

UNISA



CENTRE FOR BUSINESS LAW

ESSENTIAL COPYRIGHT LAW

Tutorial Letter 201

Contents

This tutorial letter contains feedback on the activities in your study units.



Activity 1.2

In your reply to your friend you should mention the following people:

- ☐ Sanki (the performer)
- ☐ Vusi (the author of the lyrics)
- ☐ Yvonne (the composer of the music)
- ☐ Sandile (the author of the painting)
- ☐ Africa Music Group Ltd (the holder of the right to the sound recording)



Activity 2.1

Your answer should consider the following:

- ☐ the Berne Convention and the Universal Copyright Convention (UCC)
- ☐ The Berne Convention expressly does not allow any formalities to be prescribed for copyright protection (article 5(2)), whereas the UCC allows formalities to be set (article III).
- ☐ The Berne Convention has gained the widest international acceptance, since all members of the WTO are obliged to comply with its substantive provisions. In terms of the TRIPS Agreement, members of the WTO are not obliged to implement article 6^{bis} of the Berne Convention (which grants an author certain moral rights). Subsequently, in the WCT, the obligation to comply with the substantive provisions of the Berne Convention does not exclude this provision relating to moral rights.



Activity 3.2

In this activity you had to identify the copyrightable elements of Adam's computer game. In other words, you had to identify which copyright works are embodied in the composite physical object — the computer game.

You should have noticed that the physical object concerned here is a composite work, which is stated to consist of a computer program, visual images, and sound.

To identify the copyrightable works, one must first of all identify the elements in the game that may be copyrightable. They are:

- ☐ the computer game
- ☐ the character 'Moose'
- ☐ the dungeon
- ☐ the roaring lion
- ☐ the maze
- ☐ the words in English and Zulu
- ☐ the recorded or animated 'voice'

First, remember that the mere fact that a work has been stored on a computer disk, or may be 'read' with the aid of a computer, does not render such a work a computer program. A computer program is only the set of instructions which, when used directly or indirectly in a computer, directs its operation or bring about a result. The term 'computer program' for purposes of copyright protection therefore refers to the executable code written in a computer programming language (consisting of 1's and 0's).

Secondly, note that a computer game, protectable as a cinematograph film, is a separate and independent work and the subject of copyright protection. It must be distinguished from the

scenario of the film, which is a literary work, and the computer program storing the data or sequence of images, capable of being seen as a moving picture.

Thirdly, bear in mind that works cannot be protected by copyright unless they can be accommodated within one of the categories of works. For example, the layout of a diary cannot be protected by copyright unless it can be considered to be a literary or artistic work.

As will be seen from Study Unit 5, the scope of copyright protection of a work is largely determined by the category of works into which such a work falls.

It must now be determined in which *category* of work each of the elements listed above, will fall.

The elements identified and the type of work that these fall under, are as follows:

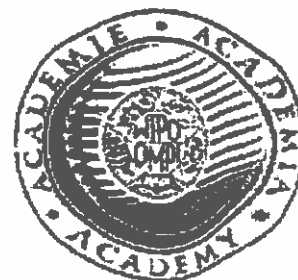
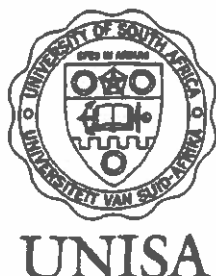
- ☐ the computer game: where a computer program fulfils the function of storing images and being instrumental in creating moving pictures, it is protected as a *cinematograph film* (see *Golden China TV Game Centre & others v Nintendo Co Ltd* 1997 (1) SA 405 (A)). The source code of the computer program, however, is protected as a *computer program*. The works made in the process of writing the computer program, such as flow charts written for the computer program, are protected as *literary works*.
- ☐ the character 'Moose': the drawings of Moose will be protected as *artistic works* (paintings, drawings)
- ☐ the dungeon: the dungeon will be protected as an *artistic work* (paintings drawings, note that the term 'drawing' includes drawings of a technical nature)
- ☐ the roaring lion: the drawings or visual images of the lion are protected as *artistic works* (painting, drawing, or photograph); the 'roaring' will be protected as a *cinematograph film* (note that the definition of the term 'cinematograph film' includes sounds associated with the film, and that the definition of a 'sound recording' excludes a sound-track associated with a film)
- ☐ the maze: the maze is protected as an *artistic work* (paintings drawings); note that the term 'drawing' includes drawings of a technical nature)
- ☐ the words in English and Zulu: the 'script' is protected as a *literary work* (note that the definition of a literary work includes cinematograph film scenarios)
- ☐ the recorded or animated 'voice': the voices are, like the 'roaring sound', protected as a *cinematograph film*

