

# IPSP01X - Essential Copyright Law

## Assignment 3 - Exam

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### Declaration

- I know that plagiarism is to use someone else's work and pass it off as my own.
- I know that plagiarism is wrong.
- I confirm that this assignment is my own work.
- I have acknowledged in the bibliography accompanying the assignment all the sources that I have used.
- I have not directly copied without acknowledgement anything from the Internet or from any other source.
- I have indicated every quotation and citation in a footnote or bracket linked to that quotation.
- I have not allowed anyone else to copy my work and to pass it off as their own work.
- I understand that if any unacknowledged copying whatsoever appears in my assignment I will receive zero per cent for the assignment.
- I am aware of the UNISA policy on plagiarism and understand that disciplinary proceedings can be instituted against me by UNISA if I contravene this policy.
- I indicate my understanding and acceptance of this declaration by entering my name hereunder:

– Name: **Nyameko Lisa** (Student Number: **7874-909-3**)

### NOTE

Please note that footnotes will be denoted as <sup>1</sup> and will appear at the bottom of the page. References will be denoted by [1] and will appear at the end of the document.

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<sup>1</sup>This is a footnote.

## 1 Name three types of copyright "work" embodied in Mia's published articles. [5]

As per [section 1][1], Mia's articles constitute *literary works* in the form of written reports, *artistic works* in the form of photographs and *published editions* in the form of the published articles appearing in Evergreen magazine, all of which are eligible for copyright as per [sections 2(1)(a, c & h)][1] respectively.

## 2 Is it possible for copyright to subsist in Roxy's drawing even if it infringes the copyright in another dress which she saw in a teen magazine? [20]

As per the definitions in [section 1 & section 1(1)(c)][1], Roxy's drawing can be considered as an **artistic work**, moreover depending on the degree to which there are substantial features in common with the original dress featured in the teen magazine, it may be considered as an **artistic adaptation** or **artistic reproduction**. Since Roxy was the first person to make or create the drawing, it follows that she is the **author** of the drawing as per [section 1][1].

Roxy's drawing must meet the '*inherent*' and '*formal*' or '*statutory*' requirements for copyright to subsist in her work.

### 2.1 Inherent Requirements

- The requirement of material embodiment is clearly satisfied as the work exists in material form.
- As per [article 9(2)][2] and [article 2][3], it can be argued that the Roxy's drawing is a '*particular form of expression of thought*', thus satisfying the requirement of originality.

### 2.2 Formal Requirements

- As a student of a school in Cape Town, it is implied that she is either a citizen of, or domiciled in, or a permanent resident of a Berne Convention country [section 3, section 37][4], meaning that she was a **qualified person** at the time of creation of the work and thus making her the author.
- Moreover it is implied that the work was first made in South Africa, [section 4][1], hence Roxy may allege that the drawing meets the statutory requirements for the subsistence of copyright in the work.

### 2.3 Yes, copyright subsists in Roxy's work.

As an '*adaptation of an artistic work*', Roxy's drawing also enjoys copyright protection, independently of the original copyright protected dress appearing in the teen magazine, as per [article 2(3)][4]. By reproducing the dress she saw in the teen magazine and / or making an adaptation thereof, Roxy has infringed the exclusive rights of the authors / copyright owners to perform or authorize those actions, as per [section 7(a),(e)][1].

Moreover as per [section 2(3)][1], Roxy's drawing is not ineligible for copyright even though it's creation would amount to infringements of copyright in the original dress appearing in the teen magazine.

Lastly Roxy's drawing does not infringe on copyright if she made the drawing purely for private and personal use, as per [section 12(1)(a)][1]. However, she will be unable to exploit her design without infringing on the copyright enjoyed in the dress appearing in the teen magazine.

## 3 When will the copyright in their wedding photographs expire? [5]

As per [section 3(2)(b)][1], the copyright will expire fifty years from the end of the year in which Ann and Mark either publish or consent to make their wedding photographs publicly available. If neither of the two events have

occurred within fifty years of their wedding, then the copyright will expire in fifty years from the end of 2013, i.e. at the end of year 2063.

## 4 Does Raymond infringe on the copyright in Amanda’s paintings? [25]

As per the definitions provided in [section 1][1], Raymond’s paintings, constitute **adaptations** of the **infringing copies** of Amanda’s ‘*original*’ **artistic works**, i.e. her paintings, the photographs of her paintings and the published editions of the photographs of her paintings.

As per definitions in [section 1][1] and [section 2(1)(c),(h)][1], Amanda is the **author** and copyright owner<sup>2</sup> for her paintings, the photographs of her paintings and the published (online) editions of the photographs of her paintings, as per [section 21(1)(a)][1].

