

IPSP01X - Essential Copyright Law

Assignment 1 - Unique Number: 659072

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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 ¹ and will appear at the bottom of the page. References will be denoted by [1] and will appear at the end of the document.

¹This is a footnote.

1 Who are the authors of English study guide? [4]

In accordance with the provisions of section 1 of the Copyright Act No. 98 of 1978 [1] and as per article 2(1) of the Berne Convention [2], the English study guide can be considered as a piece of **literary work**, which is a **work of joint authorship** and was first made or created by the ABC123 lectures, all of whom enjoy ‘*joint authorship*’.

In the case of ‘*joint authorship*’, any one of the authors must be a **qualified person** at the time the work or a substantial part thereof was created. Assuming that as university employees, at least one of the ABC123 lecturers are a citizen of, or domiciled in or permanent resident of Berne Convention country [section 3, section 37][2], it follows that the co-authors of the English study guide are the ABC123 lectures, where the term **author** is used as defined in [section 1][1].

2 Who is the copyright owner of the English study guide? [3]

As per [section 21(1)(d)][1], given that the lecturers are all under employment contracts of service with the university, and the fact that the study guide was produced² during the course of their employment with the university, it follows that ownership of the copyright is held by the proprietor or owner of the university or simply the university itself.

Alternatively however, specifically because we are not explicitly told ‘*when*’ the authors prepared the study guide, - i.e. they could have prepared a significant portion of the study guide before they were under the employ of the university - it *could* also be argued that the ownership of the copyright belongs to the co-authors, as per [section 21(1)(a)][1].

3 What is the duration of the copyright in the English study guide? [3]

As per [section 3(2)(a), section 3(4)][1], the duration of the copyright in the English study guide is the life of all co-authors and fifty years from the end of the year in which the last living author dies.

4 Does Marli infringe the copyright in the English study guide? [30]

As per the definitions provided in [section 1][1], copies of Marli’s Afrikaans translation that are sold to prospective students, constitute an **adaptation** of the ‘*original*’ **literary work**, the English ABC123 study guide. Moreover, by those definitions, given that Marli’s Afrikaans translation is a reproduction of the work, it will be considered a **copy**, and for the purposes of the following arguments it will be referred to as the **infringing copy**.

In establishing copyright infringement, it must be demonstrated that the copyright work has indeed been copied, through the following two inquiries, (*Galago Publishers (Pty) Ltd and Another v Erasmus*)[3]

- An objective connection between a substantial part of the copyright work and the alleged infringing work - this follows clearly given that it is a translation.
- It must be shown that Marli had ‘*access*’ to the original work - again this follows clearly as she was a previous student of ABC123.

As per [section 23(1), section 23(2)(b)][1], Marli infringed on the copyright of the English study guide, when she

²This is not explicitly mentioned, but it is implied in the question, *see below*.

- made the Afrikaans translation without owning the copyright, or being granted a licence by the university, or being authorized by the university to make an **adaptation** of said study guide,
- reproduced and distributed '*infringing copies*' of said **adaptation** of the work,
- each time she exploited the '*infringing copies*' it was a violation of the copyright enjoyed in the original work.

Even though Marli's translation itself enjoys copyright protection as an '*alteration*' of a **literary work**, as per [article 2][2], every time the work is reproduced or distributed, it will be an infringement of the copyright enjoyed by the English study guide. Thus Marli is liable for copyright infringement whenever she tries to exploit the translation, or **adaptation** of the work, as stipulated in [article 6][4].

4.1 Copyright Exceptions

It is important to note that Marli's translation of the study guide from English to Afrikaans, for her own personal use does not constitute an unlawful act and copyright of the study guide was not infringed upon, as per [section 12(1)(a)][1].

Moreover the creation and personal / private use of her translation does not infringe copyright, as long as she employs the translation for her own personal and private use, [section 12(11)][1].

4.2 Exclusive Rights

However, as per [section 6(f)][1], the '*infringing copy*' violates the exclusive rights of the copyright owner, specifically in respect of the right to either carry out or authorize the **adaptation** of the English study guide.

The right to translate the English study guide vests in the university and thus the exclusive rights of the copy right holder are infringed by the unauthorized adaptation. This is a '*direct infringement*'.

Moreover, as per [section 6(g)][1], and its references to paragraphs (a) and (e) of that section, the '*infringing copy*' constitutes unlawful reproduction and transmission in a diffusion service of the **adaptation** of the '*original*' work. These are '*direct infringements*'.

4.3 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 6][1].

4.4 Indirect Infringement

Each time the '*infringer*' Marli, consciously furthers the commission of any acts that only the authors are permitted to do or authorize to do, constitutes an '*indirect infringement*'. Such as is the case with the sale [Section 23(2)(b)][1], of her Afrikaans translations of the English study guide.

5 Can Marli claim copyright in her translation? [10]

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

- Inherent Requirements

- The requirement of material embodiment is clearly satisfied as the work exists in material form.
- As per [article 9(2)][4] and [article 2][5], it can be argued that the Afrikaans translation is a ‘*particular form of expression of thought*’, thus satisfying the requirement of originality.

- Formal Requirements

- As a student of the university, 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][2], 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 Marli may allege that the translation meets the statutory requirements for the subsistence of copyright in the work.

Given that translations can be considered as ‘*alterations*’ of **literary works** and thus also enjoy copyright protection as per [article 2][2]. Therefore Marli’s Afrikaans translation will enjoy copyright protection independently of the original English study guide.

Moreover as per [section 2(3)][1], Marli’s translation is not ineligible for copyright even though it’s creation, reproduction, distribution and sale amount to infringements of copyright in the English translation.

By uploading the Afrikaans translation, Marli may allege that the ABC123 lectures have directly infringed on her exclusive right to **publish** the work, [section 6(b)][1].

In turn the ABC123 lecturers may argue that their usage constitutes ‘*fair dealing*’, in that it is used as a visual record for teaching, [section 12(4)][1], provided that they acknowledged her authorship of the translation in the upload. Moreover students downloading the Afrikaans translation for personal or private use, also do not infringe copyright on the translation, [section 12(1)(a)][1].

However, it must be noted that since Marli’s translation was made without the consent of the ABC123 authors or a license from the university, Marli is unable to exploit her translated work without infringing the copyright enjoyed in the English study guide.

References

- [1] Copyright Act No. 98, 1978.
- [2] Berne Convention for the Protection of Literary and Artistic Works, 1886. [Online]. Available: http://www.wipo.int/treaties/en/text.jsp?file_id=283698.
- [3] *Galago Publishers (Pty) Ltd and Another v Erasmus*, 1989 (1) SA 276 (A).
- [4] Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994.
- [5] WIPO Copyright Treaty, 1996. [Online]. Available: http://www.wipo.int/treaties/en/text.jsp?file_id=295166.