To conclude: when answering Adam's question, you had to advise him that his computer game is a composite work which incorporates the following classes of copyright works: various literary works, various artistic works, a cinematograph film, and a computer program.

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Activity 4.3

☐ The requirement of originality

The requirement of originality refers to the original skill or labour involved in the execution of the work. The work must have emanated from the author (Brian) himself, and should not have been copied from some other source (see *Appleton & another v Harnischfeger Corporation & another* 1995 (2) SA 247 (A) at 262). The mere fact that an artistic work (the portrait) is based upon an earlier work (the photograph) does not mean that it is not original. Where use is made of existing subject-matter (the photograph), the author must expend sufficient skill or labour to impart to his work (the painting) some quality or character which the material he uses does not possess and which substantially distinguishes the painting from the photograph.

Where a painter copies a photograph, the painting deserves copyright protection as an original work. This is so because the execution of the painting requires a high degree of artistic skill. Brian employed a high degree of skill and labour in mixing the paint pigment and applying it to the canvass so that a likeness to the

photograph of Abel's late grandfather could be obtained. The painting is more than a mere slavish copy of the photograph, and will qualify as an original artistic work in terms of the Copyright Act.

- ☐ Who is the author of the painting?

A painting is an artistic work in terms of section 1(1) of the 1978 Act. The author of an artistic work is its maker or creator. So Brian is the author of the painting.

- ☐ Who owns the copyright in the painting?

As noted above, Brian is the author of the painting. The general rule is that the author of a work which is the subject of copyright will be the first owner of copyright subsisting in it. But where a person commissions, inter alia, the painting of a portrait, and pays for it in money or money's worth, the person who commissions the portrait will be the first owner of the copyright subsisting in the portrait (see section 21(1)(c)). Abel commissioned Brian to do the portrait and he paid him R10 000 for the painting. Section 21(1)(c) applies, and so Abel will qualify as the first owner of the copyright in the portrait of his late grandfather, although Brian is the author of the portrait. This means that Brian will, for example, not be able to make prints of the portrait.



Activity 4.4

Your answer should consider the following:

- ☐ Who is the author of the computer program?

The author of a computer program is the person who exercised control over the making of the computer program. According to the facts, Big John acted as the project leader. We may thus assume that Big John exercised control over the making of the computer program "Treehouse". Big John is the author of the computer program.

- ☐ Who owns the copyright in the computer program?

The author of a work is normally also owns the copyright in it (see section 21(1)(a)). Big John is the author of "Treehouse". Is he also the copyright owner? Section 21(1)(d) provides that where a work is made in the course of the author's employment, the employer is the copyright owner of such a work. So MacApple Co (Pty) Ltd is thus the copyright owner of "Treehouse".

- ☐ Would your answer be any different if Sheena had been an employee of MacApple when she wrote the computer program?

No. If Sheena had been an employee, the answer would still have been that Big John is the author of the computer program and MacApple Co is copyright owner of the computer program written during her employment. However, had Sheena been the project leader when she wrote "Treehouse", she would have been the author of the program and she would have been the copyright owner of "Treehouse" (had she been the project leader and a freelance worker).



Activity 4.5

Your answer should consider the following:

- ☐ The identity of the author of the photograph and the article:

When asked to identify the author of works, it is very important first to identify the types of works involved. In answering this question, you are required to indicate who is regarded as the author of the article and the photograph. The types of works involved are:

- ☐ the article (a literary work), and
- ☐ the photograph (an artistic work).