### 4.1 Exclusive Rights

However, as per [section 7(a)][1], Raymond’s printed photographs of Amanda’s paintings constitute infringing copies, that violate the exclusive rights of the copyright owner, specifically in respect of the right to either carry out or authorize the reproduction of the Amanda’s photographs. Moreover the right to make an adaptation of the work<sup>3</sup>, [section 7(e)][1] vests solely with the copyright owner. Raymond’s copies constitute *direct* or *conscious* copies Amanda’s paintings, given that he had printed photographs of her original paintings to work from.

### 4.2 Direct Infringement

By performing any of the acts that a copyright vests the exclusive right to either perform or authorize the performance thereof, without the authors’ consent constitutes a ‘*direct infringement*’, [section 7][1].

### 4.3 Indirect Infringement

Each time the ‘*infringer*’ Raymond, consciously furthers the commission of any acts that only the authors are permitted to do or authorize to do, constitutes an ‘*indirect infringement*’. Such would be the case with the exploitation of the infringing work, for example the sale or distribution [Section 23(2)(b-c)][1], or display in a public place (such as an art gallery) of Raymond’s adaptations (paintings) of the printed photographs of Amanda’s original paintings.

### 4.4 Copyright Exceptions

It is important to note that if Raymond had used the printed copies of the photographs of Amanda’s paintings from her website, and his subsequent paintings created from these copies, for his own personal or private use, research, criticism or review, or for purposes of reporting current events, does not constitute an unlawful act and copyright of Amanda’s works would not have been infringed upon, as per [section 15(4)][1]. However given that he produces the paintings under his own name, it is assumed that his usage does not constitute *fair use*.

### 4.5 Test for Copyright Infringement

In establishing copyright infringement, it must be demonstrated that the copyrighted work has indeed been copied, through the following two inquiries, (“Galago Publishers (Pty) Ltd and Another v Erasmus”) [5]

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<sup>2</sup>It is assumed that copyright subsists in all of her works, as the focus of the question is Raymond’s infringement of said copyright.

<sup>3</sup>Or reproductions thereof.

#### 4.5.1 Objective Connection

An objective connection between a substantial part of the copyright work and the alleged infringing work - this follows clearly given that it is alleged that Raymond printed copies of Amanda's photographs of her paintings, and based his own paintings on those photographs. It may be possible for Raymond to argue that the two works share a common prior art in which copyright does not subsist. This would require a work which has substantial qualitatively similarities with both Amanda's and Raymond's works.

#### 4.5.2 Subjection Connection

There should be a causal connection between the copyrighted work and the alleged infringing work. It must be shown that Raymond had 'access' to the original work - again this follows clearly as it is stipulated that he printed copies of photographs of Amanda's completed paintings from her website.

### 4.6 Yes, Raymond does infringe on the copyright in Amanda's work

Even though Raymond's paintings themselves enjoy copyright protection as an adaptation of an **artistic work**, as per [article 2][4], regardless of whether their creation infringes on the copyright of another work [section 2(3)][1]; every time his work is sold, reproduced or distributed, it will be an infringement of the copyright enjoyed by the Amanda's paintings, photographs and published (online) work. Thus Raymond will be liable for copyright infringement whenever he tries to exploit the work, as stipulated in [article 6][2].

## 5 Leon is a young film maker from Cape Town.

### 5.1 Can Leon make commissioned films and still own the copyright in those films? [5]

As per [section 21(1)(c)][1], the owner of the copyright in the commissioned cinematograph film will be the person who pays or agrees to pay the monetary value for the film, as it is made in pursuance of said commission.

However, this is subject to the provisions of [section 21(1)(b)][1], which stipulates that in the case where work is commissioned for the purpose of publication, then the proprietor of the organisation requesting the commission of the work will be the owner of the copyright as far as it relates to publication or reproduction for the purposes of publication, in all other respects however the author is the owner of any copyright subsisting in the work.

It follows therefore based on the provisions of [section 21(1)(b)][1], one could argue that the television channels commissioning the films will own the broadcasting rights and any reproduction of the films for the purposes of them being broadcast, but in all other respects Leon as the author, shall be owner of any copyright subsisting in his films.

### 5.2 Do exceptions [section 15(1) or 15(3)][1] apply? [2]

Yes, [section 15(1)][1] would apply given that the inclusion of the bands performance is incidental and that the principle matter represented in the film is the documentary and the guest being interviewed in said restaurant.

[Section 15(3)][1] would only apply in the case where the band was a permanent fixture in the restaurant. It would be difficult to reasonably argue that it was impossible to schedule the interview during a time when the band was not playing at the restaurant. So yes this could apply but to a lesser degree than [section 15(1)][1].

