of the profits from the computer program each is entitled to which would enable a joint-author to begin legal proceedings for his share of damages without the agreement of joint authors. A defendant could himself join the other joint-authors to the proceedings.

A rights holder who has grounds to suspect copyright infringement and that the suspected infringer is likely to dispose of the evidence of the infringement may apply to court, without the alleged infringer being given an opportunity to oppose the application, for an order authorizing the seizure and safe keeping of the evidence pending its production in litigation[48]. Damages will not be awarded against someone who proves that there were no reasonable grounds for suspecting that copyright subsisted in a computer program[49].

Whether a substantial portion of a computer program has been copied is a qualitative question, a few dozen lines of code out of thousands may constitute a substantial portion if they solve a particularly difficult problem or are crucial in some other way to the functioning of the program[50].

Literature

Jeremy Speres: 'The Enforceability of Open Source Software Licences: Can Copyright Licences Be Granted Non-Contractually?' South African Mercantile Law Journal (2009) Vol 21, Number 2, 174

[44] When an owner brings suit he must give notice to an exclusive licensee.

[45] Injunctions are referred to as interdicts in South African law.

[46] Section 24(1) of the Copyright Act

[47] Feldman v EMI Music [2009] ZASCA 75 (1 June 2009)

[48] There are both common law and statutory procedures. The common law 'Anton Piller' order is definitively discussed in Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam; Maphanga v Officer Commanding South African Police Murder and Robbery Unit, Pietermaritzburg [1995] ZASCA 49, while the statutory procedure is set out in section 11 of the Counterfeit Goods Act 37 of 1997.

[49] Section 24 (2) of the Copyright Act

[50] Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd. and Others (118/05) [2006] ZASCA 40 §45