You will remember that we have said in Study Unit 1 (at 1.4.14) that the author of a literary work is the person who first makes or creates a work. The author of a photograph is the person who is responsible for the photograph's composition (see 1.4.15). Anne, the maker or creator of the article, qualifies as the author of the article. As far as the photograph is concerned, the person responsible for its composition will qualify as the author. From the facts it is reasonable to assume that Anne will also qualify as author of the photograph.

- ☐ Now we turn to the question of who is the owner of copyright in the article and the photograph.

We have noted that the author of a work is usually also the owner of the work. So Anne should own the copyright in the article and the photograph, as she is the author of both works. But in both cases the exception stated in section 21(1)(b) applies: where one writes an article or takes a photograph as an employee of a newspaper or magazine, the author will *not* be the copyright owner of such works. The owner of the publication will be the copyright owner of the works created by employees for publication in the magazine or newspaper. In terms of section 21(1)(b), the owner of the copyright in the article is Buti. Note with regard to section 21(1)(b) that the proprietor of the magazine (Buti) is only owner for purposes of publication in any newspaper, magazine, or similar periodical. For all other purposes Anne, the author, is the owner of the copyright, for example, for publication in a book. Section 21(1)(b) applies to literary and artistic works. As Anne took the photograph in the course of her employment with Buti, Buti will be the owner of the copyright in the photograph for purposes of publication in any newspaper, magazine, or similar periodical. As Anne also wrote the article in the course of her employment with Buti, Buti will be the owner of the copyright in the article for purposes of publication in any newspaper, magazine, or similar periodical.

- ☐ The duration of copyright in the article and the photograph

The duration of the copyright in the article will be the life of the author (Anne) and 50 years from the end of the year in which she dies. The term of the copyright in the photograph will be 50 years from the end of the year in which it is lawfully made available to the public, or, failing such event, 50 years from the end of the year in which the photograph was taken. Assuming that Anne is still living, it will not be possible to determine the duration of the copyright in the article. It will only be possible to do so on her death. The duration of the copyright in the photograph is 50 years from the date of its publication in the magazine 'Bird World'.



Activity 5.3

Your answer should consider the following in addressing the first situation:

- ☐ whether the photocopying of parts of Brian's book (including parts of the appendix which contains the text of the Copyright Act) is an infringement of the exclusive right of the copyright holder, and
- ☐ whether the students can rely on any of the limitations or exceptions to copyright.

Part of Brian's book, the commentary on the Copyright Act, is a literary work, as the term literary work includes books, pamphlets, and other writings (see section 1(1) of the 1978 Act). In Study Unit 3, we saw that certain works, such as official texts of a legislative nature fall outside the scope of copyright protection (see section 12(8) of the 1978 Act and article 2(4) of the Berne Convention). But the appendix containing the text of the Act

enjoys copyright protection as a published edition (see the definition of the term in section 1(1) – the first print of a particular typographical arrangement of a literary work). The author of a literary work and a published edition has the exclusive right to reproduce the work in any manner or form. The photocopying of parts of Brian's work is an infringement of the copyright vesting in the work (it is a reproduction of the work).

We must now determine the applicability of any statutory defences to copyright infringement.

The first defence which comes to mind is fair dealing. Section 12(1) of the 1978 Act provides that copyright shall not be infringed by the fair dealing with a literary work for the purpose of research or private study of the person using the work. The same applies to a published edition (section 19A). As the copies were made by students in Alan's class, the first requirement is met, provided each student made the copy for her own personal use and not with the intention of circulating copies of it to fellow students.

The second, requirement – that the reproduction must be compatible with fair dealing – means that the students may not have made a copy of a substantial portion of Brian's work. This provision prohibits any meaningful copying of the work. As a work is normally only prescribed to students where they must use a large portion of the work for studying purposes, we may assume that the copying of the parts of the book will not pass the test of 'fair dealing'.

Your answer should consider the following in addressing the second situation:

- ☐ whether the condensation of Alan's lecture notes for the purpose of distribution to the reporters is an infringement of the exclusive rights of the copyright owner, and
- ☐ whether the proprietor of the newspaper can rely on any of the limitations or exceptions to copyright.