### 5.3 Does the general fair dealing exception [section 12(1)][1] apply? [8]

- [Section 12(1)(a)][1] cannot apply as the production of the documentary film is neither for the purposes or research, private study, personal nor private use by Leon, but intended for commission in a film sold to television channels.

- [Section 12(1)(b)][1] cannot apply as the band's music is playing in the background and incidental to the interview. Therefore one can assume that the content of the interview is not related to criticism of the band's original music or that of another work that is juxtaposed against the band's original work.
- [Section 12(1)(c)(i)][1], cannot apply as the documentary will be produced as a cinematograph film, and not for publication in a newspaper, magazine or similar periodical.

### 5.3.1 Yes the general fair dealing exception (s 12(1)(c)(ii)) does apply

It could be argued that as per [section 12(1)(c)(ii)][1], the documentary and interview constitute a cinematograph film for the purposes of reporting current events. Moreover as per the provisions of [section 12(c)][1], Leon is not required to mention the source, nor the name of the band even if it appears in his cinematograph film. Based on this he does not need to ask the band's permission, to include that scene in his film.

## 6 Discuss the possibility that James can rely on the reverse-engineering defence [section 15(3A)][3]. [10]

Given that Talia's factory both designs and manufactures the uniforms, as per [section (3A)(a)][1], it follows that three-dimensional reproductions (the physical school uniforms) were made from two-dimensional artistic drawings or designs. These reproductions subsequently went on sale and were thus made available to the public with Talia's consent.

As per [section (3A)(a)][1], it follows then that copyright has not been infringed when James, without the consent of Talia, made available to the public three-dimensional reproductions or adaptations of the authorized reproductions, provided that:

- the authorized reproductions primarily have a utilitarian purpose, as per [section (3A)(a)(ii)][1]. James could easily argue that school uniforms serve a utilitarian purpose.
- the authorized reproductions are made by an industrial process, as per [section (3A)(a)(ii)][1]. Talia owns a factory that designs and manufactures the uniforms. James could argue that the three-dimensional authorized reproductions of the uniforms design are manufactured via an industrial process.

## 7 What moral rights are protected by Copyright Act No. 98? [5]

As per [section 20(1)][1], in spite of the transfer of the copyright in a literary, musical or artistic work, cinematograph film or computer program, the author may claim authorship of the work and oppose any modifications, mutilations or distortions that would bring the author into disrepute. However, an author who has authorised the use of his work in a cinematograph film or television broadcast or computer program may not oppose modifications necessary on a technical basis or for commercial exploitation.

## 8 How my perceptions of copyright and/or specific copyright issues have changed during the course of this module. [15]

Whilst I have an intuitive sense that the regulations regarding the implementation of copyright related issues would be based on and resemble international instruments, I had no idea that the similarity and corroboration between said instruments would be so strong.

With this idea in mind it follows quite naturally that the laws governing the protection of copyright should be '*universal*' in a sense, in as much as these international instruments should give guidance and clarity to member participants, but at the same time, they should provide enough freedom for individual member states to carefully articulate and stipulate their own legal and regulatory framework [1], whilst working within the general

scaffolding of the international instruments, [3], [4], [6], [7].

Moreover, as a scientist, I particularly enjoyed how very specific aspects of the **theory** (framework of legal and regulatory instruments) could be applied to described, predict and explain the experiment (actual legal case law and hypothetical examples). Especially in instances where legal precedent is yet to be established or where it is even contradictory based on the *interpretation* of one's viewpoint are arguments. In this instance a type of phenomenological, or *mathematically numerical approximation* is required that satisfies as many corroborating sources as possible, whilst sufficiently reducing or mitigating the significance of the contradicting sources.

## References

- [1] Copyright Act No. 98, 1978.
- [2] Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994. [Online]. Available: [https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm).
- [3] WIPO Copyright Treaty, 1996. [Online]. Available: [http://www.wipo.int/treaties/en/text.jsp?file\\_id=295166](http://www.wipo.int/treaties/en/text.jsp?file_id=295166).
- [4] Berne Convention for the Protection of Literary and Artistic Works, 1886. [Online]. Available: [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698).
- [5] *Galago Publishers (Pty) Ltd and Another v Erasmus*, 1989 (1) SA 276 (A).
- [6] Paris Convention for the Protection of Industrial Property, 1883. [Online]. Available: [http://www.wipo.int/treaties/en/text.jsp?file\\_id=288514](http://www.wipo.int/treaties/en/text.jsp?file_id=288514).
- [7] Model Provisions on Protection Against Unfair Competition, 1996. [Online]. Available: [ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo\\_pub\\_832\(e\).pdf](ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_832(e).pdf).