Alan's lecture notes is a literary work, as the term literary work includes lectures and addresses (see section 1(1) of the 1978 Act). He has the exclusive right to reproduce the work in any manner or form, to make an adaptation of it, and to publish a reproduction or an adaptation of it. The making available of copies of a literary work to members of the public amounts to the publication of a work. Members of the public are those persons that fall outside the immediate domestic circle. New members of staff will be deemed to be members of the public.

One may argue that the condensation of the work is an adaptation of the work. Copies (reproductions) of the condensed notes (adaptations) were distributed to new members of staff (publication). The exclusive rights of reproduction, adaptation and publication have therefore been infringed.

We will now see whether the proprietor of the newspaper can rely on any limitations or exceptions to copyright. Section 12(6)(a) of the 1978 Act provides that copyright in a lecture that is delivered in public is not infringed by reproducing it (or an adaptation of the lecture) in the press for informatory purposes. However, the adaptations of the lectures were not reproduced in the press for informatory purposes. Also, section 12(6)(b) provides that the author of such a lecture has the exclusive right to make a collection of these lectures. The right to make a collection has thus also been infringed.

Your answer should consider the following in addressing the third situation:

- ☐ whether the translation of Brian's book into German and the publication of the translation amount to an infringement of Brian's exclusive rights, and
- ☐ whether David and/or Erich can rely on any of the limitations or exceptions to copyright.

The right to make an adaptation of his book vests in Brian. The making of an adaptation of a literary work includes the making of a translation of such a work. Brian's exclusive rights are infringed by the unauthorized translation. Brian also has the exclusive right to publish an adaptation of his work. The publication of the

adaptation is thus also an infringement of Brian's copyright.

In Study Unit 3 we mentioned that translations enjoy copyright protection as 'alterations' of literary works (see article 2 of the Berne Convention). The 'secondary works' – such as translations – enjoy copyright protection independently from the source work (the work which was translated). Brian and David will be entitled to copyright protection of their works. Note also that section 2(3) of the 1978 Act provides that a work is not ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work; in other words, David's work will qualify as an original work, irrespective of the fact that its making constituted an infringement of Brian's work.

But since the translation was made without Brian's consent, every time David's work is reproduced or published it will be an infringement of Brian's work – a reproduction or publication of an adaptation of his work. David and Erich will not be able to exploit the translated work without being liable for copyright infringement.



Activity 6.1

Your answer should consider the following:

- ☐ whether Anne's copyright in her book has been infringed, and
- ☐ whether any defences may be raised by any of the defendants against copyright infringement.

The facts of this activity is almost identical to that of Activity 5.3 above. Some of the arguments and legal principles raised above apply with equal force to this set of facts.

Was Anne's copyright in her book infringed?

The following acts are relevant here:

- ☐ Buzi is translating the work into Xhosa;
- ☐ Cathy is distributing copies of the condensed version of Anne's book to all journalists on her staff;
- ☐ lecturers at the University of Gold Reef are making copies of the pages of Anne's book containing the Copyright Act and are selling these pages to their students; and
- ☐ students are making photocopies of the pages on the photocopying machine in the library.

The right to make an adaptation of his book vests in Anne. The making of an adaptation of a literary work includes the making of a translation of such a work. Buzi is making an unauthorized translation of Anne's book into Xhosa. Anne's exclusive rights are infringed by the unauthorized translation.

One may argue that the condensation of the work is an adaptation of the work. Cathy thus made an adaptation of Anne's work. Cathy also made copies of this adaptation. The making available of copies of a literary work (or an adaptation of it) to members of the public amounts to the publication of a work. Members of the public are those persons that fall outside the immediate domestic circle. Journalists of Cathy's staff will be deemed to be members of the public. The authorized reproduction and publication of an adaptation of a work constitute copyright infringement.

Copies (reproductions) of the condensed notes (adaptations) were distributed to the journalists (publication). So the exclusive rights of reproduction, adaptation, and publication have been infringed.

As noted under the feedback to Activity 5.3, certain works, such as official texts of a legislative nature fall outside the scope of copyright protection. The appendix containing the text of the Act, however, enjoys copyright protection as a published edition. The author of a literary work and a published edition has the exclusive right to reproduce the work in any manner or form.

The photocopying of parts of Anne's work is an infringement of the copyright vesting in the work (a reproduction of the work). This includes also the making of reproductions from a reproduction (the copying by the students). Both the lecturers and the students thus reproduced Anne's work, provided that a substantial portion of the typographical arrangement of the Copyright Act was copied.

Can any defences be raised by any of the defendants against copyright infringement?

We must now determine the applicability of any statutory defences to copyright infringement. The following infringing acts are relevant here:

- ☐ Buzi's adaptation of Anne's work by translating it into Xhosa: Buzi will not be able to raise any statutory defence against copyright infringement.
- ☐ Cathy's adaptation of Anne's work and her reproduction and publication of the adaptation by the distribution of copies of the condensed version of Anne's book to all journalists on her staff: we will now see whether Cathy can rely on any limitations or exceptions to copyright. Section 12(1) provides that copyright is infringed by any fair dealing with a literary for the purposes of criticism or review of that work or of another work; or for the purpose of reporting current events in a newspaper, magazine or similar periodical; provided that the source shall be mentioned, as well as the name of the author if it appears on the work. Section 12(3) provides that copyright in a literary work is not infringed by quoting from it or the making of summaries of such works. But the quotations should be compatible with fair practice and should not exceed the extent justified by its purpose, the source must be mentioned, as well as the name of the author. Cathy made the summaries available to her staff, and so section 12(1) and (3) do not apply.
- ☐ The act of reproduction by lecturers at the University of Gold Reef by making copies of the pages of Anne's book containing the Copyright Act for student use: the first defence which comes to mind is that of fair dealing. Section 12(1) provides that copyright is not infringed by any fair dealing with a literary or musical work for the purposes of research or private study by, or the personal or private use of, the person using the work. The lecturers made copies of portions of the book for the purpose of selling it to the students. Section 12(1)(a) applies only where a person makes a copy for her own personal use; not where copies are made by a person for the use by others. Section 12(4) makes provision for use of a literary work by lecturers. It states that the copyright in a literary or musical work is not infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast, or sound or visual record for teaching. The lecturers made copies of portions of the book for the purpose of selling it to the students. Section 12(4) applies only where a work is used for the purpose of illustration. The lecturers made copies of portions of the book for the purpose of selling it to the students. So section 12(4) also does not apply.
- ☐ The act of reproduction by students for their own use on the photocopying machine in the library: section 12(1) provides that copyright is not infringed by the fair dealing with a literary work, or a published edition (see section 19A), for the purpose of research or private study of the person using the work. As the copies were made by the students for their own use on the photocopying machine in the library, the first requirement is met, provided each student made the copy for her own personal use and not with the intention of circulating copies of it to fellow students. The second requirement – that the reproduction be compatible with fair dealing – means that the students may not have made a copy of a substantial portion of Anne's work. This provision prohibits any meaningful copying of the work. As a work is normally prescribed to students only where they must use a large portion of the work for studying purposes, we may assume that the copying of the parts of the book will not pass the test of 'fair dealing'.



Activity 6.2

In this activity you had to identify the following: Ubuntu (Pty) Ltd may be advised that it has a case for copyright infringement against Xiu. In order for Ubuntu (Pty) Ltd to succeed in the action, it has to make several substantiated allegations in its pleadings:

- ☐ that copyright subsists in the work;
- ☐ that Ubuntu (Pty) Ltd owns the copyright in the work;
- ☐ that the work which has been manufactured by Xiu is a direct infringement of Ubuntu (Pty) Ltd's copyright; and
- ☐ that Xiu's trading in the infringing works constitutes indirect infringement of Ubuntu (Pty) Ltd's copyright.

To establish the subsistence of copyright in a work, it must be proved that the work in question meets the inherent and formal requirements for copyright protection. The work in question here is the painting which has been adapted to a design for woven carpets; it falls into the category of 'artistic works'.

The two inherent requirements for the subsistence of copyright are originality and material embodiment:

- ☐ It is clear that the work exists in material form.
- ☐ The requirement of originality (stated in section 2 of the 1978 Act) simply means that the work must emanate from the author and not have been copied from another work. This requirement will be satisfied even if one or more identical works exist. The design originated from a painting by B, an employee of Ubuntu (Pty) Ltd, and other employees who later adapted the painting into a design for woven carpets. Ubuntu (Pty) Ltd must thus allege that the painting and the design were created by the original and independent labour and skill of its employees.

The statutory requirements for the subsistence of copyright may be proved in the alternative.

- ☐ The author (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 of it is made. A qualified person is anyone who is a citizen of, or domiciled or permanently resident in, a Berne Convention country (section 3 read with section 37). As Bheki is a Nigerian citizen, he is a qualified person.
- ☐ Alternatively, Ubuntu (Pty) Ltd may rely on its satisfying the requirement that the work first be made in South Africa (section 4). So the company may confidently allege that it meets the statutory requirements for the subsistence of copyright in the work.

Ubuntu (Pty) Ltd must then prove that it owns the copyright in the work. The author of an artistic work is the maker or the creator of that work (here, Bheki). The author usually owns the copyright in a work (see section 21(1)(a)), except where it has been made in the course of the author's employment in terms of a contract of employment, in which case the author's employer owns the copyright (see section 21(1)(d)). Ubuntu (Pty) Ltd must allege in its pleadings that the work was made by Bheki, and that Bheki is the author of the work. Also, as the work was made by Bheki within the scope of her employment by Ubuntu (Pty) Ltd (she was employed to design carpets), Ubuntu (Pty) Ltd owns the copyright right in the work.

Ubuntu (Pty) Ltd must then establish that copyright still subsists in the work with reference to the duration of copyright, and that as copyright owner it has the exclusive right to reproduce the work in any manner or form, publish the work if it is unpublished, and make an adaptation of it (section 7). It must also allege that the unauthorized doing of any of these acts constitutes direct copyright infringement (section 23(1)).

On the facts before us, the design of Xiu's carpet is similar, although not identical, to Ubuntu (Pty) Ltd's. To establish copyright infringement, Ubuntu (Pty) Ltd must prove that its copyright work has been copied. This is a question of fact, which involves two inquiries, one objective and the other subjective (see *Galago Publishers (Pty) Ltd v Erasmus* 1989 (1) SA 276 (A)):

- ☐ An objective similarity between a substantial part of the copyright work and the alleged infringing work must be established. One should take into account that the similarity between the two works may be due to the fact that both works incorporate common prior art – the depiction of women in traditional dress. Where it can be proved, for example, that the differences between the two works are largely cosmetic, it may be said

that objective similarity had been established. Also, it must be established that a substantial part of the work had been copied. The requirement of substantiality refers to the quality of what has been appropriated, rather than the quantity.

- ☐ Subjectively, there should be a causal connection between the copyright work and the alleged infringing work. It must be proved that XIU had access to Ubuntu (Pty) Ltd's work. Such causal connection should be established by evidence. As Ubuntu (Pty) Ltd's woven carpets depicting the design had been distributed in South Africa, one may assume that Xiu had access to the design. If the similarities between the works are striking, the causal connection between the works may be evident from the works themselves (see *Fax Directories (Pty) Ltd v SA Fax Listings CC* 1990.(2) SA 164 (D)).

Ubuntu (Pty) Ltd should also allege that Xiu's actions constitute indirect copyright infringement (section 23(2)). This occurs when any person, without the consent of the copyright owner and when copyright subsists in the work, sells, lets, or by way of trade offers or exposes for sale or hire any article, if to his knowledge the making of the article constituted an infringement of copyright. Also, indirect copyright infringement also takes place where any person distributes in South Africa any article for the purpose of trade, or any other purpose, to such an extent that the owner of copyright is prejudicially affected, if to his knowledge the making of the article constituted an infringement of copyright.

To prove that Xiu has also committed indirect copyright infringement of its copyright, Ubuntu (Pty) Ltd must first allege and establish that Xiu knew that making his carpets infringed Ubuntu (Pty) Ltd's copyright. Then it must allege and establish that copyright still subsisted in the works, that Xiu had sold, traded, and distributed his carpets to its prejudice in South Africa, knowing that he was trading in or selling or distributing articles which infringed the company's copyright.

All that remains is for Ubuntu (Pty) Ltd to claim an interdict, delivery up of infringing carpets and any other articles of which the infringing reproductions or adaptations form an inseparable part, and damages.



Activity 7.1

Your answer must contain the following:

- ☐ The steps Peter must take to get immediate relief: he must apply for an urgent interim interdict and, once this has been granted, institute action for the grant of a final interdict.
- ☐ What are the requirements he must prove to get immediate relief? See the requirements listed under 'interim interdicts' on 1.7.2–1.7.3.
- ☐ What are the requirements he must prove to get permanent relief? See the requirements listed under 'final interdicts' on 1.7.3–1.7.4.

It is important to note that the primary distinction between the requirements of temporary and final relief relates to –

- ☐ the strength of the right that that can be proved: and
- ☐ a consideration of where the balance of convenience lies.



Activity 7.2

Your answer should consider the following:

- ☐ How can Peter prevent Sandy from using the infringing materials? To discourage Sandy committing the acts of infringement, Peter may apply for an order for delivery up. Peter may ask the court to order Sally to deliver the master tape that she made of the broadcast of *Shaka Zulu*.

- ☐ Can he get an order to obtain these copies? In a copyright-infringement action the infringing copies or plates used or intended to be used for infringing copies should be delivered an order for delivery as a mandatory interdict which is granted together with a prohibitory interdict. The defendant is ordered to deliver up the means and products of infringement thereby preventing further infringement as far as possible.



Activity 7.3

No, this will not prevent Peter from claiming damages. Peter must present as much information as he can about his damages, and the court may order an enquiry to determine damages as best it can. However, if Sandy was unaware that she was infringing Peter's copyright, Peter cannot recover damages from her.



Activity 7.4

Your answer should consider the following:

- ☐ When is it advisable for Peter to claim reasonable royalties? A claim for reasonable royalties is an alternative to a claim for damages. It is advisable to claim reasonable royalty when it is difficult to show or to prove damages. As reasonable royalties and a claim for damages have the same purpose and function – the recovery of compensation – Peter must also here prove fault in the form of negligence or intent on the part of Sandy.
- ☐ When is it advisable to claim additional damages? Section 24(3) provides that the court may consider the award of additional damages where the infringement was flagrant and the infringer benefited from the infringement, and effective relief is not otherwise available. Peter must be advised that he must claim additional damages where he cannot prove his damages or where no cause of action exists for their recovery.



Activity 7.5

Your answer should consider the following:

- ☐ Is there anything that Peter can do to prevent Sandy from destroying the proof of the profits she made from selling the pirate copies? Yes. Peter can request a court to grant an urgent Anton Piller order, which will allow a search of Sandy's premises and the attachment of documents showing her profits for safekeeping. The order is granted ex parte (without notice to Sandy). She will thus be caught unawares and before she has had the chance of destroying evidence.
- ☐ What must Peter prove to obtain such an order? He must show –
 - ☐ that he has a cause of action against Sandy for copyright infringement, which he intends to pursue (he can show that he has a cause of action for direct and indirect copyright infringement against Sandy for the unauthorized recording, manufacture, and selling of pirate copies of *Shaka Zulu*);
 - ☐ that Sandy has in her possession full documentation which are of vital importance to his claim (the records of Sandy's profits are vital as they will assist Peter in proving damages); and
 - ☐ that he has a real and well-founded fear that she will try to destroy the evidence (Peter can prove that he has a real and well-founded fear that Sandy will destroy these records as he has heard rumours that she wants to destroy the documents so that she cannot be forced to disclose them during the stage of discovery).

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